No. 06-1196
Vide 06-1195

Title:	Khaled A. F. Al Odah, Next Friend of Fawzi Khalid Abdullah Fahad Al Odah, et al., Petitioners v. United States, et al.
Docketed:	March 6, 2007
Lower Ct:	United States Court of Appeals for the District of Columbia Circuit
Case Nos.:	(05-5064, 05-5095, 05-5096)
Decision Date:	February 20, 2007

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Mar 5 2007	Petition for a writ of certiorari filed. (Response due April 5, 2007)
Mar 5 2007	Motion to expedite consideration of the petition for a writ of certiorari filed by petitioners.
Mar 5 2007	Brief amici curiae of Former Federal Judges, et al. filed. (VIDED).
Mar 12 2007	Motion DISTRIBUTED for Conference of March 16, 2007.
Mar 19 2007	Motion DISTRIBUTED for Conference of March 23, 2007.
Mar 21 2007	Brief of respondents United States, et al. in opposition filed. VIDED. (Distributed)
Mar 21 2007	Respondents' opposition to motions to expedite briefing and oral argument filed. VIDED. (Distributed)
Mar 22 2007	Reply of petitioners in support of motion to expedite and oral argument filed. (Distributed)
Mar 22 2007	Reply of petitioners Khaled A. F. Al Odah, Next Friend of Fawzi Khalid Abdullah Fahad Al Odah, et al. filed. (Distributed)
Mar 22 2007	Brief amicus curiae of United States Senator Arlen Spector filed. VIDED. (Distributed)
Mar 26 2007	Motion DISTRIBUTED for Conference of March 30, 2007.
Apr 2 2007	Petition DENIED. Statement of Justice Stevens and Justice Kennedy respecting the denial of certiorari. Justice Breyer filed an opinion dissenting from the denial of certiorari, joined by Justice Souter, and joined by Justice Ginsburg as to Part I. (Detached Opinion)
Apr 24 2007	Application (06A1001) to suspend the effect of the denial of the petition for a writ of certiorari, submitted to The Chief Justice.
Apr 24 2007	Application (06A1002) to extend the time to file a petition for rehearing from April 27, 2007 to August 27, 2007, submitted to The Chief Justice.
Apr 26 2007	Application (06A1001) denied by The Chief Justice. (Detached Opinion)
Apr 26 2007	Application (06A1002) denied by The Chief Justice. (Detached Opinion)
Apr 27 2007	Petition for Rehearing filed.
May 8 2007	DISTRIBUTED for Conference of May 24, 2007.
May 29 2007	DISTRIBUTED for Conference of May 31, 2007.
Jun 4 2007	The respondents are invited to file a response to the petitions for rehearing within thirty days. VIDED.
Jun 19 2007	Response to petition for rehearing from respondents United States, et al. filed. VIDED.
Jun 22 2007	Reply to opposition to petition for rehearing filed.
Jun 25 2007	DISTRIBUTED for Conference of June 28, 2007.
Jun 26 2007	Letter of June 26, 2007, from the Solicitor General received. (Distributed)

Jun 27 2007	Letter of June 27, 2007, from counsel for petitioners received. (Distributed)
Jun 29 2007	The petition for rehearing is granted. The order entered April 2, 2007, denying the petition for writ of certiorari is vacated. The petition for a writ of certiorari is granted. This case is consolidated with 06-1195 and a total of one hour is allotted for oral argument. As it would be of material assistance to consult any decision in Bismullah, et al. v. Gates, No. 06-1197, and Parhat, et al. v. Gates, et al., No. 06-1397 currently pending in the United States Court of Appeals for the District of Columbia Circuit, supplemental briefing will be scheduled upon the issuance of any decision in those cases.
Jul 13 2007	The time within which to file the opening briefs on the merits has been extended as follows: the joint appendix and petitioners' briefs on the merits are due on or before August 24, 2007; respondents' briefs are due on or before October 9, 2007. VIDED.
Aug 14 2007	Consent to the filing of amicus briefs in support of either party or neither party received from counsel for petitioners El-Banna, et al.
Aug 23 2007	Motion for leave to file amicus brief filed by International Law Scholars.
Aug 24 2007	Brief of petitioners Khaled A. F. Al Odah, Next Friend of Fawzi Khalid Abdullah Fahad Al Odah, et al. filed.
Aug 24 2007	Brief of petitioners El-Banna, et al. filed.
Aug 24 2007	Brief amicus curiae of Association of the Bar of the City of New York filed. VIDED.
Aug 24 2007	Brief amici curiae of Former United States Diplomats Diego C. Asencio, et al. filed. VIDED.
Aug 24 2007	Brief amici curiae of Scholars Paul Finkelman, et al. filed. VIDED
Aug 24 2007	Brief of respondent Omar Khadr in support filed.
Aug 24 2007	Brief amicus curiae of Coalition of Non-Governmental Organizations filed. VIDED.
Aug 24 2007	Joint appendix filed. VIDED. (Statement of costs received)
Aug 24 2007	Brief amici curiae of Former Federal Judges filed. VIDED.
Aug 24 2007	Brief amicus curiae of United Nations High Commissioner for Human Rights filed. VIDED.
Aug 24 2007	Brief amici curiae of Amnesty International, et al. filed. VIDED.
Aug 24 2007	Brief amicus curiae of Salim Hamdan filed. VIDED.
Aug 24 2007	Brief amicus curiae of Cato Institute filed. VIDED.
Aug 24 2007	Brief amicus curiae of American Bar Association filed. VIDED.
Aug 24 2007	Brief amicus curiae of Legal Historians filed. VIDED.
Aug 24 2007	Brief amici curiae of Professors of Constitutional Law and Federal Jurisdiction filed. VIDED.
Aug 24 2007	Brief amicus curiae of Retired Military Officers filed. VIDED.
Aug 24 2007	Brief amicus curiae of Specialists in Israeli Military Law and Constitutional Law filed. VIDED.
Aug 24 2007	Brief amicus curiae of United States Senator Arlen Spector filed. VIDED.
Aug 24 2007	Brief amici curiae of 383 United Kingdom and European Parliamentarians filed. VIDED.
Aug 24 2007	Brief amici curiae of Canadian Parliamentarians and Professors of Law filed. VIDED.
Aug 24 2007	Brief amici curiae of Federal Courts and International Law Professors filed. VIDED.
Aug 24 2007	Brief amicus curiae of Federal Public Defender for Southern District of Florida filed.VIDED.
Aug 24 2007	Brief amicus curiae of National Institute of Military Justice filed. VIDED.

Aug 24 2007	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for respondent Ridouane Khalid. VIDED.
Aug 24 2007	Brief amici curiae of Juvenile Law Center, et al. filed.
Aug 24 2007	Brief amici curiae of American Civil Liberties Union and Public Justice filed. VIDED.
Aug 24 2007	Brief amicus curiae of Commonwealth Lawyers Association filed. VIDED.
Aug 24 2007	Brief amici curiae of International Law Experts filed. VIDED.
Aug 30 2007	Motion only as to David M. Hicks to dismiss the writ of certiorari pursuant to Rule 46 received.
Sep 4 2007	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for Al Odah, et al. VIDED.
Sep 13 2007	Application (07A229) of respondents to file a consolidated brief on the merits in excess of the page limits, submitted to The Chief Justice. VIDED
Sep 14 2007	Motion to dismiss the writ of certiorari only as to David M. Hicks dismissed pursuant to Rule 46.
Sep 17 2007	Application (07A229) to file a consolidated brief on the merits in excess of page limits granted by The Chief Justice. The document may not exceed 75 pages.
Oct 1 2007	Motion for leave to file amici brief filed by International Law Scholars GRANTED.
Oct 8 2007	Brief amicus curiae of Criminal Justice Legal Foundation filed. VIDED.
Oct 9 2007	Motion for leave to file amicus brief filed by American Center for Law and Justice. VIDED.
Oct 9 2007	Brief of respondents United States, et al. filed. VIDED.
Oct 9 2007	Brief amici curiae of Retired Generals and Admirals, et al. filed. VIDED.
Oct 15 2007	SET FOR ARGUMENT Wednesday, December 5, 2007. VIDED.
Oct 19 2007	CIRCULATED.
Oct 22 2007	Record receved from U.S.C. A. for the District of Columbia Circuit. (3 boxes) There are sealed documents in this in this record.
Oct 30 2007	Record received from U.S.D.C. for the District of Columia Circuit. (1 box) There are sealed documents in this record.
Nov 13 2007	Motion for leave to file amicus brief filed by American Center for Law and Justice GRANTED. VIDED.
Nov 13 2007	Reply of petitioners Al Odah, et al. filed. (Distributed)
Nov 13 2007	Reply of petitioners El-Banna, et al. filed. (Distributed)
Dec 5 2007	Argued. For petitioners: Seth P. Waxman, Washington, D.C. For respondents: Paul D. Clement, Solicitor General, Department of Justice, Washington, D.C.
Dec 20 2007	Motion for leave to file a supplemental brief after argument filed by the Solicitor General. VIDED.
Jan 7 2008	Motion for leave to file a supplemental brief after argument filed by the Solicitor General is granted as to Section 1 of the brief and denied as to Section 2 of the brief. VIDED

Supreme Court, U.S.
FILED
MAR 5 - 2007
OFFICE OF THE CLERK

No. 06-1196

In the Supreme Court of the United States

KHALED A. F. AL ODAH, ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Did the D.C. Circuit err in relying again on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to dismiss these petitions and to hold that petitioners have no common law right to habeas protected by the Suspension Clause and no constitutional rights whatsoever, despite this Court's ruling in *Rasul v. Bush*, 542 U.S. 466 (2004), that these petitioners are in a fundamentally different position from those in *Eisentrager*, that their access to the writ is consistent with the historical reach of the writ at common law, and that they are confined within the territorial jurisdiction of the United States?

2. Given that the Court in *Rasul* concluded that the writ at common law would have extended to persons detained at Guantanamo, did the D.C. Circuit err in holding that petitioners' right to the writ was not protected by the Suspension Clause because they supposedly would not have been entitled to the writ at common law?

3. Are petitioners, who have been detained without charge or trial for more than five years in the exclusive custody of the United States at Guantanamo, a territory under the plenary and exclusive jurisdiction of the United States, entitled to the protection of the Fifth Amendment right not to be deprived of liberty without due process of law and of the Geneva Conventions?

4. Should section 7(b) of the Military Commissions Act of 2006, which does not explicitly mention habeas corpus, be construed to eliminate the courts' jurisdiction over petitioners' pending habeas cases, thereby creating serious constitutional issues?

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

1. Petitioner in *Hicks (Rasul) v. Bush*, No. 02-CV-0299-CKK (D.D.C.), is David Hicks. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gordon R. England, Secretary of the Navy; John D. Altenburg, Jr., Appointing Authority for Military Commissions; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Brice A. Gyurisko, Commander, Joint Detention Operations Group.

2. Petitioners in *Al-Odah v. United States*, No. 02-CV-0828-CKK (D.D.C.), are Fawzi Khalid Abdullah Fahad Al Odah, Omar Rajab Amin, Nasser Nijer Naser Al Mutairi, Khalid Abdullah Mishal Al Mutairi, Abdullah Kamal Abdullah Kamal Al Kandari, Abdulaziz Sayer Owain Al Shammari, Abdullah Saleh Ali Al Ajmi, Mohammed Funaitel Al Dihani, Fayiz Mohammed Ahmed Al Kandari, Fwad Mahmoud Al Rabiah, Adil Zamil Abdull Mohssin Al Zamil, and Saad Madai Saad Hawash Al-Azmi, and their next friends Khaled A.F. Al Odah, Mohammad R. M. R. Ameen, Nayef N.N.B.J. Al Mutairi, Meshal A.A. Th Al Mutairi, Mansour K.A. Kamel, Sayer O.Z. Al Shammari, Mesfer Saleh Ali Al Ajmi, Mubarak F.S.M. Al Daihani, Mohammad A.J.M.H. Al Kandari, Monzer M.H.A. Al Rabieah, Walid Z.A. Al Zamel, and Hamad Madai Saad.

Respondents include the United States of America and the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Richard B. Myers, Chairman, Joint Chiefs of Staff; Gen. Rick Baccus, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Terry Carrico, Commander, Camp Delta, Camp X-Ray, Guantanamo Bay, Cuba.

3. Petitioners in *Habib v. Bush*, No. 02-CV-1130-CKK (D.D.C.), are Mamdouh Habib and his next friend Maha

LIST OF ALL PARTIES—continued

Habib. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Rick Baccus, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Lt. Col. William Cline, Commander, Camp Delta.

4. Petitioners in *Kurnaz v. Bush*, No. 04-CV-1135-ESH (D.D.C.), are Murat Kurnaz and his next friend Rabiye Kurnaz. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

5. Petitioners in *Begg v. Bush*, No. 04-CV-1137-RMC (D.D.C.), are Moazzam Begg and Feroz Ali Abbasi, and their next friends Sally Begg and Zumrati Zaitun Juma. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

6. Petitioners in *El-Banna v. Bush*, No. 04-CV-1144-RWR (D.D.C.), are Jamil El-Banna, Bisher Al-Rawi, and Martin Mubanga, and their next friends Sabah Sunnrqrout, Jahida Sayyadi, and Kathleen Mubanga. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

7. Petitioners in *Gherebi v. Bush*, No. 04-CV-1164-RBW (D.D.C.), are Falen Gherebi (also known as Salim Gherebi) and his next friend Belaid Gherebi. Respondents include the following individuals or their successors in office: George

LIST OF ALL PARTIES—continued

W. Bush, President; Donald Rumsfeld, Secretary of Defense; and "1,000 Unknown Named United States Military Personnel and Government Officers and/or Officials."

8. Petitioners in *Anam v. Bush*, No. 04-CV-1194-HHK (D.D.C.), are Suhail Abdu Anam, Fahmi Abdullah Ubad Al-Tawlaqi (also known as Fahmi Abdullah Ahmed), Bisher-Naser Ali Almarwalh (also known as BashirNaser Ali Almarwalh and Bashir Nasir Ali Al-Marwala), Musaab Omar Al-Madhwani (also known as Musa'ab Omar Madhwani), Abdulkhaliq Al-Baidhani (also known as Abdul Khaleq Ahmed Al-Baidandi), Ali Ahmed Mohammed Al Razehi, Saeed Ahmed Al-Sarim, Imad Abdullah Hassan, Jalal Salim Bin Amer, Ali Yahya Mahdi (also known as Ali Yahaya Mahdi Al-Rimi), Atag Ali Abdoh (also known as Atag Ali Abdoh Al Hag), Khalid Ahmed Kassim, Fahmi Abdullah Ahmed Abdualaziz Abdoh Al Swidi (also known as Abdualaziz Abdoh Alsswidi), and Ali Hussin Al-Tis, and their next friends Mohamed Abdu Anam, Huissen Naser Ali Almarwalh, Ali Omar Madhwani, Khalid Al-Baidhani, Abdullah Ahmed Mohammed Al Razehi, Samir Ahmed Al-Sarim, Amro Abdullah Hassan, Faez Bin Amer, Mohamed Yahya Mahdi, Atag Ali Abdoh Al Hag, Fadhle Ahmed Kassim, Abdullah Ahmed Ubad Al-Tawlaqi, Kmal Abdullah Ahmed, Adnan Abdoh Alswidi, and Hadi Hussin Al-Tis.

Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

9. Petitioners in *Almurbati v. Bush*, No. 04-CV-1227-RBW (D.D.C.), are Isa Ali Abdulla Almurbati, Adel Kamel Abdulla Hajee, Salah Abdul Rasool Al Bloushi, Abdullah Majed Sayyah Hasan Alnoaimi, Salman Bin Ibrahim Bin Mohammed Bin Ali Al-Kalifa, and Jum'ah Mohammed Ab-

LIST OF ALL PARTIES—continued

dullatif Aldossari, and their next friends Mohamed Ali Abdulla Almurbati, Abdullah Kamel Abdulla Hajee, Abdul Rasool Ali Al Bloushi, Majed Sayah Alnoaimi, Ibrahim Bin Mohammed Bin Ali Al-Khalifa, and Khalid Mohammed Abdullatif Aldossari.

Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

10. Petitioners in *Abdah v. Bush*, No. 04-CV-1254-HHK (D.D.C.), are Mahmoad Abdah, Majid Mahmoud Ahmed (also known as Majed Mohmood, and Majid M. Abdu Ahmed), Abdulmalik Abdulwahhab Al-Rahabi, Makhtar Yahia Naji Al-Wrafie, Aref Abd Il Rheem, Yasein Khasem Mohammad Esmail, Adnan Farhan Abdul Latif, Jamal Mar'i, Othman Abdulraheem Mohammad, Adil Saeed El Haj Obaid, Mohamed Mohamed Hassan Odaini, Sadeq Mohammed Said, Farouk Ali Ahmed Saif, and Salman Yahaldi Hsan Mohammed Saud, and their next friends Mahmoad Abdah Ahmed, Mahmoud Ahmed, Ahmed Abdulwahhab, Foade Yahla Naji Al-Wrafie, Aref Abd Al Rahjm, Jamel Khasem Mohammad, Mohamed Farhan Abdul Latif, Nabil Mokamed Mar'I, Araf Abdulraheem Mohammad, Nazem Saeed El Haj Obaid, Bashir Mohamed Hassan Odaini, Abd Alsalam Mohammed Saeed, Sheab Al Mohamedi, and Yahiva Hsane Mohammed Saud Al-Rewaye.

Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (Appendix ("App.") D, 61-128) is reported at 355 F. Supp. 2d 443 (D.D.C. 2005). The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. A, 1-54) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on February 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS

United States Constitution, art. I, § 9, cl. 2 and amend. V; Authorization for Use of Military Force ("AUMF"), 115 Stat. 224 (2001); Military Commissions Act of 2006 ("MCA") §§ 3(a) (adding 10 U.S.C. § 950j(b)), 7, Pub. L. No. 109-366, 120 Stat. 2600; Detainee Treatment Act of 2005 ("DTA") § 1005, Pub. L. No. 109-148, 119 Stat. 2740, 10 U.S.C. § 801 note; Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, dated July 7, 2004; Memorandum of the Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba, dated July 29, 2004; Deputy Secretary of Defense Order OSD 06942-04, dated May 11, 2004. These provisions are reprinted at App. E-L, 129-203.

STATEMENT OF THE CASE

Petitioners are 39 prisoners held by the United States at the U.S. Naval Base at Guantanamo Bay.[1] Most have been in U.S. custody for more than five years. None is a citizen of a nation at war with the United States.[2] All maintain that they have never engaged in combat against the United States and are wholly innocent of wrongdoing. They seek a single remedy: a fair and impartial hearing before a neutral decision maker to determine whether there is a reasonable basis in law and fact for detaining them. They have never received such a hearing, although this Court ruled almost three years ago that they were entitled to one. *See Rasul v. Bush*, 542 U.S. 466 (2004).

A. The Guantanamo Detainees

Nearly 400 prisoners remain at Guantanamo. Only 15 have been designated as persons the government "has reason to believe" supported terrorism, and, after more than five years, only ten have ever been charged.[3] None has been tried. If those charged are ever convicted, they may be sentenced to terms in prison. Meanwhile, the other approximately 380 detainees have already served terms as long as five years without charge, without trial, and without any fair hearing – and with no end in sight. And Department of De-

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[1] Petitioners also include next friends of the prisoners who filed petitions on their behalf as well as prisoners who have been repatriated but whose cases were not dismissed as a result by the district court. Thirteen of the petitioners were before this Court in *Rasul v. Bush*, 542 U.S. 466 (2004).

[2] Petitioners in these cases are citizens of Afghanistan, Australia, Bahrain, Jordan, Iraq, Kuwait, Libya, Turkey, and Yemen.

[3] *See* Department of Defense News Release, *President Determines Enemy Combatants Subject to His Military Order*, July 3, 2003, http://www.defenselink.mil/releases/2003/nr20030703-0173.html; Department of Defense News Release, *Presidential Military Order Applied to Nine more Combatants*, July 7, 2004, http://www.defenselink.mil/releases/2004/nr20040707-0987.html.

fense Officials have indicated that those charged may continue to be detained even if they are acquitted.[4]

Who are these prisoners? According to Defense Department documents, only 5% were captured by U.S. forces; 86% were taken into custody by Pakistani or Northern Alliance forces at a time when the United States was offering large financial bounties for the capture of any suspected Arab terrorist; the large majority never participated in any combat against the United States on a battlefield; only 8% have been classified as al Qaeda fighters.[5]

Some of the prisoners, including a number of the petitioners in these cases, were picked up thousands of miles from the conflict in Afghanistan. Most, however, were rounded up in Afghanistan and the areas of Pakistan bordering on Afghanistan in the months immediately following 9/11. At that time, Afghanistan was suffering "the worst humanitarian crisis in the world" after enduring twenty-three years of civil war and three consecutive years of severe drought.[6] Charitable organizations and individual volunteers, mostly from the Middle East, had flocked to the area to provide humanitarian aid.[7] Following the September 11

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[4] *See* Department of Defense News Briefing, Presentation by Secretary of Defense Donald Rumsfeld, March 28, 2002, http://www.defenselink.mil/transcripts/2002/t03282002_t0328sd.html.

[5] Mark Denbeaux *et al.*, Seton Hall University School of Law, *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data* 2-4 (2006) ("Seton Hall Report"), App. 221-23.

[6] *United Nations Development Program/United Nations Office for the Coordination of Humanitarian Affairs*, Assistance for Afghanistan Weekly Update, Issue No. 429, September 12, 2001, *available at* http://www.reliefweb.int/rw/rwb.nsf/db900SID/OCHA-64DHQ4.

[7] RAND National Defense Research Institute, *Aid During Conflict: Interaction Between Military and Civil Assistance Providers in Afghanistan, September 2001-June 2002* 26-37, Prepared for the Office of the Secretary of Defense and the United States Agency for International De-

attacks, they were at great risk. The U.S. government offered substantial financial bounties for "any Arab terrorist" turned in to U.S. forces.[8] In response, numerous Arabs in the area were swept up and turned over by Pakistani and Northern Alliance forces.[9]

The U.S. military has well-established procedures for culling out people detained by mistake. Army Regulation 190-8 requires hearings to be held promptly in the field close to the time and place of capture if there is any doubt about a captive's status.[10] That regulation and its predecessors had been followed in every previous conflict since Vietnam. During the Gulf War, for example, the military held 1,196 of these hearings and, in 886 of those cases – almost 75% of the time – the detainees were found not to be combatants,

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velopment (2004), http://www.rand.org/pubs/monographs/2004/RAND_MG212.sum.pdf.

[8] Leaflet distributed by U.S. Forces in Afghanistan, Seton Hall Report, App. 236.

[9] Seton Hall Report, App. 205-06, 221-24. The bounties offered ranged from $5,000 to $25,000. These sums were paid to residents of countries where the average annual income per capita is less than $200. *See* The World Bank Group, Press Release, *World Bank Increases Support For Public Administration* (Jan. 27, 2005), *available at* http://www.reliefweb.int/rw/RWB.NSF/db900SID/KHII-6932QV. The leaflets correctly proclaimed that the bounties offered were sufficient "to take care of [a] family . . . for the rest of your life." App. 236. Any Arab in the area was therefore an extremely valuable commodity.

[10] *Enemy Prisoners of War; Retained Personnel, Civilian Internees and Other Detainees,* U.S. Army Regulation 190-8, applicable to the Departments of the Army, the Navy, the Air Force, and the Marine Corps, Washington, D.C. (1 Oct. 1997), Chapter 1-5, para. a ("All persons taken into custody by U.S. forces will be provided with the protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War ("GPW") until some legal status is determined by a competent authority."); *id.* at 1-6 para. b ("a competent tribunal shall determine the status of any person . . . concerning whom any doubt . . . exists").

but innocent civilians, and released.[11] Inexplicably, the government did not provide the hearings required by that regulation before shipping captives to Guantanamo.[12]

It is now clear that the government selected Guantanamo as its prison site specifically to avoid judicial review of the legality of its actions. It sought a location beyond the reach of both U.S. and foreign courts. As John Yoo, the Deputy Assistant Attorney General at the time, has recounted: "[N]o location was perfect," but Guantanamo "seemed to fit the bill."[13]

Uncertainty about the true nature of the prisoners at Guantanamo – a concern that, in many instances, the U.S. simply got the wrong guy – has pervaded the highest echelons of the military at Guantanamo. On October 6, 2004, Brigadier General Martin Lucenti, Jr., the deputy commander at Guantanamo, said: "I would say most of [the prisoners], the majority of them, will either be released or transferred to their own countries . . . Most of these guys weren't fighting. They were running."[14] In January 2005 Major General Jay Hood, commander at Guantanamo, ac-

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[11] *See Report on the Conduct of the Persian Gulf War*, Final Report to Congress by the Department of Defense (April 1992), *cited in* David Cole, *Enemy Aliens*, 42 n.69 (2003).

[12] Reportedly, military officials intended to hold these hearings, as they had in previous conflicts, but civilian officials in Washington stopped them. *See* Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, THE NEW YORKER, July 3, 2006.

[13] John Yoo, *War By Other Means: An Insider's Account of the War on Terror* 142-43 (2006). *See also* Patrick F. Philbin and John C. Yoo, Memorandum for William J. Haynes, II, General Counsel, Department of Defense, Re: Possible Habeas Jurisdiction over Aliens Held at Guantanamo Bay, Cuba, Dec. 28, 2001, *reprinted in* Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* 29 (2005); Col. Daniel F. McCallum, *Why GTMO?* (2003), http://www.ndu.edu/library/n4/n035603g.pdf.

[14] John Mintz, *Most at Guantanamo to be Freed or Sent Home, Officer Says*, THE WASHINGTON POST, Oct. 6, 2004, at A16.

knowledged that: "Sometimes we just didn't get the right folks," and that the reason those "folks" were still in Guantanamo was that "[n]obody wants to be the one to sign the release papers . . . . There's no muscle in the system."[15] We now know that, in August 2002 – more than four and a half years ago – the CIA sent a confidential report to Washington reporting that most of the Guantanamo detainees "didn't belong there."[16]

B. Summary of Proceedings Below

The history of this litigation was outlined by Judge Green in her opinion below. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 448-52 (D.D.C. 2005). The first case was filed more than five years ago, on February 19, 2002, *Rasul v. Bush*, D.D.C., No. 02-CV-0299 (CKK), styled as a petition for the writ of habeas corpus. *Rasul* was soon followed by *Al Odah v. United States*, D.D.C., No. 02-CV-0828, styled as a complaint, but asserting a cause of action for violation of the habeas statute and seeking, most importantly, an impartial hearing to determine if there was a reasonable basis for the detentions.[17]

The government never filed a return or answer in *Rasul* or *Al Odah*. Instead, it moved to dismiss both for lack of jurisdiction. The district court granted the motion, and the D.C. Circuit affirmed. Relying principally on this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the D.C. Circuit held that, because Guantanamo is outside the technical sovereignty of the United States, petitioners had no rights under the Constitution and therefore no access to the

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[15] Christopher Cooper, *Detention Plan: In Guantanamo, Prisoners Languish in Sea of Red Tape*, WALL ST. J., Jan. 26, 2005, at A1.

[16] That report was brought to the attention of White House officials and ignored. *See* Mayer, *supra*.

[17] Formal applications for the writ of habeas corpus were filed in *Al Odah* on July 27, 2004.

U.S. courts through the writ of habeas corpus or otherwise. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

In *Rasul*, this Court reversed. It found that the Guantanamo petitioners differ from the *Eisentrager* detainees in "important respects." 542 U.S. at 476. Most significantly, the Court emphasized that, unlike the convicted prisoners in *Eisentrager* who were incarcerated in Germany, the Guantanamo petitioners are imprisoned "within 'the territorial jurisdiction' of the United States" in an area "over which the United States exercises exclusive jurisdiction and control." *Id.* at 476, 480. The Court held that aliens at Guantanamo, "no less than American citizens," have the right to challenge the legality of their detention in the U.S. courts through the writ of habeas corpus. *Id.* at 481. Notably, in addition to holding that the petitioners were entitled to the writ under the federal habeas statute, the Court concluded that application of the writ to them was "consistent with the historical reach of the writ of habeas corpus" at common law. *Id.* It observed that "[h]abeas corpus is . . . 'a writ antecedent to statute,'" and at common law the writ extended to persons detained not only "within sovereign territory of the realm," but in "all other dominions under the sovereign's control." *Rasul*, 542 U.S. at 473, 481-82. The Court also noted that the Guantanamo petitioners' claims "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" *Id.* at 484 n.15. The Court remanded to the district court with instructions "to consider in the first instance the merits of petitioners' claims." *Id.* at 485.

Despite that ruling, almost three years later, not a single habeas hearing has been held.

Nine days after this Court's decision, the Deputy Secretary of Defense suddenly announced, as a matter of internal department "management," a new, so-called Combatant

Status Review Tribunal ("CSRT") process at Guantanamo.[18] That process did not even purport to provide *de novo* determinations of whether the detainees were properly detained. Rather, according to the announcement, it provided a process to review the determinations that had already been made "through multiple levels of review by officers of the Department of Defense" that the detainees were "enemy combatants." The detainees were not allowed counsel. They were not allowed to see or rebut the key accusations against them, which the government considered classified, and they were given no meaningful opportunity to present exculpatory evidence. In short, the detainees had the burden of proving themselves innocent of charges that, for the most part, they were not entitled to see, let alone examine or rebut. Predictably, in over 90% of the cases, the tribunals confirmed the decisions previously made by higher ups that the detainees were properly detained as enemy combatants.[19]

On October 4, 2004, while it was conducting these internal CSRT proceedings at Guantanamo, the government moved in court to dismiss these cases as a matter of law. It argued again that, because petitioners are being detained outside sovereign U.S. territory, they have no constitutional rights and therefore no right to obtain relief.

Judge Richard Leon agreed with respondents and granted their motion to dismiss in two of the cases that were then pending. *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). The judges in the other 11 pending cases transferred those cases for decision to Judge Joyce Hens Green, who

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[18] Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, dated July 7, 2004, App. I, 141-46.

[19] Mark Denbeaux *et al.*, Seton Hall University School of Law, *No Hearing Hearings: An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantánamo* 39 (2006), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

denied the government's motion in large part. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005).

Judge Green rejected the government's contention that it had effectively deprived the petitioners of constitutional rights by placing them in Guantanamo, an area outside technical U.S. sovereignty. Judge Green held that "the right not to be deprived of liberty without due process of law – is one of the most fundamental rights recognized by the U.S. Constitution," and that, in light of the decision in *Rasul*, "it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply." *Id.* at 464. Judge Green also rejected the government's alternative argument that the CSRT proceedings afforded petitioners the equivalent of constitutional due process. *Id.* at 465-78. She found that the CSRT procedures "deprive[d] the detainees of sufficient notice of the factual bases for their detention and den[ied] them a fair opportunity to challenge their incarceration," and also improperly allowed for reliance on statements obtained through torture and coercion. *Id.* at 468, 472. Finally, Judge Green sustained the Geneva Conventions claims of those detainees who the government claimed were connected to the Taliban but dismissed the Geneva Conventions claims of those detainees who the government claimed were connected to al Qaeda. *Id.* at 478-81.

On February 3, 2005, Judge Green certified respondents' request for interlocutory appeal and granted their motion for a stay of proceedings pending the outcome of the appeal. Petitioners cross-appealed. The D.C. Circuit consolidated those appeals with petitioners' appeal from Judge Leon's decision.

C. The DTA and the MCA

On December 30, 2005, after the cases had been briefed and argued before the D.C. Circuit, the President signed the

Detainee Treatment Act of 2005 (the "DTA") into law.[20] Section 1005(e) of the DTA purported to strip the courts of jurisdiction over habeas petitions filed by Guantanamo detainees.[21] This Court held in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764-69 (2006), that the DTA did not deprive the courts of jurisdiction over habeas cases pending in court when the legislation was enacted.

On October 17, 2006, the President signed the Military Commissions Act of 2006 (the "MCA").[22] Section 7(a) of the MCA struck the amendment to 28 U.S.C. § 2241 made by the DTA and added a new paragraph (e) stripping the courts of jurisdiction over two categories of cases: (1) "application[s] for a writ of habeas corpus" and (2) "other action[s]" that relate "to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of aliens determined by the United States to have been properly detained as enemy combatants. Section 7(b) provides that the amendments made by section 7(a) shall take effect upon enactment of the MCA and shall apply "to all cases, without exception, pending on or after the date of enactment . . . which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention."

D. Court of Appeals Opinion

The D.C. Circuit held that the MCA eliminated the courts' jurisdiction over petitioners' pending habeas cases. App. 6-10.[23] The majority (Randolph & Sentelle, JJ.,

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[20] The DTA was enacted twice in identical form, first on December 30, 2005, as part of the Defense Appropriations Act, 2006, Pub. L. No. 109-148, 119 Stat. 2739, and second on January 6, 2006, as part of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3474. *See* 10 U.S.C. § 801 note.

[21] App. G, 132-38.

[22] App. H, 139-40.

[23] The D.C. Circuit opinions, majority and dissent, are reproduced as Appendix A, App. 1-54.

Rogers, J. dissenting) also held that the elimination of habeas did not violate the Suspension Clause of the U.S. Constitution, relying on *Eisentrager* as the "controlling" decision. App. 14-22.

First, citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001), the majority asserted that the Suspension Clause "protects the writ 'as it existed in 1789.'" App. 10-11. The majority said that its own research and analysis of the cases confirmed that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." App. 11-14. It said that *Eisentrager* "ends any doubt about the scope of common law habeas." App. 14. The majority acknowledged that this Court in *Rasul* had examined the "'historical reach of the writ'" but relied instead on Justice Scalia's contrary analysis in his dissenting opinion. App. 14-15.

Second, the majority held that, in any event, petitioners could not claim the protections of the Suspension Clause because, under *Eisentrager*, "the Constitution does not confer rights on aliens without property or presence within the United States." App. 15. The majority concluded that "[a]ny distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany . . . is immaterial to the application of the Suspension Clause." App. 17.

Judge Rogers dissented. She observed at the outset that the majority "fundamentally misconstrues" the nature of the Suspension Clause, which "is a limitation on the powers of Congress," and that "it is only by misreading the historical record and ignoring the Supreme Court's well-considered and binding dictum in *Rasul v. Bush*, 542 U.S. 466, 481-82 (2004), that the writ at common law would have extended to the detainees, that the court can conclude that neither this court nor the district courts have jurisdiction to consider the detainees' habeas claims." App. 23.

Judge Rogers noted that this Court has stated on several occasions that "*at the absolute minimum*, the Suspension Clause protects the writ 'as it existed in 1789.'" App. 32. She further pointed out that this Court already had determined in *Rasul* that application of the writ "'to persons detained at the [Guantanamo] base is consistent with the historical reach of the writ of habeas corpus." App. 36. Thus, in Judge Rogers' view, "[t]o the extent the court relies on *Eisentrager* as proof of its historical theory, the Supreme Court rejected that approach in *Rasul*." App. 40 n.8.

Judge Rogers analyzed whether Congress had provided an adequate substitute for habeas in the MCA (*see Swain v. Pressley*, 430 U.S. 372 (1977)), and concluded that it had not. App. 40-46. She found that the MCA's "alternatives are neither adequate to test whether detention is unlawful nor directed toward releasing those who are unlawfully held." [24] App. 41.

REASONS FOR GRANTING THE PETITION

Two years and eight months have passed since this Court held in *Rasul* that the courts have jurisdiction "to determine

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[24] Among the deficiencies Judge Rogers found in the underlying CSRT proceedings were: (i) the detainee bears the burden of proving why he should not be detained; (ii) the detainee need not be informed of the basis for his detention or be allowed to introduce rebuttal evidence; (iii) the detainee must proceed without the benefit of his own counsel; and (iv) the CSRT proceedings are before a military panel subject to command influence. App. 42-43. Judge Rogers found that "each of these practices impedes the process of determining the true facts underlying the lawfulness of the challenged detention," and therefore "are inimical to the nature of habeas review." App. 43. Judge Rogers also found that judicial review would not cure these deficiencies because: (i) the D.C. Circuit can review only the record developed by the CSRT and determine if the CSRT followed its own standards; (ii) the detainee cannot present rebuttal evidence to the court; and (iii) continued detention could be justified by the CSRT on the basis of evidence obtained through torture. App. 43-44. Beyond that, Judge Rogers pointed out that, unlike a habeas court, the reviewing court could not guarantee the remedy of discharge. App. 44.

the legality of the Executive's potentially indefinite detention" of petitioners at Guantanamo and ordered the district court "to consider in the first instance the merits of petitioners' claims." 542 U.S. at 485. Yet, to date, the district court has not considered the merits of *any* of petitioners' habeas claims.

While at the time of *Rasul* there was a statutory basis for habeas, all of the predicates for the Court's ruling in that case also establish a common law right to habeas that Congress could not suspend without meeting the requirements of the Suspension Clause. Thus, Congress' passage of the MCA following *Rasul* does nothing to alter the Court's conclusion that the detainees have a right to habeas.

Petitioners agree with Judge Rogers that it is only by "ignoring" *Rasul* that the D.C. Circuit was able to dismiss petitioners' pending habeas cases. App. 23. Beginning with its reliance on Justice Scalia's dissent instead of the Court's analysis in *Rasul* on the historical reach of the writ and continuing through its repeated invocation of *Eisentrager* as the foundation for its decision, the D.C. Circuit seems to have decided the issues before it as if *Rasul* did not exist. The majority opinion, upholding Congress' purported elimination of the courts' jurisdiction over petitioners' habeas cases and denying petitioners' entitlement to the very right this Court previously proclaimed that petitioners, "no less than American citizens, are entitled to invoke," 542 U.S. at 481, effectively renders *Rasul* meaningless. Moreover, it raises questions that go to the essential meaning and purpose of habeas and the Suspension Clause, and of the constitutional separation of powers established by our Founders.

Those important constitutional questions can be decided only by this Court. They should be decided now; petitioners have entered their sixth year of imprisonment without being charged or afforded their day in court, and the denial of those basic hallmarks of American justice and fair dealing to the

prisoners at Guantanamo has become a matter of national and international debate. The Court should grant the petition and decide these important issues.[25]

1. The Decision Ignores *Rasul*

The D.C. Circuit's decision is remarkable. Approximately four years ago the D.C. Circuit affirmed the dismissal of the *Rasul* and *Al Odah* petitions, holding that *Eisentrager* compelled the dismissal of habeas petitions filed by aliens detained outside the technical "sovereignty" of the United States. *Al Odah v. United States*, 321 F.3d 1134.

On June 24, 2004, this Court reversed, pointing out that these cases are fundamentally different from *Eisentrager* – the petitioners here are not enemy aliens, they deny that they have ever engaged in or supported hostilities against the United States, they have never been charged or convicted of any wrongdoing, and they are "imprisoned in territory over which the United States exercises exclusive jurisdiction and control." *Rasul*, 542 U.S. at 476. The Court rejected in every respect the D.C. Circuit's reliance on *Eisentrager*, and the theory that the Guantanamo detainees' rights depended on notions of "ultimate sovereignty." *Id.* at 475-79, 484-85. The Court found that the Guantanamo detainees are being detained "within 'the territorial jurisdiction' of the United States," that they have the right to habeas under the federal habeas statute, and that application of the statute to them is "consistent with the historic reach of the writ" at common law. *Id.* at 480-81.

Yet, two weeks ago, the D.C. Circuit again dismissed these habeas petitions and, again, it relied principally on *Eis-*

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[25] This petition is being filed contemporaneously with the petition in *Boumediene v. Bush, et al.*, Nos. 05-5062 and 05-5063, which seeks review of the same judgment of the Court of Appeals with respect to *In re Guantanamo Detainee Cases*. Because of the overlap in issues between the two petitions, the Court may wish to consider granting both petitions.

entrager to do so. It characterized as "immaterial" the distinctions this Court drew in *Rasul* between Guantanamo and the German prison in *Eisentrager,* and it ruled that, under *Eisentrager*, the right to habeas, to which this Court held petitioners were entitled, was not protected by the Suspension Clause. App. 14-22. Based on *Eisentrager*, it held that these petitioners would not have had access to the writ at common law (*Eisentrager*, it said, "ends any doubt about the scope of common law habeas"), and that they have no constitutional rights whatsoever. App. 14-15.

To the majority below, it as if *Rasul* never happened. Indeed, to the extent the D.C. Circuit paid any regard to *Rasul*, it chose to elevate Justice Scalia's dissenting analysis and conclusions regarding the historic reach of the writ at common law over those of the Court. *See* App. 15. Whatever authority Congress may have to override the decisions of this Court – and on matters involving the constitutional limits on its authority, it is questionable whether it has any – the lower federal courts certainly have none.

2. The Decision Misconceives and Misapplies The Suspension Clause

This Court also should grant review to clarify the scope of the Suspension Clause of the Constitution. Article I, Section 9, Clause 2 of the Constitution provides: "The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Unlike the Fourth, Fifth, and Sixth Amendments, this Clause does not itself confer rights on individuals. Rather, it provides constitutional protection to a preexisting right founded in the common law; the right to obtain independent judicial review of a detention to ensure that no person is deprived of liberty by the Executive without reasonable basis in law and fact. The Founders considered that right essential; as Alexander Hamilton explained: "the practice of arbitrary imprisonments, [has] been, in all ages, the

favorite and most formidable instruments of tyranny," and habeas corpus is the "remedy for this fatal evil." Federalist No. 84.

The Suspension Clause protects that fundamental right from intrusion by the legislature in times of political crisis. It is a direct, plain, and explicit limit on the power of Congress. That is why the Framers placed it in Article I of the Constitution. It permits Congress to suspend the writ only in certain, narrowly defined circumstances, and no others. Unless those circumstances exist – and they clearly do not – Congress may not suspend the writ. Congress may no more suspend the writ in the absence of "Rebellion" or "Invasion" consistently with Article I, Section 9, Clause 2 of the Constitution than it may tax exports consistently with Article I, Section 9, Clause 4. It could not impose an export tax on a foreign national abroad any more than it could impose one on a U.S. citizen at home. It is simply without power to do so.

Congress has authorized suspension of the Great Writ only four times, and each occurred during times of indisputable, and congressionally declared, rebellion or invasion.[26] There are no congressional findings of rebellion or invasion in the MCA. Thus, Congress has no power to suspend the writ.

This Court has not yet resolved whether the protections of the Suspension Clause encompass all of the evolutions the writ has undergone since 1789. The Court has emphasized, however, that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301. Therefore, to determine if petitioners' right to habeas is protected by the Suspension Clause, the initial inquiry to be made is whether they would have had a right to the writ "as it existed in 1789."

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[26] *See* William F. Duker, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 149, 178 n.190 (1980).

As Judge Rogers pointed out, this Court answered that question in the affirmative in *Rasul*. The Court concluded that "[a]pplication of the habeas statute to persons detained at the [Guantanamo Bay naval] base is consistent with the historical reach of the writ of habeas corpus." *Rasul*, 542 U.S. at 481. The Court pointed out that "[a]t common law, courts exercised habeas jurisdiction [not only] over the claims of aliens detained within sovereign territory of the realm [but also over] the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control." *Id.* at 481-82 (footnotes omitted). The Court cited Lord Mansfield, who wrote in 1759 that, "even if a territory was 'no part of the realm,' there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.'" *Id.* at 482.

The Court thus found that the common law writ of habeas corpus, as of 1759, applied to aliens detained outside the realm but in territories under the subjection of the Crown. The Court also noted that "[l]ater cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" *Id.* at 482.[27] Given those findings, it was not only unnecessary, but also improper for the D.C. Circuit to determine for itself whether the writ would have been available to petitioners at common law. This Court had already answered that question.

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[27] Congress has long recognized the applicability of that Clause in U.S. controlled territories outside the United States. For example, in 1902, during a rebellion against U.S. authority in the Philippines, Congress authorized the suspension of the writ for the duration of any "rebellion, insurrection, or invasion," and the writ was thereafter suspended in two rebellious provinces in the Philippines. *See* Act of July 1, 1902, ch. 1369, 32 Stat. 691; *Fisher v. Baker*, 203 U.S. 174, 179 (1906).

Nonetheless, the D.C. Circuit engaged in its own inquiry on the matter. App. 10-14. And, rather than paying heed to this Court's analysis and conclusion, it instead favored Justice Scalia's dissent in *Rasul,* which disagreed with the Court's analysis and conclusion. App. 14-15. This was plain error. The Court was well aware of Justice Scalia's dissenting views and rejected them. *Rasul*, 542 U.S. at 482 n.14. The D.C. Circuit was bound to follow the Court's analysis in *Rasul*, not the dissent, and hold accordingly that, because habeas would have been available to petitioners at common law, petitioners' right to habeas is protected by the Suspension Clause.

As Judge Rogers pointed out, the relevant question is not whether a particular case existed as of 1789 that is on all fours with the present petitions. The question is whether these petitions fall within the core of what habeas was intended to safeguard under the common law. As challenges to the legality of indefinite detention by the Executive, they fall directly within that core. As the Court has emphasized: "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301.

This Court has never failed to accord habeas a scope appropriate to the writ's "grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). As the Court noted in *Rasul*, at common law, the right to habeas to challenge executive detention turned not on technical notions of sovereignty, but on the degree of control over the territory and the power to enforce the writ. *Rasul*, 542 U.S. at 481-82. At common law, the executive could not bypass habeas review of its actions by deliberately housing prisoners in a leased territory, such as Guantanamo, where it exercised complete and total control if not *de jure* sovereignty. Such attempts to establish lawless en-

claves are contrary to the essential purpose of habeas at common law, as a check on illegal executive imprisonment.

The government may avoid neither petitioners' right to habeas nor the Suspension Clause's protection of that right by placing these petitioners at Guantanamo. This Court should confirm that the Suspension Clause protects petitioners' fundamental right, founded in the common law, to obtain habeas review of their detentions.

3. The Decision Impermissibly Denies Petitioners the Fundamental Protections of the Constitution

The D.C. Circuit held that petitioners have no rights under any part of the Constitution and therefore cannot claim protection under the Suspension Clause. App. 15-21. It relied on *Eisentrager* for this holding, again ignoring the distinctions between that case and these. Petitioners agree with Judge Rogers that their right to habeas corpus is protected under the Suspension Clause even if they have no other protections under the Constitution. Petitioners submit, however, that as prisoners held in U.S. custody at Guantanamo, an area within the complete jurisdiction and control of the United States, they are entitled "no less than American citizens" to the fundamental protections of the Constitution, including due process of law, before being locked up forever at the Executive's behest. The Court should decide that issue now, before these petitioners are forced to endure many more months and years deprived of their liberty without fair process.

This Court has already decided the issues that are central to holding that petitioners are entitled to fundamental constitutional protections. Most importantly, the Court found in *Rasul* that Guantanamo, where petitioners are incarcerated, is "a territory over which the United States exercises plenary and exclusive jurisdiction" and that it is "within 'the territorial jurisdiction' of the United States." 542 U.S. at 475. That finding distinguishes the present case not only from

Eisentrager, but also from *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), where this Court declined to apply the warrant requirement of the Fourth Amendment to a search of the Mexican residence of a Mexican national. As Justice Kennedy explained in his concurrence in *Verdugo*, "the differing . . . conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does here." 494 U.S. at 278. But there is no such potential for conflict or need for cooperation with foreign sovereigns at Guantanamo. No other sovereign exercises jurisdiction there. The United States exercises complete jurisdiction and control at Guantanamo.

As Justice Kennedy pointed out in his concurrence in *Rasul*: "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities . . . . From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." 542 U.S. at 487.[28]

It was on this basis that Judge Green concluded that "Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply." *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 464. In fact, this Court has long held that constitutional protections from arbitrary government action apply to aliens as well as to U.S. citizens in foreign territories controlled by the United States. In one of the early *Insular Cases*, this Court recognized the importance of preserving fundamental constitutional protections for alien inhabitants of territories

[28] As the U.S. Navy's own website says, Guantanamo, "for all practical purposes, is American territory," and "the United States . . . exercise[s] the essential elements of sovereignty over this territory." Rear Admiral M.E. Murphy, 1 *The History of Guantanamo Bay*, ch. 3 (1953), http://www.nsgtmo.navy.mil/history/gtmohistorymurphyvol1ch3.htm.

held and controlled by the United States, observing that fundamental and "personal" constitutional protections undoubtedly apply to aliens in such territories. *Downes v. Bidwell*, 182 U.S. 244 (1901) ("[e]ven if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property.").

Application of core constitutional protections to aliens outside of the United States, but in territories controlled by the United States, was again affirmed by this Court in *Balzac v. Porto Rico*, 258 U.S. 298 (1922). The Court explained that, although particular rights such as trial by jury might not apply, there was no question that other core constitutional protections applied to both citizens and aliens in a U.S.-controlled territory: "The guaranties of certain fundamental personal rights declared in the Constitution, *as for instance that no person could be deprived of life, liberty or property without due process of law*, had from the beginning full application in the Philippines and Porto Rico . . . ." *Id.* at 312-13 (emphasis added).

In *Rasul*, this Court explicitly rejected the proposition that petitioners' rights depend on whether the United States has technical "'sovereignty'" over Guantanamo. 542 U.S. at 475. With regard to the writ of habeas corpus, the Court noted with approval that the reach of the writ at common law "depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" *Id.* at 482. The reason, very simply, was to prevent the sovereign from avoiding court review of its actions simply by taking its prisoners outside the territory. Wherever the sovereign acted, and certainly whenever it acted within areas under its exclusive jurisdiction and control, it could not avoid the law.

The same should be true with respect to fundamental constitutional protections. Making the reach of those protec-

tions turn on technical sovereignty would allow the Executive to define the limits of the Constitution and avoid constitutional restraints on its authority simply by electing to detain people beyond our formal sovereign borders. It would permit the Executive to create law-free zones, negotiating leases for prisons abroad over which it exercised complete jurisdiction and control without acquiring technical sovereignty. It would grant the government a blank check to establish prisons outside the United States that are wholly outside the law.

Even the D.C. Circuit implicitly recognized that, if petitioners had been brought to the United States — if their U.S. captors had decided, upon reaching the eastern coastline of the United States, to turn the plane right and fly the detainees to a military facility in Virginia, rather than left, to the U.S. Naval Base at Guantanamo — they would have been entitled to invoke the protections afforded to detained persons by the Constitution, including those available under the Due Process Clause and the Suspension Clause. *See* App. 17-18 (noting that Guantanamo is not a "Territory or other Property belonging to the United States" and that "presence" in the United States is the criteria by which an alien's constitutional rights are determined). The Executive should not be granted the authority to create a constitutional loophole – or more accurately, a constitutional "black hole." Application of the Constitution should not depend on whether the government decides to turn the plane "left" or "right."[29]

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[29] One of the petitioners, David Hicks, was removed from U.S. sovereign territory, where he was first detained, so that the government could detain him at Guantanamo. Mr. Hicks was initially brought to and detained on a U.S. naval vessel for over a month before being transferred to Guantanamo. A naval vessel indisputably is sovereign U.S. territory, as this Court has recognized for more than a century. *See United States v. Rogers*, 50 U.S. 249, 260 (1893); *United States v. Flores*, 289 U.S. 137, 159 (1933); *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953). Courts have long addressed the merits of habeas claims brought by those detained on vessels, including one of the cases cited by the D.C. Circuit as an exam-

This is not a hypothetical issue. As mentioned, John Yoo, the former Deputy Assistant Attorney General in the Office of Legal Counsel of the Department of Justice, who played a key role in orchestrating the Administration's Guantanamo policy, bluntly admitted that the government chose Guantanamo precisely to avoid legal review of its actions:

> No location was perfect, but the U.S. Naval Station at Guantanamo Bay, Cuba, seemed to fit the bill. . . . [T]he federal courts probably wouldn't consider Gitmo as falling within their habeas jurisdiction . . .[30]

Petitioners submit that they cannot be held indefinitely in an area under exclusive U.S. jurisdiction and control without being afforded core constitutional protections, including protections under the Due Process Clause and the Suspension Clause. Petitioners are not asking the Court to engage in a novel analysis regarding what constitutional standards should apply. In *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-35 (2004), the Court decided that a citizen detained following capture on the battlefield in the conflict in Afghanistan is entitled to basic due process protections, including the right to

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ple of a habeas claim brought in sovereign territory. *See The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (1865). Therefore, although petitioners dispute the D.C. Circuit's opinion that the reach of fundamental constitutional protections turns on notions of technical sovereignty, even under that opinion Mr. Hicks undoubtedly was held as a captive within U.S. sovereign territory and is entitled to invoke the protections afforded to detained persons by the Due Process Clause and the Suspension Clause. Respondents cannot void those protections by removing Mr. Hicks to Guantanamo.

[30] *See generally* John Yoo, *War By Other Means: An Insider's Account of the War on Terror* (2006) at 142. Yoo explains that, from the beginning, Guantanamo was intended to provide U.S. officials with a place where they could interrogate detainees without having to worry whether either the detention or the interrogation tactics employed were lawful. *Id.* at 151.

receive notice of the factual basis for the detention, a fair opportunity to rebut the government's assertions, and the right to be heard before a neutral decision-maker "at a meaningful time and in a meaningful manner."

Those basic due process safeguards are also the minimum that justice requires for the prisoners held within U.S. jurisdiction at Guantanamo. As Justice Jackson stated over 50 years ago in the midst of the hysteria sweeping the nation over the spread of communism:

> Under the best tradition of Anglo-American law, courts will not deny hearing to an unconvicted prisoner just because he is an alien whose keep, in legal theory, is just outside our gates. . . . [A]n alien who has come within our jurisdiction . . . must meet a fair hearing with fair notice of the charges. It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone.[31]

What ultimately is at stake here is America's commitment to its core values and the rule of law. That commitment requires that the D.C. Circuit's decision be reversed and that this Court make clear that our government cannot evade the core constitutional limits on its authority – and the fundamental values of fairness for which our country is known – simply by placing its prisoners in areas beyond our technical sovereignty.

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[31] *Shaughnessy v. United States*, 345 U.S. 206, 219, 228 (1953) (Jackson, J., dissenting). Justice Jackson further cautioned: "Let it not be overlooked that due process of law is not for the sole benefit of the accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to appear on *ex parte* consideration." *Id.* at 224-25.

4. The MCA Does Not Clearly and Explicitly Revoke Habeas Jurisdiction Over These Pending Cases.

The Court can avoid the serious constitutional issues described above by construing the MCA, as it is drafted, as not revoking habeas jurisdiction over these pending cases. The Court has emphasized that there is a "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous *statutory directives* to effect a repeal." *Id.* at 299 (emphasis added). *See Ex parte Yerger*, 75 U.S. 85, 102, 104 (1868) (the courts "are not at liberty to except from [habeas jurisdiction] any cases not plainly excepted by law," and may not read a statute repealing habeas jurisdiction "to have any further effect than that plainly apparent from its terms").

The MCA by its terms does not revoke jurisdiction over pending habeas actions. As the government has pointed out, section 7(a) of the MCA purports to revoke jurisdiction over two distinct categories of cases: (1) "application[s] for a writ of habeas corpus" and (2) "other action[s]" that relate "to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of aliens determined by the United Sates to have properly detained as enemy combatants. The effective date provisions in subsection 7(b) of the MCA, however, apply the jurisdiction-stripping provision only to *pending* cases in the latter category—that is, those relating to "any aspect of the detention, transfer, treatment, trial, or conditions of detention."

Section 7(b) also stands in stark contrast to section 3(a) of the MCA, adding 10 U.S.C. § 950j, where Congress explicitly refers to habeas corpus in purporting to eliminate jurisdiction over *pending* actions relating to the prosecution, trial, or judgment of a military commission:

> Except as otherwise provided in this chapter and notwithstanding any other provision of law (**including section 2241 of title 28 or any other habeas corpus provision**), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action **pending on or filed after the date of enactment** of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter . . .

MCA § 3(a), 10 U.S.C. § 950j(b) (emphasis added). The D.C. Circuit paid scant attention to the difference between the language of the two sections. But it is significant. Congress withdrew jurisdiction over pending cases in two sections of the MCA: in one – section 3(a) – it expressly included habeas cases, and in the other – section 7(b) – it did not. By including habeas cases in section 3(a) and omitting mention of them in section 7(b), Congress indicated that section 7(b) should not apply to pending habeas cases.[32]

5. Most Of Petitioners' Treaty-Based Habeas Claims Were Improperly Dismissed

Finally, this case presents the issue of whether petitioners may enforce applicable treaty-based claims through habeas. Judge Green correctly held that the Geneva Conventions are self-executing and enforceable through habeas by petitioners allegedly connected to the Taliban. 355 F. Supp. 2d at 478-79. However, she erroneously dismissed the Geneva Conventions claims of those petitioners allegedly connected to al Qaeda on the ground that al Qaeda was not a "High Contracting Party" to the Conventions. *Id.* at 479.

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[32] *See, e.g., Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2765 (2006); *BPF v. RTC*, 511 U.S. 531, 537 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another") (quoting *Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994)).

Judge Green's decision runs afoul of this Court's ruling in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). First, the Court in *Hamdan* reversed as "erroneous" the D.C. Circuit's conclusion that the Geneva Conventions cannot be enforced through habeas by an individual alleged to be connected to al Qaeda, holding that Hamdan, a Guantanamo detainee alleged to be connected to al Qaeda, could enforce through habeas claims that the government violated Common Article 3 of the Conventions. 126 S. Ct. at 2795-96. Second, the Court in *Hamdan* implicitly endorsed the independent enforceability of Geneva Conventions rights and held that law-of-war constraints in treaties that are incorporated in legislation and imposed by Congress on the President's war powers are enforceable through habeas. *Id.*

Therefore, petitioners, including those allegedly connected to al Qaeda, may enforce through habeas the Geneva Conventions as well as other law-of-war constraints incorporated in the AUMF, which is the source of the President's power to detain them.[33] *See Hamdi v. Rumsfeld*, 542 U.S. 507, 517-18 (2004) (plurality opinion). It is important that the Court review and reverse the lower court's contrary ruling even though the D.C. Circuit did not address this issue. Given the long delay since *Rasul*, and the clarity of the Court's decision on this point in *Hamdan*, it would be unfair and unjust not to address this issue now.

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[33] Although section 5(a) of the MCA purports to bar the invocation of the Geneva Conventions as a "source of rights," it does not preclude the invocation of the rules embodied in the Conventions where the "source of right" is established by legislation. Moreover, Congress could not, without raising serious constitutional questions, bar habeas review of Geneva Conventions claims that otherwise would support habeas relief unless it abrogated or superseded the Conventions so as to deprive them of their status as U.S. law. *See, e.g., Henderson v. INS*, 157 F.3d 106, 119-22 (2d Cir. 1998). In any event, section 5(a) does not even purport to apply to pending actions and presumptively does not apply to petitioners' cases. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994).

CONCLUSION

The Court should grant this petition for a writ of *certiorari* to the Court of Appeals.

Respectfully submitted,

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MARCH 5, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 8, 2005 Decided February 20, 2007

No. 05-5062

LAKHDAR BOUMEDIENE, DETAINEE, CAMP DELTA, ET AL.,
Appellants,

v.

GEORGE W. BUSH, President of The United States, *et al.*,
Appellees.

Consolidated with
05-5063

Appeals from the United States District Court
for the District of Columbia
(No. 04cv01142)
(No. 04cv01166)

No. 05-5064

KHALED A. F. AL ODAH, NEXT FRIEND OF FAWZI KHALID
ABDULLAH FAHAD AL ODAH *et al.*,
Appellees/Cross-Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellants/Cross-Appellees.

App. 2

Consolidated with
05-5095, 05-5096, 05-5097, 05-5098, 05-5099, 05-5100,
05-5101, 05-5102, 05-5103, 05-5104, 05-5105, 05-5106,
05-5107, 05-5108, 05-5109, 05-5110, 05-5111, 05-5112,
05-5113, 05-5114, 05-5115, 05-5116

Appeals from the United States District Court
for the District of Columbia
(No. 02cv00828) (No. 02cv00299) (No. 02cv01130)
(No. 02cv01135) (No. 02cv01136) (No. 02cv01137)
(No. 02cv01144) (No. 02cv01164) (No. 02cv01194)
(No. 02cv01227) (No. 02cv01254)

Before: SENTELLE, RANDOLPH and ROGERS, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge*

RANDOLPH. Dissenting opinion filed by *Circuit Judge* ROGERS.

RANDOLPH, *Circuit Judge:* Do federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants at the Guantanamo Bay Naval Base in Cuba? The question has been the recurring subject of legislation and litigation. In these consolidated appeals, foreign nationals held at Guantanamo filed petitions for writs of habeas corpus alleging violations of the Constitution, treaties, statutes, regulations, the common law, and the law of nations. Some detainees also raised non-habeas claims under the federal question statute, 28 U.S.C. § 1331, and the Alien Tort Act, *id.* § 1350. In the "Al Odah" cases (Nos. 05-5064, 05-5095 through 05-5116), which consist of eleven cases involving fifty-six detainees, Judge Green denied the government's motion to dismiss with respect to the claims arising from alleged violations of the Fifth Amendment's Due Process Clause and the Third

Geneva Convention, but dismissed all other claims. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). After Judge Green certified the order for interlocutory appeal under 28 U.S.C. § 1292(b), the government appealed and the detainees cross-appealed. In the "Boumediene" cases (Nos. 05-5062 and 05-5063)—two cases involving seven detainees—Judge Leon granted the government's motion and dismissed the cases in their entirety. *See Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

In the two years since the district court's decisions the law has undergone several changes. As a result, we have had two oral arguments and four rounds of briefing in these cases during that period. The developments that have brought us to this point are as follows.

In *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 (2004), we affirmed the district court's dismissal of various claims—habeas and non-habeas—raised by Guantanamo detainees. With respect to the habeas claims, we held that "no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees." 321 F.3d at 1141. The habeas statute then stated that "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a) (2004). Because Guantanamo Bay was not part of the sovereign territory of the United States, but rather land the United States leases from Cuba, *see Al Odah*, 321 F.3d at 1142-43, we determined it was not within the "respective jurisdictions" of the district court or any other court in the United States. We therefore held that § 2241 did not provide statutory jurisdiction to consider habeas relief for any alien—enemy or not—held at Guantanamo. *Id.* at 1141. Regarding the non-habeas claims, we noted that "'the privilege of litigation' does not extend to aliens in military custody who have no presence

in 'any territory over which the United States is sovereign,'" *id.* at 1144 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950)), and held that the district court properly dismissed those claims.

The Supreme Court reversed in *Rasul v. Bush*, 542 U. S. 466 (2004), holding that the habeas statute extended to aliens at Guantanamo. Although the detainees themselves were beyond the district court's jurisdiction, the Court determined that the district court's jurisdiction over the detainees' custodians was sufficient to provide subject-matter jurisdiction under § 2241. *See Rasul*, 542 U.S. at 483-84. The Court further held that the district court had jurisdiction over the detainees' non-habeas claims because nothing in the federal question statute or the Alien Tort Act categorically excluded aliens outside the United States from bringing such claims. *See Rasul*, 542 U. S. at 484- 85. The Court remanded the cases to us, and we remanded them to the district court.

In the meantime Congress responded with the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (DTA), which the President signed into law on December 30, 2005. The DTA added a subsection (e) to the habeas statute. This new provision stated that, "[e]xcept as provided in section 1005 of the [DTA], no court, justice, or judge" may exercise jurisdiction over

> (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
>
> (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who
>
> (A) is currently in military custody; or

> (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit . . . to have been properly detained as an enemy combatant.

DTA § 1005(e)(1) (internal quotation marks omitted). The "except as provided" referred to subsections (e)(2) and (e)(3) of section 1005 of the DTA, which provided for exclusive judicial review of Combatant Status Review Tribunal determinations and military commission decisions in the D.C. Circuit. *See* DTA § 1005(e)(2), (e)(3).

The following June, the Supreme Court decided *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Among other things, the Court held that the DTA did not strip federal courts of jurisdiction over habeas cases pending at the time of the DTA's enactment. The Court pointed to a provision of the DTA stating that subsections (e)(2) and (e)(3) of section 1005 "shall apply with respect to any claim . . . that is pending on or after the date of the enactment of this Act." DTA § 1005(h). In contrast, no provision of the DTA stated whether subsection (e)(1) applied to pending cases. Finding that Congress "chose not to so provide . . . after having been presented with the option," the Court concluded "[t]he omission [wa]s an integral part of the statutory scheme." *Hamdan*, 126 S. Ct. at 2769.

In response to *Hamdan*, Congress passed the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (MCA), which the President signed into law on October 17, 2006. Section 7 of the MCA is entitled "Habeas Corpus Matters." In subsection (a), Congress again amended § 2241(e). The new amendment reads:

> (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

> (2) Except as provided in [section 1005(e)(2) and (e)(3) of the DTA], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

MCA § 7(a) (internal quotation marks omitted). Subsection (b) states:

> The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to *all cases, without exception, pending on or after the date of the enactment* of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

MCA § 7(b) (emphasis added).

The first question is whether the MCA applies to the detainees' habeas petitions. If the MCA does apply, the second question is whether the statute is an unconstitutional suspension of the writ of habeas corpus.[1]

I.

As to the application of the MCA to these lawsuits, section 7(b) states that the amendment to the habeas corpus statute, 28 U.S.C. § 2241(e), "shall apply to all cases, without exception, pending on or after the date of the enactment" that

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[1] Section 7(a) of the MCA eliminates jurisdiction over non-habeas claims by aliens detained as enemy combatants. That alone is sufficient to require dismissal even of pending non-habeas claims. *See Bruner v. United States*, 343 U.S. 112, 116-17 (1952). Section 7(b) reinforces this result.

relate to certain subjects. The detainees' lawsuits fall within the subject matter covered by the amended § 2241(e); each case relates to an "aspect" of detention and each deals with the detention of an "alien" after September 11, 2001. The MCA brings all such "cases, without exception" within the new law.

Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule *Hamdan*.[2]

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[2] Without exception, both the proponents and opponents of section 7 understood the provision to eliminate habeas jurisdiction over pending cases. *See, e.g.*, 152 Cong. Rec. S10357 (daily ed. Sept. 28, 2006) (statement of Sen. Leahy) ("The habeas stripping provisions in the bill go far beyond what Congress did in the Detainee Treatment Act . . . . This new bill strips habeas jurisdiction retroactively, even for pending cases."); *id.* at S 10367 (statement of Sen. Graham) ("The only reason we are here is because of the *Hamdan* decision. The *Hamdan* decision did not apply . . . the [DTA] retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now."); *id.* at S10403 (statement of Sen. Cornyn) ("[O]nce . . . section 7 is effective, Congress will finally accomplish what it sought to do through the [DTA] last year. It will finally get the lawyers out of Guantanamo Bay. It will substitute the blizzard of litigation instigated by *Rasul v. Bush* with a narrow DC Circuit-only review of the [CSRT] hearings."); *id.* at S10404 (statement of Sen. Sessions) ("It certainly was not my intent, when I voted for the DTA, to exempt all of the pending Guantanamo lawsuits from the provisions of that act. * * * Section 7 of the [MCA] fixes this feature of the DTA and ensures that there is no possibility of confusion in the future. . . . I don't see how there could be any confusion as to the effect of this act on the pending Guantanamo litigation. The MCA's jurisdictional bar applies to that litigation 'without exception.'"); 152 Cong. Rec. H7938 (daily ed. Sept. 29, 2006) (statement of Rep. Hunter) ("The practical effect of [section 7] will be to eliminate the hundreds of detainee lawsuits that are pending in courts throughout the country and to consolidate all detainee treatment cases in the D.C. Circuit."); *id.* at H7942 (Rep. Jackson-Lee) ("The habeas provisions in the legislation are contrary to congressional intent in the [DTA]. In that act, Congress did not intend to strip the courts of jurisdiction over the pending habeas [cases].").

Everyone, that is, except the detainees. Their cases, they argue, are not covered. The arguments are creative but not cogent. To accept them would be to defy the will of Congress. Section 7(b) could not be clearer. It states that "the amendment made by subsection (a)"—which repeals habeas jurisdiction—applies to "all cases, without exception" relating to any aspect of detention. It is almost as if the proponents of these words were slamming their fists on the table shouting "When we say 'all,' we mean all—**without exception !**"[3]

The detainees of course do not see it that way. They say Congress should have expressly stated in section 7(b) that habeas cases were included among "all cases, without exception, pending on or after" the MCA became law. Otherwise, the MCA does not represent an "unambiguous statutory directive[]" to repeal habeas corpus jurisdiction. *INS v. St. Cyr*, 533 U.S. 289, 299 (2001). This is nonsense. Section 7(b) specifies the effective date of section 7(a). The detainees' argument means that Congress, in amending the habeas statute (28 U.S.C. § 2241), specified an effective date only for non-habeas cases. Of course Congress did nothing of the sort. Habeas cases are simply a subset of cases dealing with detention. *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973).[4] Congress did not have to say that "the

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[3] Congress has rarely found it necessary to emphasize the *absence* of exceptions to a clear rule. Indeed, the use of "without exception" to emphasize the word "all" occurs in only one other provision of the U.S. Code. *See* 48 U.S.C. § 526(a).

[4] If section 7(b) did not include habeas cases among cases "which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention," it would be inconsistent with section 7(a). Section 7(a) of the MCA first repeals jurisdiction "to hear or consider an application for a writ of habeas corpus" by detainees. 28 U.S.C. § 2241(e)(1). It then repeals jurisdiction over "any *other* action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of a detainee, *id.* § 2241(e)(2) (emphasis added), thus

amendment made by subsection (a)"—which already *expressly* includes habeas cases—shall take effect on the date of enactment and shall apply to "all cases, without exception, *including habeas cases*." The *St. Cyr* rule of interpretation the detainees invoke demands clarity, not redundancy.

The detainees also ask us to compare the language of section 7(b) to that of section 3 of the MCA. Section 3, entitled "Military Commissions," creates jurisdiction in the D.C. Circuit for review of military commission decisions, *see* 10 U.S.C. § 950g. It then adds 10 U.S.C. § 950j, which deals with the finality of military commission decisions. Section 950j strips federal courts of jurisdiction over any pending or future cases that would involve review of such decisions:

> Except as otherwise provided in this chapter and notwithstanding any other provision of law *(including section 2241 of title 28 or any other habeas corpus provision)*, no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

10 U.S.C. § 950j(b) (emphasis added). The detainees maintain that § 950j calls into question Congress's intention to apply section 7(b) to pending habeas cases.

The argument goes nowhere. Section 7(b), read in conjunction with section 7(a), is no less explicit than § 950j. Section 7(a) strips jurisdiction over detainee cases, including habeas

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signifying that Congress considered habeas cases as cases relating to detention, as indeed they are.

cases, and section 7(b) makes section 7(a) applicable to pending cases. Section 950j accomplishes the same thing, but in one sentence. A drafting decision to separate section 7 into two subsections—one addressing the scope of the jurisdictional bar, the other addressing how the bar applies to pending cases—makes no legal difference.[5]

II.

This brings us to the constitutional issue: whether the MCA, in depriving the courts of jurisdiction over the detainees' habeas petitions, violates the Suspension Clause of the Constitution, U.S. CONST. art. I, § 9, cl. 2, which states that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The Supreme Court has stated the Suspension Clause protects the writ "as it existed in 1789," when the first

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[5] The detainees suggest that federal courts retain some form of residual common law jurisdiction over habeas petitions. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807), holds the opposite. *See Ex parte McCardle*, 74 U.S. 506 (1868). "Jurisdiction of the lower federal courts is . . . limited to those subjects encompassed within a statutory grant of jurisdiction." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). The observations about common law habeas in *Rasul*, 542 U.S. at 481-82, referred to the practice in England. Even if there were such a thing as common law jurisdiction in the federal courts, § 2241(e)(1) quite clearly eliminates all "jurisdiction to hear or consider an application for a writ of habeas corpus" by a detainee, whatever the source of that jurisdiction.

In order to avoid "serious 'due process,' Suspension Clause, and Article III problems," the detainees also urge us not to read section 7 of the MCA to eliminate habeas jurisdiction over Geneva Convention claims. But that reading is unavoidable. Section 7 is unambiguous, as is section 5(a), which states that "No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding . . . as a source of rights in any court of the United States."

Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus. *St. Cyr*, 533 U.S. at 301; *cf.* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 170 (1970). The detainees rely mainly on three cases to claim that in 1789 the privilege of the writ extended to aliens outside the sovereign's territory. In *Lockington's Case*, Bright. (N.P.) 269 (Pa. 1813), a British resident of Philadelphia had been imprisoned after failing to comply with a federal marshal's order to relocate. The War of 1812 made Lockington an "enemy alien" under the Alien Enemies Act of 1798. Although he lost on the merits of his petition for habeas corpus before the Pennsylvania Supreme Court, two of three Pennsylvania justices held that he was entitled to review of his detention.[6] In *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779), three Spanish seamen had boarded a merchant vessel bound for England with a promise of wages on arrival. After arriving in England, the English captain refused to pay their wages and turned them over to a warship as prisoners of war. The King's Bench denied the sailors' petitions because they were "alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus." *Id.* at 776. The detainees claim that, as in *Lockington's Case*, the King's Bench exercised jurisdiction and reached the merits. The third case—*Rex v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759)—involved a citizen of Sweden intent on entering the English merchant trade. While at sea on an English merchant's ship, a French privateer took Schiever along with the rest of the crew as prisoners, transferred the

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[6] During this period, state courts often employed the writ of habeas corpus to inquire into the legality of federal detention. The Supreme Court later held in *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859), and *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871), that state courts had no such power.

crew to another French ship, and let the English prisoners go free. An English ship thereafter captured the French ship and its crew, and carried them to Liverpool where Schiever was imprisoned. From Liverpool Schiever petitioned for habeas corpus, claiming he was a citizen of Sweden and only by force entered the service of the French. The court denied him relief because it found ample evidence that he was a prisoner of war. *Id.* at 552.

None of these cases involved an alien outside the territory of the sovereign. Lockington was a resident of Philadelphia. And the three Spanish sailors and Schiever were all held within English sovereign territory.[7] The detainees cite no case and no historical treatise showing that the English common law writ of habeas corpus extended to aliens beyond the Crown's dominions. Our review shows the contrary. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 53 (1980); 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 116-17, 124 (1982 ED.); 3 BLACKSTONE, COMMENTARIES 131 (1768); *see also* 1 Op. Att'y Gen. 47 (1794); *In re Ning Yi-Ching*, 56 T. L. R. 3, 5 (Vacation Ct. 1939) (noting prior judge "had listened in vain for a case in which the writ of *habeas corpus* had issued in respect of a foreigner detained in a part of the world which was not a part of the King's dominions or realm"). Robert Chambers, the successor to Blackstone at Oxford, wrote in his lectures that the writ ofhabeas corpus extended only to the King's dominions. 2 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW DELIVERED AT OXFORD 1767-1773 (composed in association with Samuel Johnson), at 7-8

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[7] The dissent claims that the difference between Schiever and the detainees is "exceedingly narrow," Dissent at 14, because Schiever was brought *involuntarily* to Liverpool. For this proposition, the dissent cites *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). *Verdugo-Urquidez* was a Fourth Amendment case. Obviously, it had nothing to say about habeas corpus in Eighteenth Century England.

(Thomas M. Curley ed., 1986). Chambers cited *Rex v. Cowle*, 97 Eng. Rep. (2 Burr.) 587 (K.B. 1759), in which Lord Mansfield stated that "[t]o foreign dominions . . . this Court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland, or to the electorate; but to Ireland, the Isle of Man, the plantations [American colonies] . . . we may." Every territory that Mansfield, Blackstone, and Chambers cited as a jurisdiction to which the writ extended (e.g., Ireland, the Isle of Man, the colonies, the Cinque Ports, and Wales) was a sovereign territory of the Crown.

When agents of the Crown detained prisoners outside the Crown's dominions, it was understood that they were outside the jurisdiction of the writ. *See* HOLDSWORTH, *supra*, at 116-17. Even British citizens imprisoned in "remote islands, garrisons, and other places" were "prevent[ed] from the benefit of the law," 2 HENRY HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 127-28 (William S. Hein Co. 1989) (1827), which included access to habeas corpus, *see* DUKER, *supra*, at 51-53; HOLDSWORTH, *supra*, at 116; *see also* Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1, 8 (2004) ("the writ of habeas corpus would not be available" in "remote islands, garrisons, and other places" (internal quotation marks omitted)). Compliance with a writ from overseas was also completely impractical given the habeas law at the time. In *Cowle*, Lord Mansfield explained that even in the far off territories "annexed to the Crown," the Court would not send the writ, "notwithstanding the power." 97 Eng. Rep. at 600. This is doubtless because of the Habeas Corpus Act of 1679. The great innovation of this statute was in setting time limits for producing the prisoner and imposing fines on the custodian if those limits were not met. *See* CHAMBERS, *supra*, at 11. For a prisoner detained over 100 miles from the court, the detaining officer had twenty days after receiving the writ to produce the body before the court. *See id.* If he did not produce the body, he incurred a fine. One can easily imagine the practical

problems this would have entailed if the writ had run outside the sovereign territory of the Crown and reached British soldiers holding foreign prisoners in overseas conflicts, such as the War of 1812. The short of the matter is that given the history of the writ in England prior to the founding, habeas corpus would not have been available in 1789 to aliens without presence or property within the United States.

Johnson v. Eisentrager, 339 U.S. 763 (1950), ends any doubt about the scope of common law habeas. "We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Id.* at 768; *see also* Note, *Habeas Corpus Protection Against Illegal Extraterritorial Detention*, 51 COLUM. L. REV. 368, 368 (1951). The detainees claim they are in a different position than the prisoners in *Eisentrager*, and that this difference is material for purposes of common law habeas.[8] They point to dicta in *Rasul*, 542 U. S. 481-82, in which the Court discussed English habeas cases and the "historical reach of the writ." *Rasul* refers to several English and American cases involving varying combinations of territories of the Crown and relationships between the petitioner and the country in which the writ was sought. *See id.* But as Judge Robertson found in *Hamdan*, "[n]ot one of the cases mentioned in *Rasul* held that an alien captured abroad and detained outside the United States—or in 'territory over which the United States exercises exclusive jurisdiction and control,' *Rasul*, 542 U.S. at 475—had a

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[8] The detainees are correct that they are not "enemy aliens." That term refers to citizens of a country with which the United States is at war. *See Al Odah*, 321 F.3d at 1139-40. But under the common law, the dispositive fact was not a petitioner's enemy alien status, but his lack of presence within any sovereign territory.

common law or constitutionally protected right to the writ of habeas corpus." *Hamdan v. Rumsfeld*, No. 04-1519, 2006 WL 3625015, at *7 (D.D.C. Dec. 13, 2006). Justice Scalia made the same point in his *Rasul* dissent, *see Rasul*, 542 U. S. at 502-05 & n.5 (Scalia, J., dissenting) (noting the absence of "a single case holding that aliens held outside the territory of the sovereign were within reach of the writ"), and the dissent acknowledges it here, *see* Dissent at 12. We are aware of no case prior to 1789 going the detainees' way,[9] and we are convinced that the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government.

The detainees encounter another difficulty with their Suspension Clause claim. Precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States. As we explained in *Al Odah*, 321 F.3d at 1140-41, the controlling case is *Johnson v. Eisentrager*. There twenty-one German nationals confined in custody of the U.S. Army in Germany filed habeas corpus petitions. Although the German prisoners alleged they were civilian agents of the German government, a military commission convicted them of war crimes arising from military activity against the United States in China after Germany's surrender. They claimed their convictions and imprisonment violated various constitutional provisions and the Geneva Conventions. The Supreme Court rejected the proposition "that the Fifth

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[9] The dissent claims the lack of any case on point is a result of the unique combination of circumstances in this case. But extraterritorial detention was not unknown in Eighteenth Century England. *See* HOLDSWORTH, *supra*, at 116-17; DUKER, *supra*, at 51-53. As noted, *supra*, these prisoners were beyond the protection of the law, which included access to habeas corpus. And *Eisentrager* (and the two hundred other alien petitioners the court noted, *see* 339 U.S. at 768 n.1) involved both extraterritorial detention and alien petitioners.

Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses," 339 U.S. at 783. The Court continued: "If the Fifth Amendment confers its rights on all the world . . . [it] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments." *Id.* at 784. (Shortly before Germany's surrender, the Nazis began training covert forces called "werewolves" to conduct terrorist activities during the Allied occupation. *See* http://www.archives.gov/iwg/declassified_records/oss_records_263_wilhelm_hoettl.html.)

Later Supreme Court decisions have followed *Eisentrager*. In 1990, for instance, the Court stated that *Eisentrager* "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). After describing the facts of *Eisentrager* and quoting from the opinion, the Court concluded that with respect to aliens, "our rejection of extraterritorial application of the Fifth Amendment was emphatic." *Id.* By analogy, the Court held that the Fourth Amendment did not protect nonresident aliens against unreasonable searches or seizures conducted outside the sovereign territory of the United States. *Id.* at 274-75. Citing *Eisentrager* again, the Court explained that to extend the Fourth Amendment to aliens abroad "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries," particularly since the government "frequently employs Armed Forces outside this country," *id.* at 273. A decade after *Verdugo-Urquidez*, the Court—again citing *Eisentrager*—found it "well established that certain constitutional pro-

tections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).[10]

Any distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in *Eisentrager* were held, is immaterial to the application of the Suspension Clause. The United States occupies the Guantanamo Bay Naval Base under an indefinite lease it entered into in 1903. *See Al Odah*, 321 F.3d at 1142. The text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba—not the United States—has sovereignty over Guantanamo Bay. *See VermilyaBrown Co. v. Connell*, 335 U.S. 377, 381 (1948); *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412 (11th Cir. 1995). The "determination of sovereignty over an area," the Supreme Court has held, "is for the legislative and executive departments." *Vermilya-Brown*, 335 U.S. at 380. Here the political departments have firmly and clearly spoken: "'United States,' when used in a geographic sense . . . does not include the United States Naval Station, Guantanamo Bay, Cuba." DTA § 1005(g).

The detainees cite the *Insular Cases* in which "fundamental personal rights" extended to U.S. territories. *See Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922); *Dorr v. United States*, 195 U.S. 138, 148 (1904); *see also Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977). But in each of those cases, Congress had exercised its power under Article IV, Section 3 of the Constitution to regulate "Territory or other Property belonging to the United States," U. S. CONST., art. IV, § 3, cl.

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[10] The *Rasul* decision, resting as it did on statutory interpretation, *see* 542 U.S. at 475, 483-84, could not possibly have affected the constitutional holding of *Eisentrager*. Even if *Rasul* somehow calls *Eisentrager*'s constitutional holding into question, as the detainees suppose, we would be bound to follow *Eisentrager*. *See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484-85 (1989).

2. These cases do not establish anything regarding the sort of *de facto* sovereignty the detainees say exists at Guantanamo. Here Congress and the President have specifically disclaimed the sort of territorial jurisdiction they asserted in Puerto Rico, the Philippines, and Guam.

Precedent in this circuit also forecloses the detainees' claims to constitutional rights. In *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002), we quoted extensively from *Verdugo-Urquidez* and held that the Court's description of *Eisentrager* was "firm and considered dicta that binds this court." Other decisions of this court are firmer still. Citing *Eisentrager*, we held in *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) (per curiam), that "non-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States." The law of this circuit is that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999); *see also 32 County Sovereignty Comm. v. U.S. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002).[11]

As against this line of authority, the dissent offers the distinction that the Suspension Clause is a limitation on congressional power rather than a constitutional right. But this is no distinction at all. Constitutional rights are rights against the

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[11] The text of the Suspension Clause also does not lend itself freely to extraterritorial application. The Clause permits suspension of the writ only in cases of "Rebellion or Invasion," neither of which is applicable to foreign military conflicts. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 593-94 (2004) (Thomas, J., dissenting); *see also* J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. (forthcoming 2007) (manuscript at 59-60, *available at* http://ssrn.com/abstract=888602).

government and, as such, *are* restrictions on governmental power. *See H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534 (1949) ("Even the Bill of Rights amendments were framed only as a limitation upon the powers of Congress.").[12] Consider the First Amendment. (In contrasting the Suspension Clause with provisions in the Bill of Rights, *see* Dissent at 3, the dissent is careful to ignore the First Amendment.) Like the Suspension Clause, the First Amendment is framed as a limitation on Congress: "Congress shall make no law . . . ." Yet no one would deny that the First Amendment protects the rights to free speech and religion and assembly.

The dissent's other arguments are also filled with holes. It is enough to point out three of the larger ones.

There is the notion that the Suspension Clause is different from the Fourth, Fifth, and Sixth Amendments because it does not mention individuals and those amendments do (respectively, "people," "person," and "the accused"). *See* Dissent at 3. Why the dissent thinks this is significant eludes us. Is the point that if a provision does not mention individuals there is no constitutional right? That cannot be right. The First Amendment's guarantees of freedom of speech and free exercise of religion do not mention individuals; nor does the Eighth Amendment's prohibition on cruel and unusual punishment or the Seventh Amendment's guarantee of a civil jury. Of course it is fair to assume that these provisions apply to individuals, just as it is fair to assume that petitions for writs of habeas corpus are filed by individuals.

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[12] James Madison's plan was to insert almost the entire Bill of Rights into the Constitution rather than wait for amendment. His proposed location of the Bill of Rights? Article I, Section 9—next to the Suspension Clause. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 700-01 & n.437 (1999).

The dissent also looks to the Bill of Attainder and Ex Post Facto Clauses, both located next to the Suspension Clause in Article I, Section 9. We do not understand what the dissent is trying to make of this juxtaposition. The citation to *United States v. Lovett*, 328 U.S. 303 (1946), is particularly baffling. *Lovett* held only that the Bill of Attainder Clause was justiciable. The dissent's point cannot be that the Bill of Attainder Clause and the Ex Post Facto Clause do not protect individual rights. Numerous courts have held the opposite.[13] "The fact that the Suspension Clause abuts the prohibitions on bills of attainder and ex post facto laws, provisions well-accepted to protect individual liberty, further supports viewing the habeas privilege as *a core individual right.*" Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 374 & n.227 (2006) (emphasis added).[14]

Why is the dissent so fixated on how to characterize the Suspension Clause? The unstated assumption must be that the reasoning of our decisions and the Supreme Court's in denying constitutional rights to aliens outside the United States would not apply if a constitutional provision could be characterized as protecting something other than a "right." On this theory, for example, aliens outside the United States are entitled to the protection of the Separation of Powers because

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[13] *See South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) ("[C]ourts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private groups . . . .") (citing *United States v. Brown*, 381 U.S. 437 (1965); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866)); *see also Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005); *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468-69 (1977); *Shabazz v. Gabry*, 123 F.3d 909, 912 (6th Cir. 1997).

[14] *Accord* Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 318, 321 (2000) ("[W]e could easily describe [Article I,] Section 9 as a bill of rights for the people of the United States.").

they have no individual rights under the Separation of Powers. Where the dissent gets this strange idea is a mystery, as is the reasoning behind it.

III.

Federal courts have no jurisdiction in these cases. In supplemental briefing after enactment of the DTA, the government asked us not only to decide the habeas jurisdiction question, but also to review the merits of the detainees' designation as enemy combatants by their Combatant Status Review Tribunals. *See* DTA § 1005(e)(2).[15] The detainees objected to converting their habeas appeals to appeals from their Tribunals. In briefs filed after the DTA became law and after the Supreme Court decided *Hamdan*, they argued that we were without authority to do so.[16] Even if we have authority to convert the habeas appeals over the petitioners' objections, the record does not have sufficient information to perform the review the DTA allows. Our only

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[15] *See* Supplemental Br. of the Federal Parties Addressing the Detainee Treatment Act of 2005 53-54 ("This Court can and should convert the pending appeals into petitions for review under [DTA section] 1005(e)(2).").

[16] *See* The Guantanamo Detainees' Supplemental Br. Addressing the Effect of the Supreme Ct.'s Op. in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), on the Pending Appeals 8-9 ("The detainees in the pending petitions challenge the lawfulness of their detentions—not the subsequent CSRT decisions . . . ."); Corrected Supplemental Br. of Pet'rs Boumediene, et al., & Khalid Regarding Section 1005 of the Detainee Treatment Act of 2005 56-59 ("Nothing in the [DTA] authorizes the Court to 'convert' Petitioners' notices of appeal of the district court's judgment into original petitions for review of CSRT decisions under section 1005(e)(2) of the Act."); The Guantanamo Detainees' Corrected Second Supplemental Br. Addressing the Effect of the Detainee Treatment Act of 2005 on this Ct.'s Jurisdiction over the Pending Appeals 43-44 ("[T]his court should not convert these petitions into petitions for review under the DTA as the government suggests.").

recourse is to vacate the district courts' decisions and dismiss the cases for lack of jurisdiction.

So ordered.

ROGERS, *Circuit Judge*, dissenting: I can join neither the reasoning of the court nor its conclusion that the federal courts lack power to consider the detainees' petitions. While I agree that Congress intended to withdraw federal jurisdiction through the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), the court's holding that the MCA is consistent with the Suspension Clause of Article I, section 9, of the Constitution does not withstand analysis. By concluding that this court must reject "the detainees' claims to constitutional rights," Op. at 21, the court fundamentally misconstrues the nature of suspension: Far from conferring an individual right that might pertain only to persons substantially connected to the United States, *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), the Suspension Clause is a limitation on the powers of Congress. Consequently, it is only by misreading the historical record and ignoring the Supreme Court's well-considered and binding dictum in *Rasul v. Bush*, 542 U.S. 466, 481-82 (2004), that the writ at common law would have extended to the detainees, that the court can conclude that neither this court nor the district courts have jurisdiction to consider the detainees' habeas claims.

A review of the text and operation of the Suspension Clause shows that, by nature, it operates to constrain the powers of Congress. Prior to the enactment of the MCA, the Supreme Court acknowledged that the detainees held at Guantanamo had a statutory right to habeas corpus. *Rasul*, 542 U.S. at 483-84. The MCA purports to withdraw that right but does so in a manner that offends the constitutional constraint on suspension. The Suspension Clause limits the removal of habeas corpus, at least as the writ was understood at common law, to times of rebellion or invasion unless Congress provides an adequate alternative remedy. The writ would have reached the detainees at common law, and Congress has neither provided an adequate alternative remedy, through the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, tit. X,

119 Stat. 2680, 2739 ("DTA"), nor invoked the exception to the Clause by making the required findings to suspend the writ. The MCA is therefore void and does not deprive this court or the district courts of jurisdiction.

On the merits of the detainees' appeal in *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005) and the cross-appeals in *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), I would affirm in part in *Guantanamo Detainee Cases* and reverse in *Khalid* and remand the cases to the district courts.

I.

Where a court has no jurisdiction it is powerless to act. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-74 (1803). But a statute enacted by Congress purporting to deprive a court of jurisdiction binds that court only when Congress acts pursuant to the powers it derives from the Constitution. The court today concludes that the Suspension Clause is an individual right that cannot be invoked by the detainees. *See* Op. at 22. The text of the Suspension Clause and the structure of the Constitution belie this conclusion. The court further concludes that the detainees would have had no access to the writ of habeas corpus at common law. *See* Op. at 14-17. The historical record and the guidance of the Supreme Court disprove this conclusion.

In this Part, I address the nature of the Suspension Clause, the retroactive effect of Congress's recent enactment on habeas corpus—the MCA—and conclude with an assessment of the effect of the MCA in light of the dictates of the Constitution.

A.

The court holds that Congress may suspend habeas corpus as to the detainees because they have no individual rights under the Constitution. It is unclear where the court finds that

the limit on suspension of the writ of habeas corpus is an individual entitlement. The Suspension Clause itself makes no reference to citizens or even persons. Instead, it directs that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. This mandate appears in the ninth section of Article I, which enumerates those actions expressly excluded from Congress's powers. Although the Clause does not specifically say so, it is settled that only Congress may do the suspending. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807); *see Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting); *Ex parte Merryman*, 17 F. Cas. 144, 151-152 (No. 9487) (Taney, Circuit Justice, C.C.D. Md. 1861); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1342 (5th ed. 1891). In this manner, by both its plain text and inclusion in section 9, the Suspension Clause differs from the Fourth Amendment, which establishes a "right of the people," the Fifth Amendment, which limits how a "person shall be held," and the Sixth Amendment, which provides rights to "the accused." These provisions confer rights to the persons listed.[1]

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[1] The Suspension Clause is also distinct from the First Amendment, which has been interpreted as a guarantor of individual rights. *See, e.g., United States v. Robel*, 389 U.S. 258, 263 (1967); *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The court cannot seriously maintain that the two provisions are alike while acknowledging that the First Amendment confers an individual right enforceable by the courts and simultaneously claiming that the Suspension Clause does not, *see* Op. at 13 n.5 (citing *Bollman*, 8 U.S. (4 Cranch) at 95); *see also In re Barry*, 42 F. 113, 122 (C.C.S.D.N.Y. 1844), *error dismissed sub nom. Barry v. Mercein*, 46 U.S. 103 (1847) ("The ninth section of the first article of the constitution, par. 2, declaring that 'the privilege of the writ of habeas corpus shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it,' does not purport to convey power or jurisdiction to the judiciary. It is in restraint of executive and legislative powers, and no further affects the judiciary than to impose on them the necessity, if the

The other provisions of Article I, section 9, indicate how to read the Suspension Clause. The clause immediately following provides that "[n]o Bill of Attainder or ex post facto Law shall be passed."[2] The Supreme Court has construed the Attainder Clause as establishing a "category of Congressional actions which the Constitution barred." *United States v. Lovett*, 328 U.S. 303, 315 (1946). In *Lovett*, the Court dismissed the possibility that an Act of Congress in violation of the Attainder Clause was non-justiciable, remarking:

> Our Constitution did not contemplate such a result. To quote Alexander Hamilton,
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> > * * * a limited constitution * * * [is] one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; *whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.* Without this, all the reservations of particular rights or privileges would amount to nothing.

Id. at 314 (quoting THE FEDERALIST NO. 78) (emphasis added) (alteration and omissions in original). So too, in *Weaver v. Graham*, 450 U.S. 24, 28-29 & n.10 (1981), where the Court noted that the ban on *ex post facto* legislation "restricts governmental power by restraining arbitrary and

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privilege of habeas corpus is suspended by any authority, to decide whether the exigency demanded by the constitution exists to sanction the act.").

[2] Suspensions and bills of attainder have a shared history. In England, suspensions occasionally named specific individuals and therefore amounted to bills of attainder. *See* Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 339 (1952).

potentially vindictive legislation" and acknowledged that the clause "confin[es] the legislature to penal decisions with prospective effect." *See also Marbury*, 5 U.S. (1 Cranch) at 179-80; *Foretich v. United States*, 351 F.3d 1198, 1216-26 (D.C. Cir. 2003). For like reasons, any act in violation of the Suspension Clause is void, *cf. Lovett,* 328 U.S. at 316, and cannot operate to divest a court of jurisdiction.[3]

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[3] The court cites a number of cases for the proposition that the Attainder Clause confers an individual right instead of operating as a structural limitation on Congress. *See* Op. at 23 n.13. None of these cases makes the court's point. In *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966), the Supreme Court held that it is not a bill of attainder for Congress to punish a state. This speaks to the definition of a bill of attainder and says nothing about the operation of the Attainder Clause. *Weaver v. Graham*, 450 U.S. 24, 30 (1981), says the opposite of what the court asserts. In *Weaver*, the Supreme Court emphasized that the *Ex Post Facto* Clause is not intended to protect individual rights but governs the operation of government institutions:

> The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

The Court also emphasized the structural nature of the limitations of Article I, section 9, in *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 469 (1977) (noting that "the Bill of Attainder Clause [is] . . . one of the organizing principles of our system of government"). Unsurprisingly, the court cites no authority that would support its novel construction of section 9 by providing that certain individuals lack Attainder Clause or *Ex Post Facto* Clause rights.

The court dismisses the distinction between individual rights and limitations on Congress's powers. It chooses to make no affirmative argument of its own, instead hoping to rebut the sizable body of conflicting authorities.

The court appears to believe that the Suspension Clause is just like the constitutional amendments that form the Bill of Rights.[4] It is a truism, of course, that individual rights like those found in the first ten amendments work to limit Congress. However, individual rights are merely a subset of those matters that constrain the legislature. These two sets cannot be understood as coextensive unless the court is prepared to recognize such awkward individual rights as Commerce Clause rights, *see* U.S. CONST. art. I, § 8, cl. 3, or the personal right not to have a bill raising revenue that originates in the Senate, *see* U.S. CONST. art. I, § 7, cl. 1; *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 224 (1974) (finding no individual right under the Ineligibility Clause).

That the Suspension Clause appears in Article I, section 9, is not happenstance. In Charles Pinckney's original proposal, suspension would have been part of the judiciary provision. It was moved in September 1789 by the Committee on Style and Arrangement, which gathered the restrictions on Congress's power in one location. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 128-32 (1980); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 596 (Max Farrand ed., rev. ed. 1966). By the court's

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[4] For this point, the court quotes, without context, from *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949), *see* Op. at 22. In that case, the Supreme Court emphasized that the Bill of Rights limited the powers of Congress and did not affect the powers of the individual states, *H.P. Hood & Sons*, 336 U.S. at 534, at least until certain amendments were incorporated after ratification of the Fourteenth Amendment. This says nothing about the distinction, relevant here, between individual rights and limitations on Congress.

reasoning, the Framers placed the Suspension Clause in Article I merely because there were no similar individual rights to accompany it. It is implausible that the Framers would have viewed the Suspension Clause, as the court implies, as a budding Bill of Rights but would not have assigned the provision its own section of the Constitution, much as they did with the only crime specified in the document, treason, which appears alone in Article III, section 3. Instead, the court must treat the Suspension Clause's placement in Article I, section 9, as a conscious determination of a limit on Congress's powers. The Supreme Court has found similar meaning in the placement of constitutional clauses ever since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419-21 (1819) (Necessary and Proper Clause); *see also, e.g., Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 220-21 (1989) (Taxing Clause).

The court also alludes to the idea that the Suspension Clause cannot apply to foreign military conflicts because the exception extends only to cases of "Rebellion or Invasion." Op. at 21 n. 11. The Framers understood that the privilege of the writ was of such great significance that its suspension should be strictly limited to circumstances where the peace and security of the Nation were jeopardized. Only after considering alternative proposals authorizing suspension "on the most urgent occasions" or forbidding suspension outright did the Framers agree to a narrow exception upon a finding of rebellion or invasion. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 438. Indeed, it would be curious if the Framers were implicitly sanctioning Executive-ordered detention abroad without judicial review by limiting suspension—and by the court's reasoning therefore limiting habeas corpus—to domestic events. To the contrary, as Alexander Hamilton foresaw in *The Federalist No. 84*, invoking William Blackstone,

> To bereave a man of life (says he), or by violence to confiscate his estate, without accusation or trial, would

> be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government.

THE FEDERALIST NO. 84, at 468 (E.H. Scott ed. 1898) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *131-32); *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 125 (1866).

B.

This court would have jurisdiction to address the detainees' claims but for Congress's enactment of the MCA. In *Rasul*, 542 U.S. at 483-84, the Supreme Court held that the federal district courts had jurisdiction to hear petitions for writs of habeas corpus filed pursuant to 28 U.S.C. § 2241 by persons detained as "enemy combatants" by the United States at the Guantanamo Bay Naval Base. At the time, the habeas statute provided, in relevant part, that upon the filing of such a petition, the district court would promptly determine whether the petitioner was being held under the laws, Constitution, and treaties of the United States, utilizing the common-law procedure of a return filed by the government and a traverse filed by the petitioner. *See* 28 U.S.C. §§ 2242-2253. After *Rasul*, Congress enacted the DTA, which purported to deprive the federal courts of habeas jurisdiction. DTA § 1005(e), 118 Stat. at 2741-43. The Supreme Court held in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764-69 (2006), however, that the DTA does not apply retroactively, and so it does not disturb this court's jurisdiction over the instant appeals, which were already pending when the DTA became law.

As for the MCA, I concur in the court's conclusion that, notwithstanding the requirements that Congress speak clearly when it intends its action to apply retroactively, *see Landgraf*

v. USI Film Prods., 511 U.S. 244, 265-73 (1994), and when withdrawing habeas jurisdiction from the courts, *see INS v. St. Cyr*, 533 U.S. 289, 299 (2001); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1869), Congress sought in the MCA to revoke all federal jurisdiction retroactively as to the habeas petitions of detainees held at Guantanamo Bay. *See* Op. at 9-12. I do not join the court's reasoning. The court stresses Congress's emphasis that the provision setting the effective date for the jurisdictional change "shall apply to all cases, without exception." However, the absence of exceptions does not establish the scope of the provision itself. The entire provision reads:

> (b)—EFFECTIVE DATE. The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act *which relate to* any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

MCA § 7(b), 120 Stat. at 2636 (emphasis added). Subsection (a), in turn, amends 28 U.S.C. § 2241(e), which confers habeas jurisdiction on the federal courts. New section 2241(e)(1) repeals "jurisdiction to hear or consider an application for a writ of habeas corpus." New section 2241(e)(2) repeals "jurisdiction to hear or consider any other action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement."

The detainees suggest that by singling out habeas corpus in § 2241(e)(1) and by failing to do so in section 7(b)—and instead repeating the same list ("detention, transfer, treatment, trial, or conditions of confinement") that appears in § 2241(e)(2)—Congress was expressing its intent to make the MCA retroactive only as to § 2241(e)(2). This argument hinges on their view that a petition for a writ of habeas corpus

is not "relating to any aspect of . . . detention." But, by the plain text of section 7, it is clear that the detainees suggest ambiguity where there is none. As the court notes, *see* Op. at 11 n. 4, whereas § 2241(e)(1) refers to habeas corpus, § 2241(e)(2) deals with "any *other* action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement." (Emphasis added). By omitting the word "other" in section 7(b), and by cross-referencing section 7(a) in its entirety, Congress signaled its intent for the retroactivity provision to apply to habeas corpus cases. This conclusion has nothing to do with Congress's emphasis that there are no exceptions and everything to do with the intent it expressed through the substantive provisions of the statute.

C.

The question, then, is whether by attempting to eliminate all federal court jurisdiction to consider petitions for writs of habeas corpus, Congress has overstepped the boundary established by the Suspension Clause. The Supreme Court has stated on several occasions that *"at the absolute minimum*, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)) (emphasis added). Therefore, at least insofar as habeas corpus exists and existed in 1789, Congress cannot suspend the writ without providing an adequate alternative except in the narrow exception specified in the Constitution.[5] This proscription applies equally to

[5] It is unnecessary to resolve the question of whether the Constitution provides for an affirmative right to habeas corpus—either through the Suspension Clause, the Fifth Amendment guarantee of due process, or the Sixth Amendment—or presumed the continued vitality of this "writ antecedent to statute," *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945) (internal quotation marks omitted). Because the Supreme Court in *Rasul* held that the writ existed in 2004 and that there was, therefore, something to suspend, it is sufficient to assess whether the writ sought here existed in 1789. Given my conclusion, *see infra* Part C.1, it is also unnecessary to resolve the question of whether the Suspension Clause protects the writ of

removing the writ itself and to removing all jurisdiction to issue the writ. *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3.2 (4th ed. 2003).

1.

Assessing the state of the law in 1789 is no trivial feat, and the court's analysis today demonstrates how quickly a few missteps can obscure history. In conducting its historical review, the court emphasizes that no English cases predating 1789 award the relief that the detainees seek in their petitions. Op. at 15-17. "The short of the matter," the court concludes, is that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." Op. at 17. But this misses the mark. There may well be no case at common law in which a court exercises jurisdiction over the habeas corpus claim of an alien from a friendly nation, who may himself be an enemy, who is captured abroad and held outside the sovereign territory of England but within the Crown's exclusive control without being charged with a crime or violation of the Laws of War. On the other hand, the court can point to no case where an English court has refused to exercise habeas jurisdiction because the enemy being held, while under the control of the Crown, was not within the Crown's dominions.[6] The paucity

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habeas corpus as it has developed since 1789. *Compare St. Cyr*, 533 U.S. at 304-05, *and LaGuerre v. Reno*, 164 F.3d 1035, 1038 (7th Cir. 1998), *with Felker*, 518 U.S. at 663-64, *and* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 970 (1998). The court oddly chooses to ignore the issue by truncating its reference to *St. Cyr*, without comment, and omitting the qualifier "at the absolute minimum." *See* Op. at 14.

[6] The court's assertion that "extraterritorial detention was not unknown in Eighteenth Century England," Op. at 18 n.9, is of no moment. The court references the 1667 impeachment of the Earl of Clarendon, Lord High Chancellor of England. *See id.* at 16, 18 n.9. Clarendon was accused of sending enemies to faraway lands to deprive them of effective legal

of direct precedent is a consequence of the unique confluence of events that defines the situation of these detainees and not a commentary on the reach of the writ at common law.

The question is whether by the process of inference from similar, if not identical, situations the reach of the writ at common law would have extended to the detainees' petitions. At common law, we know that "the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" *Rasul*, 542 U. S. at 482 (quoting *Ex parte Mwenya*, [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.)). We also know that the writ extended not only to citizens of the realm, but to aliens, *see id.* at 481 & n.11, even in wartime, *see id.* at 474-75; *Case of Three Spanish Sailors*, 2 Black. W. 1324, 96 Eng. Rep. 775 (C.P. 1779); *Rex v. Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K.B. 1759). A War of 1812-era case in which Chief Justice John Marshall granted a habeas writ to a British subject establishes that even conceded enemies of the United States could test in its courts detention that they claimed was unauthorized. *See* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 GREEN BAG 2D 39 (2005) (reporting *United States v. Williams* (C.C.D. Va. Dec. 4, 1813)).

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process. The court makes the unsupported inference that habeas corpus was therefore unavailable abroad. Nothing in the Clarendon affair suggests that habeas corpus was sought and refused. Instead, as remains the case today, legal process can be evaded when prisoners are detained without access to the courts. That the detainees at Guantanamo were able to procure next friends and attorneys to pursue their petitions whereas seventeenth-century Englishmen would have found this difficult, if not impossible, says nothing about the availability of the writ at common law. The court's obfuscation as to the distinction between impracticality and unavailability is further addressed *infra*.

To draw the ultimate conclusion as to whether the writ at common law would have extended to aliens under the control (if not within the sovereign territory) of the Crown requires piecing together the considerable circumstantial evidence, a step that the court is unwilling to take. Analysis of one of these cases, the 1759 English case of *Rex v. Schiever*, shows just how small this final inference is. Barnard Schiever was the subject of a neutral nation (Sweden), who was detained by the Crown when England was at war with France. *Schiever*, 2 Burr. at 765, 97 Eng. Rep. at 551. He claimed that his classification as a "prisoner of war" was factually inaccurate, because he "was desirous of entering into the service of the merchants of England" until he was seized on the high seas by a French privateer, which in turn was captured by the British Navy. *Id.* In an affidavit, he swore that his French captor "detained him[] against his will and inclination . . . and treated him with so much severity[] that [his captor] would not suffer him to go on shore when in port . . . but closely confined him to duty [on board the ship]." *Id.* at 765-66, 97 Eng. Rep. at 551. The habeas court ultimately determined, on the basis of Schiever's own testimony, that he was properly categorized and thus lawfully detained. *Id.* at 766, 97 Eng. Rep. at 551-52.

The court discounts *Schiever* because, after England captured the French privateer while en route to Norway, it was carried into Liverpool, England, where Schiever was held in the town jail. *Id.*, 97 Eng. Rep. at 551. As such, the case did not involve "an alien outside the territory of the sovereign." Op. at 14-15. However, Schiever surely was not *voluntarily* brought into England, so his mere presence conferred no additional rights. As the Supreme Court observed in *Verdugo-Urquidez*, "involuntary [presence] is not the sort to indicate any substantial connection with our country." 494 U.S. at 271. Any gap between *Schiever* and the detainees' detention at Guantanamo Bay is thus exceedingly narrow.

This court need not make the final inference. It has already been made for us. In *Rasul*, the Supreme Court stated that "[a]pplication of the habeas statute to persons detained at the [Guantanamo] base is consistent with the historical reach of the writ of habeas corpus." 542 U. S. at 481. By reaching a contrary conclusion, the court ignores the settled principle that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003) (quoting *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997)) (internal quotation marks omitted). Even setting aside this principle, the court offers no convincing analysis to compel the contrary conclusion. The court makes three assertions: First, Lord Mansfield's opinion in *Rex v. Cowle*, 2 Burr. 834, 97 Eng. Rep. 587 (K.B. 1759), disavows the right claimed by the detainees. Second, it would have been impractical for English courts to extend the writ extraterritorially. Third, *Johnson v. Eisentrager*, 339 U.S. 763 (1949), is controlling. None of these assertions withstands scrutiny.

In *Cowle*, Lord Mansfield wrote that "[t]here is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety." 2 Burr. at 856, 97 Eng. Rep. at 599. He noted thereafter, by way of qualification, that the writ would not extend "[t]o foreign dominions, which belong to a prince who succeeds to the throne of England." *Id.*, 97 Eng. Rep. at 599- 600. Through the use of ellipsis marks, the court excises the qualification and concludes that the writ does not extend "[t]o foreign dominions." Op. at 16. This masks two problems in its analysis. A "foreign dominion" is not a foreign country, as the court's reasoning implies, but rather "a country which at some time formed part of the dominions of a foreign state or potentate, but which by conquest or cession has become a part of the dominions of the Crown of England." *Ex parte Brown*, 5 B. & S. 280, 122 Eng. Rep. 835 (K.B. 1864). And

the exception noted in Lord Mansfield's qualification has nothing to do with extraterritoriality: Instead, habeas from mainland courts was unnecessary for territories like Scotland that were controlled by princes in the line of succession because they had independent court systems. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES *95-98; James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497, 512- 13 (2006). In the modern-day parallel, where a suitable alternative for habeas exists, the writ need not extend. *See* 2 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW DELIVERED AT OXFORD 1767-1773, at 8 (Thomas M. Curley, ed., 1986) (quoting *Cowle* as indicating that, notwithstanding the power to issue the writ "in *Guernsey, Jersey, Minorca,* or the *plantations*," courts would not think it "proper to interpose" because "the most usual way is to complain to the *king in Council*, the supreme court of appeal from those provincial governments"); *see also infra* Part C.2. The relationship between England and principalities was the only instance where it was "found necessary to restrict the scope of the writ." 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 124 (1938). *Cowle*, by its plain language, then, must be read as recognizing that the writ of habeas corpus ran even to places that were "no part of the realm," where the Crown's other writs did not run, nor did its laws apply. 2 Burr. at 835-36, 853- 55, 97 Eng. Rep. at 587-88, 598-99. The Supreme Court has adopted this logical reading. *See Rasul*, 542 U. S. at 481-82; *see also* Mitchell B. Malachowski, *From Gitmo with Love: Redefining Habeas Corpus Jurisdiction in the Wake of the Enemy Combatant Cases of 2004*, 52 NAVAL L. REV. 118, 122- 23 (2005).[7]

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[7] The significance of a 1794 opinion by the U.S. Attorney General, *see* Op. at 15, which expresses the view that the writ should issue to the foreign commander of a foreign ship-of-war in U.S. ports, reasoning that the foreign ship has "no exemption from the jurisdiction of the country

The court next disposes of *Cowle* and the historical record by suggesting that the "power" to issue the writ acknowledged by Lord Mansfield can be explained by the Habeas Corpus Act of 1679, 31 Car. 2, c. 2. *See* Op. at 16. The Supreme Court has stated that the Habeas Corpus Act "enforces the common law," *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1730), thus hardly suggesting that the "power" recognized by Lord Mansfield was statutory and not included within the 1789 scope of the common-law writ. To the extent that the court makes the curious argument that the Habeas Corpus Act would have made it too impractical to produce prisoners if applied extraterritorially because it imposed fines on jailers who did not quickly produce the body, Op. at 16-17, the court cites no precedent that suggests that "practical problems" eviscerate "the precious safeguard of personal liberty [for which] there is no higher duty than to maintain it unimpaired," *Bowen v. Johnston,* 306 U. S. 19, 26 (1939). This line of reasoning employed by the court fails for two main reasons:

First, the Habeas Corpus Act of 1679 was expressly limited to those who "have beene committed for criminall or supposed criminall Matters." 31 Car. 2, c. 2, § 1. Hence, the burden of expediency imposed by the Act could scarcely have prevented common-law courts from exercising habeas jurisdiction in noncriminal matters such as the petitions in

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into which he comes," 1 Op. Att'y Gen. 47 (1794), is unclear. Nor is it clear what point the court is making by referencing *In re Ning Yi-Ching*, 56 T.L.R. 3 (K.B. Vacation Ct. 1939). In *Rasul*, the Supreme Court noted that *Ning Yi-Ching* "made quite clear that 'the remedy of *habeas corpus* was not confined to British subjects,' but would extend to 'any person . . . detained' within the reach of the writ," 542 U.S. at 483 n.13 (quoting *Ning Yi-Ching*, 56 T.L.R. at 5), and that the case does not support a "narrow view of the territorial reach of the writ," *id.* Here, the court provides a parenthetical quotation for *Ning Yi-Ching* that recalls a dissenting position from a prior case that was later repudiated. *See Rasul*, 542 U.S. at 483 n.14; *Mwenya*, [1960] 1 Q.B. at 295 (Lord Evershed, M.R.).

these appeals. Statutory habeas in English courts did not extend to non-criminal detention until the Habeas Corpus Act of 1816, 56 Geo. 3, c. 100, although courts continued to exercise their common-law powers in the interim. *See* 2 CHAMBERS, *supra*, at 11; 9 HOLDSWORTH, *supra*, at 121.

Second, there is ample evidence that the writ did issue to faraway lands. In *Ex parte Anderson*, 3 El. & El. 487, 121 Eng. Rep. 525 (Q.B. 1861), *superseded by statute*, 25 & 26 Vict., c. 20, § 1, the Court of Queen's Bench exercised its common-law powers to issue a writ of habeas corpus to Quebec in Upper Canada after expressly acknowledging that it was "sensible of the inconvenience which may result from such a step." *Id.* at 494-95, 121 Eng. Rep. at 527-28; *see also Brown*, 5 B. & S. 280, 122 Eng. Rep. 835 (issuing a writ to the Isle of Man in the sea between England and Ireland). English common-law courts also recognized the power to issue habeas corpus in India, even to non-subjects, and did so notwithstanding competition from local courts, well before England recognized its sovereignty in India. *See* B.N. PANDEY, THE INTRODUCTION OF ENGLISH LAW INTO INDIA 112, 149, 151 (1967); *see also Rex v. Mitter*, Morton 210 (Sup. Ct., Calcutta 1781), *reprinted in* 1 THE INDIAN DECISIONS (OLD SERIES) 1008 (T.A. Venkasawmy Row ed., 1911); *Rex v. Hastings*, Morton 206, 208-09 (Sup. Ct., Calcutta 1775) (opinion of Chambers, J.), *reprinted in* 1 THE INDIAN DECISIONS, *supra*, at 1005, 1007; *id.* at 209 (opinion of Impey, C. J.); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2530 n.156 (2005).

Finally, the court reasons that *Eisentrager* requires the conclusion that there is no constitutional right to habeas for those in the detainees' posture. *See* Op. at 17-18. In *Eisentrager*, the detainees claimed that they were "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*." 339 U.S. at 777. Thus *Eisentrager* presented a far different question than confronts

this court.[8] The detainees do not here contend that the Constitution accords them a positive right to the writ but rather that the Suspension Clause restricts Congress's power to eliminate a preexisting statutory right. To answer that question does not entail looking to the extent of the detainees' ties to the United States but rather requires understanding the scope of the writ of habeas corpus at common law in 1789. The court's reliance on *Eisentrager* is misplaced.

2.

This brings me to the question of whether, absent the writ, Congress has provided an adequate alternative procedure for challenging detention. If it so chooses, Congress may replace the privilege of habeas corpus with a commensurate procedure without overreaching its constitutional ambit. However, as the Supreme Court has cautioned, if a subject of Executive detention "were subject to any substantial procedural hurdles which ma[k]e his remedy . . . less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered [under the Suspension Clause]." *Sanders v. United States*, 373 U.S. 1, 14 (1963).

The Supreme Court has, on three occasions, found a replacement to habeas corpus to be adequate. In *United States v. Hayman*, 342 U.S. 205 (1952), the Court reviewed 42 U.S.C. § 2255, which extinguished the writ as to those convicted of federal crimes before Article III judges in exchange for recourse before the sentencing court. Prior to the enactment of section 2255, the writ was available in the jurisdiction of detention, not the jurisdiction of conviction. The Court concluded that this substitute was acceptable in part because the traditional habeas remedy remained available by statute where section 2255 proved "inadequate or inef-

[8] To the extent that the court relies on *Eisentrager* as proof of its historical theory, the Supreme Court rejected that approach in *Rasul*, *see* 542 U.S. at 475-79.

fective." *Id.* at 223. The Court came to a similar conclusion in *Swain v. Pressley*, 430 U.S. 372 (1977), reviewing a statute with a similar "inadequate or ineffective" escape hatch, *id.* at 381 (reviewing D.C. CODE § 23-110). In that case, the Court concluded that a procedure for hearing habeas in the District of Columbia's courts, as distinct from the federal courts, was an adequate alternative. Finally, in *Felker*, 518 U. S. at 663-64, the Court found no Suspension Clause violation in the restrictions on successive petitions for the writ under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1217, concluding that these were "well within the compass of [the] evolutionary process" of the habeas corpus protocol for abuse of the writ and did not impose upon the writ itself.

These cases provide little cover for the government. As the Supreme Court has stated, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301. With this in mind, the government is mistaken in contending that the combatant status review tribunals ("CSRTs") established by the DTA suitably test the legitimacy of Executive detention. Far from merely adjusting the mechanism for vindicating the habeas right, the DTA imposes a series of hurdles while saddling each Guantanamo detainee with an assortment of handicaps that make the obstacles insurmountable.

At the core of the Great Writ is the ability to "inquire into illegal detention with a view to an order releasing the petitioner." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (internal quotation marks and alteration omitted). An examination of the CSRT procedure and this court's CSRT review powers reveals that these alternatives are neither adequate to test whether detention is unlawful nor directed toward releasing those who are unlawfully held.

"Petitioners in habeas corpus proceedings . . . are entitled to careful consideration and plenary processing of their claims including full opportunity for the presentation of the relevant facts." *Harris v. Nelson*, 394 U.S. 286, 298 (1969). The offerings of CSRTs fall far short of this mark. Under the common law, when a detainee files a habeas petition, the burden shifts to the government to justify the detention in its return of the writ. When not facing an imminent trial,[9] the detainee then must be afforded an opportunity to traverse the writ, explaining why the grounds for detention are inadequate in fact or in law. *See, e.g.*, 28 U.S.C. §§ 2253, 2248; *Bollman*, 8 U.S. (4 Cranch) at 125; *Ex parte Beeching*, 4 B. & C. 137, 107 Eng. Rep. 1010 (K.B. 1825); *Schiever*, 2 Burr. 765, 97 Eng. Rep. 551; *cf. Hamdi*, 542 U.S. at 53738 (plurality opinion). A CSRT works quite differently. *See* Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defenselnk.mil/ news/Jul2004/ d20040707review.pdf. The detainee bears the burden of coming forward with evidence explaining why he should *not* be detained. The detainee need not be informed of the basis for his detention (which may be classified), need not be allowed to introduce rebuttal evidence (which is sometimes deemed by the CSRT too impractical to acquire), and must proceed without the benefit of his own counsel.[10] Moreover,

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[9] At common law, where criminal charges were pending, a prisoner filing a habeas writ would be remanded, although habeas incorporated a speedy-trial guarantee. *See, e.g., Ex parte Beeching*, 4 B. & C. 137, 107 Eng. Rep. 1010 (K.B. 1825); *Bushell's Case*, Vaugh. 135, 124 Eng. Rep. 1006, 1009-10 (C.P. 1670). But see MCA § 3(a)(1), 120 Stat. at 2602 (codified at 10 U.S.C. § 948b(d)(A)). Once there was "a judgment of conviction rendered by a court of general criminal jurisdiction," release under the writ was unavailable. *Hayman*, 342 U.S. at 210-22.

[10] With a few possible exceptions, the Guantanamo detainees before the federal courts are unlikely to be fluent in English or to be familiar with legal procedures and, as their detentions far from home and cut off from their families have been lengthy, they are likely ill prepared to be able to

these proceedings occur before a board of military judges subject to command influence, *see Hamdan*, 126 S. Ct. at 2804, 2806 (Kennedy, J., concurring in part); *Weiss v. United States*, 510 U.S. 163, 179-80 (1994); *cf.* 10 U.S.C. § 837(a). Insofar as each of these practices impedes the process of determining the true facts underlying the lawfulness of the challenged detention, they are inimical to the nature of habeas review.

This court's review of CSRT determinations, *see* DTA § 1005(e)(2), 119 Stat. at 2742, is not designed to cure these inadequacies. This court may review only the record developed by the CSRT to assess whether the CSRT has complied with its own standards. Because a detainee still has no means to present evidence rebutting the government's case—even assuming the detainee could learn of its contents—assessing whether the government has more evidence in its favor than the detainee is hardly the proper antidote. The fact that this court also may consider whether the CSRT process "is consistent with the Constitution and laws of the United States," DTA § 1005(e)(2)(C)(ii), 119 Stat. at 2742, does not obviate the need for habeas. Whereas a cognizable constitutional, statutory, or treaty violation could defeat the lawfulness of the government's cause for detention, the writ issues whenever the Executive lacks a lawful justification for continued detention. The provisions of DTA § 1005(e)(2) cannot be reconciled with the purpose of habeas corpus, as they handcuff attempts to combat "the great engines of judicial despotism," THE FEDERALIST NO. 83, at 456 (Alexander Hamilton) (E.H. Scott ed. 1898).

Additionally, and more significant still, continued detention may be justified by a CSRT on the basis of evidence resulting from torture. Testimony procured by coercion is

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obtain evidence to support their claims that they are not enemies of the United States.

notoriously unreliable and unspeakably inhumane. *See generally* INTELLIGENCE SCIENCE BOARD, EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART (2006), *available at* http://www. fas.org/irp/dni/educing.pdf. This basic point has long been recognized by the common law, which "has regarded torture and its fruits with abhorrence for over 500 years." *A. v. Sec'y of State*, [2006] 2 A.C. 221 ¶ 51 (H.L.) (appeal taken from Eng.) (Bingham, L.); *see also Hamdan*, 126 S. Ct. at 2786; *Jackson v. Denno*, 378 U.S. 368, 386 (1964); *Proceedings Against Felton*, 3 Howell's St. Tr. 367, 3 71 (162 8) (Eng.); JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 73 (1977) ("Already in the fifteenth and sixteenth centuries, . . . the celebrated Renaissance 'panegyrists' of English law were . . . extolling the absence of torture in England.") (footnote omitted). The DTA implicitly endorses holding detainees on the basis of such evidence by including an anti-torture provision that applies only to future CSRTs. DTA § 1005(b)(2), 119 Stat. at 2741. Even for these future proceedings, however, the Secretary of Defense is required only to develop procedures to assess whether evidence obtained by torture is probative, not to require its exclusion. *Id.* § 1005(b)(1), 119 Stat. at 2741.

Even if the CSRT protocol were capable of assessing whether a detainee was unlawfully held and entitled to be released, it is not an adequate substitute for the habeas writ because this remedy is not guaranteed. Upon concluding that detention is unjustified, a habeas court "can only direct [the prisoner] to be discharged." *Bollman*, 8 U.S. (4 Cranch) at 136; *see also* 2 STORY, *supra*, § 1339. But neither the DTA nor the MCA require this, and a recent report studying CSRT records shows that when at least three detainees were found by CSRTs not to be enemy combatants, they were subjected to a second, and in one case a third, CSRT proceeding until they were finally found to be properly classified as enemy combatants. Mark Denbeaux et al., No-Hearing Hearings:

CSRT: The Modern Habeas Corpus?, at 37-39 (2006), http://law.shu.edu/news/ final_no_ hearing_hearings_report.pdf.

3.

Therefore, because Congress in enacting the MCA has revoked the privilege of the writ of habeas corpus where it would have issued under the common law in 1789, without providing an adequate alternative, the MCA is void unless Congress's action fits within the exception in the Suspension Clause: Congress may suspend the writ "when in Cases of Rebellion or Invasion the public Safety may require it." U. S. CONST. art. I, § 9, cl. 2. However, Congress has not invoked this power.

Suspension has been an exceedingly rare event in the history of the United States. On only four occasions has Congress seen fit to suspend the writ. These examples follow a clear pattern: Each suspension has made specific reference to a state of "Rebellion" or "Invasion" and each suspension was limited to the duration of that necessity. In 1863, recognizing "the present rebellion," Congress authorized President Lincoln during the Civil War "whenever, in his judgment, the public safety may require it, . . . to suspend the writ of habeas corpus." Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755. As a result, no writ was to issue "so long as said suspension by the President shall remain in force, and said rebellion continue." *Id.* In the Ku Klux Klan Act of 1871, Congress agreed to authorize suspension whenever "the unlawful combinations named [in the statute] shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State," finding that these circumstances "shall be deemed a rebellion against the government of the United States." Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 13, 14-15. Suspension was also authorized "when in cases of rebellion, insurrection, or invasion the public safety may require it" in

two territories of the United States: the Philippines, Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692, and Hawaii, Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 141, 153 (1900); *see Duncan v. Kahanamoku*, 327 U.S. 304, 307-08 (1946). *See also* DUKER, *supra*, at 149, 178 n.190.

Because the MCA contains neither of these hallmarks of suspension, and because there is no indication that Congress sought to avail itself of the exception in the Suspension Clause, its attempt to revoke federal jurisdiction that the Supreme Court held to exist exceeds the powers of Congress. The MCA therefore has no effect on the jurisdiction of the federal courts to consider these petitions and their related appeals.

II.

In *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), Judge Joyce Hens Green addressed eleven coordinated habeas cases involving 56 aliens being detained by the United States as "enemy combatants" at Guantanamo Bay, *id.* at 445. These detainees are citizens of friendly nations—Australia, Bahrain, Canada, Kuwait, Libya, Turkey, the United Kingdom, and Yemen—who were seized in Afghanistan, Bosnia and Herzegovina, The Gambia, Pakistan, Thailand, and Zambia. Each detainee maintains that he was wrongly classified as an "enemy combatant." Denying in part the government's motion to dismiss the petitions, the district court ruled:

> [T]he petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and . . . the procedures implemented by the government to confirm that the petitioners are "enemy combatants" subject to indefinite detention violate the petitioners' rights to due process of law.

Id. at 445. The district court further ruled that the Taliban but not the al Qaeda detainees were entitled to the protections of the Third and Fourth Geneva Conventions. *Id.* at 478-80.

In *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005), Judge Richard J. Leon considered the habeas petitions of five Algerian-Bosnian citizens and one Algerian citizen with permanent Bosnian residency. They were arrested by Bosnian police in 2001 on suspicion of plotting to attack the United States and British embassies in Sarajevo. After the Supreme Court of the Federation of Bosnia and Herzegovina ordered the six men to be released in January 2002,[11] they were seized by United States forces and transported to Guantanamo Bay. The *Khalid* decision also covers the separate case of a French citizen seized in Pakistan and transported to Guantanamo Bay. Rejecting the petitioners' claim that their detention is unjustified, the district court ruled that "no viable legal theory exists by which [the district court] could issue a writ of habeas corpus under" the circumstances presented, *id.* at 314, noting the President's powers under Article II, Congress's Authorization for the Use of Military Force ("AUMF"), and the Order on Detention (Nov. 13, 2001), *see id.* at 317-20. The district court granted the government's motion and dismissed the petitions. *Id.* at 316.

The fundamental question presented by a petition for a writ of habeas corpus is whether Executive detention is lawful. A far more difficult question is what serves to justify Executive detention under the law. At the margin, the precise constitutional bounds of Executive authority are unclear, *see Hamdan*, 126 S. Ct. at 2773-74; *id.* at 2786 (citing *Ex parte Quirin*, 317 U.S. 1, 28 (1942)), and the Executive detention at issue is the product of a unique situation in our history. Unlike the uniformed combat that is contemplated by the laws of war, *see generally* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920), the Geneva Conventions, *e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S.

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[11] *See* Supreme Court of the Federation of Bosnia and Herzegovina, Sarajevo, Jan. 17, 2003, Ki-1001/01.

135, and the Constitution, *see* U.S. CONST. art. I, § 8, cl. 11, the United States confronts a stateless enemy in the war on terror that is difficult to identify and widely dispersed. *See Hamdi*, 519 U. S. at 519-20.

The parties recite in their several briefs the substantial competing interests of individual liberty and national security that are at stake, much as did the Supreme Court in *Hamdi*, 542 U.S. at 529-32 (plurality opinion); *see id.* at 544-45 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment). In *Hamdi*, the plurality acknowledged that "core strategic matters of war-making belong in the hands of those who are best positioned and most politically accountable for making them." *Id.* at 531. At the same time, it acknowledged that for Hamdi "detention could last for the rest of his life." *Id.* at 520. Although Hamdi was a United States citizen, the premise underlying the conclusion that there is a role for the judiciary, *id.* at 532-33, was that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat," *id.* at 530. In short, the nature of the conflict makes true enemies of the United States more troublesome. At the same time, the risk of wrongful detention of mere bystanders is acute, particularly where, as here, the Executive detains individuals without trial.

Parsing the role of the judiciary in this context is arduous. The power of the President is at its zenith, after all, when the President acts in the conduct of foreign affairs with the support of Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Even assuming the AUMF and the Order on Detention provide such support for the detentions at issue, still the President's powers are not unlimited in wartime. *See, e.g., Milligan*, 71 U.S. (4 Wall.) at 125. The Founders could have granted plenary power to the President to confront emergency

situations, but they did not; they could have authorized the suspension of habeas corpus during any state of war, but they limited suspension to cases of "Rebellion or Invasion." U.S. CONST. art. I, § 9, cl. 2; *see* 2 STORY, *supra,* § 1342; *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra,* at 341 (proposal of Charles Pinckney). Even in 1627, at a time when "[a]ll justice still flowed from the king [and] the courts merely dispensed that justice," DUKER, *supra,* at 44, the idea that a court would remand a prisoner merely because the Crown so ordered ("*per speciale mandatum Domini Regis*") was deemed to be inconsistent with the notion of a government under law. *See Darnel's Case*, 3 Howell's St. Tr. 1, 59 (K.B. 1627); MEADOR, *supra,* at 13-19. While judgments of military necessity are entitled to deference by the courts and while temporary custody during wartime may be justified in order properly to process those who have been captured, the Executive has had ample opportunity during the past five years during which the detainees have been held at Guantanamo Bay to determine who is being held and for what reason. *See, e.g., Hamdan*, 126 S. Ct. at 2773; *cf. Hamdi*, 542 U.S. at 521.

Throughout history, courts reviewing the Executive detention of prisoners have engaged in searching factual review of the Executive's claims. In *Bollman*, the Supreme Court reviewed a petition of two alleged traitors accused of levying war against the United States. The petitioners were held in custody by the marshal but had not yet been charged. 8 U. S. (4 Cranch) at 75-76, 125. After the "testimony on which they were committed [was] fully examined and attentively considered," the Court ordered the prisoners released. *Id.* at 136-37. The 1759 English case of *Rex v. Schiever*, discussed *supra* Part I.C.1, also shows that habeas courts scrutinized the factual basis for the detention of even wartime prisoners. In *Schiever*, the court reviewed the prisoner's affidavit and took further testimony from a witness, who "sw[ore] that Schiever was forced against his inclination . . . to serve on board [the

French privateer]." 2 Burr. at 766, 97 Eng. Rep. at 551. Nonetheless, to the court it was clear that Schiever had, in fact, fought against England. As such, "the Court thought this man, upon his own shewing, clearly a prisoner of war and lawfully detained as such. Therefore they Denied the motion." *Id.*, 97 Eng. Rep. at 552 (footnote omitted). Similar themes and factual inquiry appear in *Three Spanish Sailors*, 2 Black. W. 1324, 96 Eng. Rep. 775, in which three alien petitioners submitted affidavits during wartime but failed to convince the court that they were not enemies of the Crown, and *Goldswain's Case*, 5 Black. W. 1207, 96 Eng. Rep. 711 (C.P. 1778), in which a wrongly impressed Englishman was released from service during wartime. *See also Beeching*, 4 B. & C. 137, 107 Eng. Rep. 1010.

In the early history of the United States, two cases further suggest that factual review accompanied even writs during wartime. In *United States v. Williams* (C.C.D. Va. Dec. 4, 1813), a previously unreported case researched for a recent essay in *The Green Bag*, Chief Justice John Marshall, riding circuit, released an enemy alien from detention by civil authorities. The Chief Justice concluded that "the regulations made by the President of the United States respecting alien enemies [did] not authorize the confinement of the petitioner in this case." Neuman & Hobson, *supra*, at 42 (quoting the circuit court's order book). A majority of the Supreme Court of Pennsylvania, in *Lockington's Case*, 1 Brightly's (N.P.) 269 (Pa. 1813), agreed that alien enemies were entitled to a judgment on the merits as to whether their detention was justified,[12] and thereafter remanded the prisoners. *Id.* at 283-84 (Tilghman, C.J.); *id.* at 285, 293 (Yeates, J.).

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[12] Prior to *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859), and *Tarble's Case*, 80 U.S. (13 Wall.) 397, 411-12 (1872), state courts regularly issued writs of habeas corpus as to federal prisoners.

The government maintains that a series of World War II-era cases undercuts the proposition that habeas review of uncharged detainees requires a factual assessment. It cites several cases in which courts have refused to engage in factual review of the findings of military tribunals imposing sentences under the laws of war. *See, e.g., Eisentrager*, 339 U.S. 763; *In re Yamashita*, 327 U.S. 1 (1945); *Quirin*, 317 U.S. at 25. There is good reason to treat differently a petition by an uncharged detainee—who could be held indefinitely without even the prospect of a trial or meaningful process—from that of a convicted war criminal. *See Rasul*, 542 U.S. at 476; *Omar v. Harvey*, No. 06-5126, slip op. at 13 (D.C. Cir. Feb. 9, 2007); *see also supra* note 9. For example, in *Yamashita*, the prisoner petitioned for a writ of habeas corpus only after a trial before a military tribunal where his six attorneys defended against 286 government witnesses. 327 U.S. at 5. *Quirin* involved a military commission, *see* 317 U.S. at 18-19, where the government presented "overwhelming" proof that included confessions from the German saboteurs. PIERCE O'DONNELL, IN TIME OF WAR 152-53, 165-66, 189 (2005). In *Eisentrager*, 339 U.S. at 766, the military tribunal conducted a trial lasting months. By contrast, the detainees have been charged with no crimes, nor are charges pending. The robustness of the review they have received to date differs by orders of magnitude from that of the military tribunal cases.[13]

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[13] There is also good reason to distinguish between these detainees' cases and parallel cases where detainees have been accorded prisoner-of-war status and the benefits of Army Regulation 190-8, which implements the Third Geneva Convention. These provisions contemplate the end of hostilities and prisoner exchanges, *id.* §§ 3-11, 3-13, and provide for more extensive process for determining the status of prisoners, *id.* § 1-6. The regulations further specify that:

> Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to deter-

The Supreme Court in *Rasul* did not address "whether and what further proceedings may become necessary after respondents make their responses to the merits of petitioners' claims," 542 U.S. at 485. The detainees cannot rest on due process under the Fifth Amendment. Although the district court in *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 454, made a contrary ruling, the Supreme Court in *Eisentrager* held that the Constitution does not afford rights to aliens in this context. 339 U.S. at 770; *accord Verdugo-Urquidez*, 494 U.S. at 269. Although in *Rasul* the Court cast doubt on the continuing vitality of *Eisentrager*, 542 U. S. at 475-79, absent an explicit statement by the Court that it intended to overrule *Eisentrager*'s constitutional holding, that holding is binding on this court. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); Op. at 21. Rather, the process that is due inheres in the nature of the writ and the inquiry it entails. The Court in *Rasul* held that federal court jurisdiction under 28 U.S.C. § 2241 is permitted for habeas petitions filed by detainees at Guantanamo, 542 U. S. at 485; *id.* at 488 (Kennedy, J., concurring in the judgment), and this

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> mine what acts they have committed and what penalty should be imposed. The record of every Tribunal proceeding resulting in a determination denying [Enemy Prisoner of War] status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

Id. § 1-6g. In *Hamdi*, the Supreme Court recognized that it was conceivable that procedures similar to Army Regulation 190-8 may suffice to provide due process to a citizen-detainee. 542 U.S. at 538 (plurality opinion); *id.* at 550-51 (Souter, J., with whom Ginsburg, J., joins, concurring in part, dissenting in part, and concurring in the judgment). Even assuming that according Guantanamo detainees rights under Army Regulation 190-8 would provide adequate and independent factual review of their claims sufficient to satisfy the dictates of habeas corpus, as well as any treaty obligations that the detainees are able to enforce, the Executive has declined to accord such detainees prisoner-of-war status, *see, e.g.*, The President's News Conference With Chairman Hamid Karzai of the Afghan Interim Authority, 1 PUB. PAPERS 121, 123 (Jan. 28, 2002).

result is undisturbed because the MCA is void. So long as the Executive can convince an independent Article III habeas judge that it has not acted unlawfully, it may continue to detain those alien enemy combatants who pose a continuing threat during the active engagement of the United States in the war on terror. *See id.* at 488 (Kennedy, J., concurring in the judgment); *cf. Hamdi*, 542 U. S. at 518-19. But it must make that showing and the detainees must be allowed a meaningful opportunity to respond. *See* MEADOR, *supra*, at 18; *see also Hamdi*, 542 U.S. at 525-26.

Therefore, I would hold that on remand the district courts shall follow the return and traverse procedures of 28 U.S.C. § 2241 *et seq.* In particular, upon application for a writ of habeas corpus, 28 U.S.C. § 2242, the district court shall issue an order to show cause, whereupon "[t]he person to whom the writ is or order is directed shall make a return certifying the true cause of the detention," *id.* § 2243. So long as the government "puts forth credible evidence that the [detainee] meets the enemy-combatant criteria," *Hamdi*, 542 U.S. at 533, the district court must accept the return as true "if not traversed" by the person detained. *Id.* § 2248. The district court may take evidence "orally or by deposition, or, in the discretion of the judge, by affidavit." *Id.* § 2246. The district court may conduct discovery. *See Harris*, 394 U.S. at 298-99; *cf.* Rules Governing Section 2254 Cases, R. 6-8; Rules Governing Section 2255 Cases, R. 6-8. Thereafter, "[t]he [district] court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."[14]

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[14] Because the Suspension Clause question must be decided by the Supreme Court in the detainees' favor in order for the district court proceedings to occur, I leave for another day questions relating to the evolving and unlimited definition of "enemy combatant," *see Guantanamo Detainee Cases*, 355 F. Supp. 2d at 474-75, a detainee's inability to rebut evidence withheld on national security grounds, *see id.* at 468-72, as well as the detainees' claims under other statutes, international conventions, and treaties, and whether challenges to the conditions of confinement are

District courts are well able to adjust these proceedings in light of the government's significant interests in guarding national security, as suggested in *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 467, by use of protective orders and ex parte and in camera review, *id.* at 471. The procedural mechanisms employed in that case, *see, e.g., id.* at 452 & n.12, should be employed again, as district courts must assure the basic fairness of the habeas proceedings, *see generally id.* at 468-78.

Accordingly, I respectfully dissent from the judgment vacating the district courts' decisions and dismissing these appeals for lack of jurisdiction.

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cognizable in habeas. *Compare Khalid*, 355 F. Supp. 2d at 324-25, *with Miller v. Overholser*, 206 F.2d 415, 419-21 (D.C. Cir. 1953). Congressional action may also clarify matters. *See, e.g.*, S. 185, S. 576, 110th Cong. (2007).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed On: March 10, 2005]

No. 05-8003
September Term, 2004

02cv1130 02cv0299 02cv0828 04cv1227 04cv1254
04cv1135 04cv1136 04cv1137 04cv1144 04cv1164
04cv1194

In re: Guantanamo Detainee Cases,
05-5064
02cv00828

KHALED A. F. AL ODAH, Next Friend of Fawzi Khalid Abdullah Fahad Al Odah, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

BEFORE: Sentelle, Garland, and Roberts, *Circuit Judges*.

ORDER

Upon consideration of the petition for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and motion to expedite appeal filed in No. 05-8003, the joint answer and cross-petition, and the reply, it is

ORDERED that the petition and cross-petition be granted. *See* 28 U.S.C. § 1292(b). Approval of the petition and cross-

petition is without prejudice to reconsideration by the merits panel to which this appeal is assigned. It is

FURTHER ORDERED that the motion to expedite be granted and that the following briefing schedule and format apply:

Joint Opening Brief for Appellants—April 13, 2005
(not to exceed 14,000 words)

Joint Appendix—April 13, 2005

Joint Brief for Appellees/Cross-Appellants—May 13, 2005
(not to exceed 14,000 words)

Joint Answering and Reply Brief—June 13, 2005 for Appellants/Cross-Appellees
(not to exceed 14,000 words)

Reply Brief for Cross-Appellants—June 28, 2005
(not to exceed 7,000 words)

Any amici curiae are to file their briefs on the same date as the party they support, and aligned amici must file jointly to the extent possible. *See* D.C. Cir. Rule 29(d).

The Clerk is directed to schedule this case, which will be assigned a general docket number upon payment of the docketing and filing fees, for oral argument on the first appropriate date after the conclusion of briefing and on the same day, and before the same panel, as No. 05-5062, et al., *Boumediene v. Bush*.

The Clerk is directed to transmit a certified copy of this order to the district court. With respect to the petition and cross-petition for interlocutory review in No. 05-8003, the district court is directed to file two copies of the order as separate notices of appeal pursuant to Fed. R. App. P. 5 and to collect the mandatory docketing and filing fees from counsel. Upon payment of the fees, the district court is to

certify and transmit the preliminary record to this court, after which the cases will be assigned general docket numbers and consolidated with one another. After those general docket numbers have been assigned, No. 05-5064 will be consolidated with those consolidated cases. The parties in all three cases will be required to comply with the briefing schedule and format established by this order.

Per Curiam

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action Nos.
02-CV-0299 (CKK), 02-CV-0828 (CKK),
02-CV-1130 (CKK), 04-CV-1135 (ESH),
04-CV-1136 (JDB), 04-CV-1137 (RMC),
04-CV-1144 (RWR), 04-CV-1164 (RBW)
04-CV-1194 (HHK), 04-CV-1227 (RBW),
04-CV-1254 (HHK)

In re Guantanamo Detainee Cases

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION FOR CERTIFICATION OF JANUARY 31, 2005 ORDERS AND FOR STAY

Upon consideration of respondents' Motion for Certification of January 31, 2005 Interlocutory Orders for Appeal Pursuant to 28 U.S.C. § 1292(b) and to Stay Proceedings Pending Appeal, it is hereby

ORDERED that the respondents' motion is granted in part and denied in part. It is

FURTHER ORDERED that the Court finds that its January 31, 2005 Order (and Memorandum Opinion) Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law and Requesting Briefing on the Future Proceedings in These Cases (hereinafter "Order on Motion to Dismiss") involves controlling questions of law as to which there is substantial ground for difference of opinion, such as whether petitioners possess

enforceable rights under the Fifth Amendment to the United States Constitution; whether assuming arguendo that petitioners possess such rights, the Combatant Status Review Tribunals comport with those rights; and whether certain of the petitioners possess rights under the Third Geneva Convention that are judicially enforceable. It is

FURTHER ORDERED that the Court does not find that the Court's January 31, 2005 Order Granting November 18, 2004 Motion for Access to Unredacted Factual Returns (hereinafter "Order on Discovery Motion") involves controlling questions of law to which there is substantial ground for difference of opinion. It is

FURTHER ORDERED that the Court finds that an immediate appeal of the Order on Motion to Dismiss but not of the Order on Discovery Motion may materially advance the ultimate termination of this litigation. It is

FURTHER ORDERED that the Order on Motion to Dismiss is hereby CERTIFIED for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). It is

FURTHER ORDERED that, pursuant to 28 U.S.C. § 1292(b), the Order on Motion to Dismiss shall be deemed amended to include and reflect the findings in this Order. It is

FURTHER ORDERED that the respondents' request for certification of the Order on Discovery Motion is denied. It is

FURTHER ORDERED that the proceedings in the eleven above-captioned cases are stayed for all purposes pending resolution of all appeals in this matter. The stay for "all purposes" includes a stay of the resolution of the respondents' motions to dismiss the claims of petitioners who have been transferred out of the custody of the United States.

It shall be up to the individual Judges assigned to the other Guantanamo detainee cases not contained in the above cap

tion to determine whether stays should be granted in those cases. **IT IS SO ORDERED**.

February 3, 2005

_____/s/_____
JOYCE HENS GREEN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action Nos.
02-CV-0299 (CKK), 02-CV-0828 (CKK),
02-CV-1130 (CKK), 04-CV-1135 (ESH),
04-CV-1136 (JDB), 04-CV-1137 (RMC),
04-CV-1144 (RWR), 04-CV-1164 (RBW),
04-CV-1194 (HHK), 04-CV-1227 (RBW),
04-CV-1254 (HHK)

In re Guantanamo Detainee Cases

MEMORANDUM OPINION DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW

These eleven coordinated *habeas* cases were filed by de tainees held as "enemy combatants" at the United States Naval Base at Guantanamo Bay, Cuba. Presently pending is the government's motion to dismiss or for judgment as a matter of law regarding all claims filed by all petitioners, including claims based on the United States Constitution, treaties, statutes, regulations, the common law, and customary international law. Counsel filed numerous briefs addressing issues raised in the motion and argued their positions at a hearing in early December 2004. Upon consideration of all filings submitted in these cases and the arguments made at the hearing, and for the reasons stated below, the Court concludes that the petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and that the procedures implemented by the government to confirm that the petitioners are "enemy combatants" subject to indefinite

detention violate the petitioners' rights to due process of law. The Court also holds that at least some of the petitioners have stated valid claims under the Third Geneva Convention. Finally, the Court holds that the government is entitled to the dismissal of the petitioners' remaining claims.

Because this Memorandum Opinion references classified material, it is being issued in two versions. The official version is unredacted and is being filed with the Court Security Officer at the U.S. Department of Justice responsible for the management of classified information in these cases. The Court Security Officer will maintain possession of the original, distribute copies to counsel with the appropriate security clearances in accordance with the procedures earlier established in these cases, and ensure that the document is transmitted to the Court of Appeals should an appeal be taken. Classified information in the official version is highlighted in gray to alert the reader to the specific material that may not be released to the public. The other version of the Memorandum Opinion contains redactions of all classified information and, in an abundance of caution, portions of any discussions that might lead to the discovery of classified information. The redacted version is being posted in the electronic dockets of the cases and is available for public review.

I. BACKGROUND

In response to the horrific and unprecedented terrorist attacks by al Qaeda against the United States of America on September 11, 2001, Congress passed a joint resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . , or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (hereinafter

"AUMF"). In accordance with the AUMF, President George W. Bush ordered the commencement of military operations in Afghanistan against al Qaeda and the Taliban regime, which, harbored the terrorist organization. During the course of the military campaign, United States forces took custody of numerous individuals who were actively fighting against allied forces on Afghan soil. Many of these individuals were deemed by military authorities to be "enemy combatants" and, beginning in early 2002, were transferred to facilities at the United States Naval Base at Guantanamo Bay, Cuba, where they continue to be detained by U.S. authorities.

In addition to belligerents captured during the heat of war in Afghanistan, the U.S. authorities are also detaining at Guantanamo Bay pursuant to the AUMF numerous individuals who were captured hundreds or thousands of miles from a battle zone in the traditional sense of that term. For example, detainees at Guantanamo Bay who are presently seeking *habeas* relief in the United States District Court for the District of Columbia include men who were taken into custody as far away from Afghanistan as Gambia,[1] Zambia,[2] Bosnia,[3] and Thailand.[4] Some have already been detained as long as three years[5] while others have been captured as recently as September 2004.[6] Although many of these individuals may never have been close to an actual battlefield and may never have raised conventional arms against the United States or its

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[1] Jamil El-Banna and Bisher Al-Rawi, petitioners in *El-Banna v. Bush*, 04-CV-1144 (RWR).

[2] Martin Mubanga, petitioner in *El-Banna v. Bush*, 04-CV-1144 (RWR).

[3] Lakhdar Boumediene, Mohammed Nechle, Hadj Boudella, Belkacem Bensayah, Mustafa Ait Idr, and Saber Lahmar, petitioners in *Boumediene v. Bush*, 04-CV-1166 (RJL).

[4] Saifullah Paracha, petitioner in *Paracha v. Bush*, 04-CV-2022 (PLF).

[5] *E.g.*, the petitioners in *Al Odah v. Bush*, 02-CV-0828 (CKK).

[6] *E.g.*, Saifullah Paracha in *Paracha v. Bush*, 04-CV-2022 (PLF).

allies, the military nonetheless has deemed them detainable as "enemy combatants" based on conclusions that they have ties to al Qaeda or other terrorist organizations.

All of the individuals who have been detained at Guantanamo Bay have been categorized to fall within a general class of people the administration calls "enemy combatants." It is the government's position that once someone has been properly designated as such, that person can be held indefinitely until the end of America's war on terrorism or until the military determines on a case by case basis that the particular detainee no longer poses a threat to the United States or its allies. Within the general set of "enemy combatants" is a subset of individuals whom the administration decided to prosecute for war crimes before a military commission established pursuant to a Military Order issued by President Bush on November 13, 2001. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). Should individuals be prosecuted and convicted in accordance with the Military Order, they would be subject to sentences with fixed terms of incarceration or other specific penalties.

Since the beginning of the military's detention operations at Guantanamo Bay in early 2002, detainees subject to criminal prosecution have been bestowed with more rights than detainees whom the military did not intend to prosecute formally for war crimes. For example, the military regulations governing the prosecutions of detainees required a formal notice of charges, a presumption of innocence of any crime until proven guilty, a right to counsel, pretrial disclosure to the defense team of exculpatory evidence and of evidence the prosecution intends to use at trial, the right to call reasonably available witnesses, the right to have defense counsel cross-examine prosecution witnesses, the right to have defense counsel attend every portion of the trial proceedings even where classified information is presented, and the right to an

open trial with the press present, at least for those portions not involving classified information. *See* Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. §§ 9.1 *et seq.* (2005). Although detainees at Guantanamo Bay not subject to prosecution could suffer the same fate as those convicted of war crimes—potentially life in prison, depending on how long America's war on terrorism lasts—they were not given any significant procedural rights to challenge their status as alleged "enemy combatants," at least until relatively recently. From the beginning of 2002 through at least June 2004, the substantial majority of detainees not charged with war crimes were not informed of the bases upon which they were detained, were not permitted access to counsel, were not given a formal opportunity to challenge their "enemy combatant" status, and were alleged to be held virtually *incommunicado* from the outside world. Whether those individuals deemed "enemy combatants" are entitled under the United States Constitution and other laws to any rights and, if so, the scope of those rights is the focus of the government's motion to dismiss and this Memorandum Opinion.[7]

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[7] In a decision issued on November 8, 2004, Judge James Robertson ruled that the procedures for trying Guantanamo detainees for alleged war crimes by military commission were unlawful for failing to comply with the requirements for courts martial set forth in the Uniform Code of Military Justice. *Hamdan v. Rumsfeld*, 344 F. Supp.2d 152 (D.D.C. 2004). Only one of the detainees in the above-captioned cases has been given notice that he will be tried for war crimes. That detainee, David Hicks, a petitioner in *Hicks v. Bush*, 02-CV-0299 (CKK), has filed a separate motion for partial summary judgment challenging the legality of the military commission procedures. Pursuant to an order issued in that case on December 15, 2004, resolution of that motion is being held in abeyance pending final resolution of all appeals in *Hamdan*. This Memorandum Opinion does not address the legality of the military commission proceedings but rather focuses on the issue of the rights of detainees with respect to their classification as "enemy combatants" regardless of whether they have been formally charged with a war crime.

The first of these coordinated cases challenging the legality of the detention of alleged "enemy combatants" at Guantanamo Bay and the terms and conditions of that detention commenced nearly three years ago on February 19,2002. *Rasul v. Bush*, 02-CV-0299 (CKK). The action, brought by relatives on behalf of one Australian and two British nationals as their "next friends,"[8] was styled as a petition for writ of *habeas corpus* pursuant to 28 U.S.C. §§ 2241 and 2242. The initial relief sought included an order requiring the release of the detainees, an order permitting counsel to meet with the detainees in private and without government monitoring, and an order directing the cessation of interrogations of the detainees during the pendency of litigation. The asserted substantive bases for the requested relief ultimately included the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, and customary international law.

Less than three months after the commencement of *Rasul*, the second of these coordinated cases was filed. *Al Odah v. Bush*, 02-CV-0828 (CKK). The individuals filing suit on behalf of the twelve Kuwaiti detainees in that case did not expressly request release from custody but rather sought judicial enforcement of the detainees' asserted rights to meet with family members, be informed of any charges against them, and have access to the courts or some other impartial tribunal to exonerate themselves of any wrongdoing. The alleged bases for these rights included the Fifth Amendment to the United States Constitution, the Alien Tort Claims Act, and the Administrative Procedure Act.

The government filed a motion to dismiss the two cases, arguing that both of them should be classified as *habeas*

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[8] 28 U.S.C. § 2242 provides that a *habeas* petition may be brought "by the person for whose relief it is intended or by someone acting in his behalf."

actions and asserting that because all of the detainees were aliens being held outside the sovereign territory of the United States, the District Court should dismiss the actions for lack of jurisdiction to hear their claims. The government's motion relied heavily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), a Supreme Court case involving German nationals convicted by a United States military commission sitting in China for acts committed in China after Germany's surrender in World War II. The German nationals were eventually incarcerated in Landsberg prison in Germany and sought *habeas* relief, claiming their trial, conviction, and imprisonment violated Articles I and III of the United States Constitution, the Fifth Amendment, other laws of the United States, and the Geneva Convention governing the treatment of prisoners of war. The Supreme Court ultimately held that the petitioners in *Eisentrager* had no standing to file a claim for *habeas* relief in a United States court.

In a thoughtful analysis of *Eisentrager* and its progeny, Judge Colleen Kollar-Kotelly granted the government's motion to dismiss both cases. *Rasul v. Bush*, 215 F. Supp.2d 55 (D.D.C. 2002). The decision was based on an interpretation that *Eisentrager* barred claims of any alien seeking to enforce the United States Constitution in a *habeas* proceeding unless the alien is in custody in sovereign United States territory. *Id.* at 68. Recognizing that Guantanamo Bay is not part of the sovereign territory of the United States, *id.* at 69, the District Court dismissed the cases for lack of "jurisdiction to consider the constitutional claims that are presented to the Court for resolution." *Id.* at 73. After issuing a show cause order as to why an additional pending *habeas* case filed by a Guantanamo detainee, *Habib v. Bush*, 02-CV-1130 (CKK), should not be dismissed in light of the decision in *Rasul* and *Al Odah*, the District Court also dismissed that case, and all three cases were appealed to the United States Court of Appeals for the District of Columbia Circuit.

On appeal, the D.C. Circuit affirmed the District Court's decisions in all three cases. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). Reviewing recent precedent involving aliens and constitutional rights, the Court of Appeals announced, "The law of the circuit now is that a 'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.'" *Id.* at 1141 (*citing People's Mojahedin Org. v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) and *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002)). "The consequence," the court continued, "is that no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States." *Id.* at 1141.

The Supreme Court reversed the D.C. Circuit's decision and held that the District Court did have jurisdiction to hear the detainees' habeas claims. *Rasul v. Bush*, ___ U.S. ___, 124 S. Ct. 2686 (2004). The majority opinion, issued June 28, 2004, noted several facts that distinguished the Guantanamo detainees from the petitioners in *Eisentrager* more than fifty years earlier:

> [The Guantanamo petitioners] are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

124 S. Ct. at 2693. Emphasizing that "[b]y the express terms of its agreements with Cuba, the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base," and highlighting that the government conceded

at oral argument that "the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base," the Court concluded, "Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under [the *habeas* statute]." 124 S. Ct. at 2696.

The Supreme Court expressly acknowledged that the allegations contained in the petitions for writs of *habeas corpus* "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States" as required by the *habeas* statute, 124 S. Ct. at 2698 n.15 (*quoting* 28 U.S.C. § 2241(c)(3)), and concluded by instructing:

> Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims.

124 S. Ct. at 2699.

On July 7, 2004, nine days after the issuance of the *Rasul* decision, Deputy Secretary of Defense Paul Wolfowitz issued an Order creating a military tribunal called the Combatant Status Review Tribunal (hereinafter "CSRT") to review the status of each detainee at Guantanamo Bay as an "enemy combatant."[9] It appears that this is the first formal document

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[9] The document is attached as Exhibit A to the respondents' motion to dismiss and can also be found at http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

to officially define the term "enemy combatant" as used by the respondents. That definition is as follows:

> [T]he term "enemy combatant" shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

The Deputy Secretary's Order notes that all Guantanamo detainees were previously determined to be "enemy combatants" through what the Order describes without additional specificity as "multiple levels of review by officers of the Department of Defense." Order at 1. The Order sets forth procedures by which detainees can contest this status before a panel of three commissioned military officers.

The CSRT procedures will be described in more detail below, but in brief, under the terms of the July 7 Order and a July 29, 2004 Memorandum issued by Secretary of the Navy Gordon England implementing the Order,[10] detainees for the first time have the right to hear the factual bases for their detention, at least to the extent that those facts do not involve information deemed classified by the administration. Detainees also have the right to testify why they contend they should not be considered "enemy combatants" and may present additional evidence they believe might exculpate them, at least to the extent the tribunal finds such evidence relevant and "reasonably available." The detainees do not have a right to counsel in the proceedings, although each is assigned a military officer who serves as a "Personal Representative" to assist the detainee in understanding the process and pre-

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[10] The Implementing Memorandum is attached as Exhibit B to the motion to dismiss and can also be found at http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

senting his case. Formal rules of evidence do not apply, and there is a presumption in favor of the government's conclusion that a detainee is in fact an "enemy combatant." Although the tribunal is free to consider classified evidence supporting a contention that an individual is an "enemy combatant," that individual is not entitled to have access to or know the details of that classed evidence.

The record of the CSRT proceedings, including the tribunal's decision regarding "enemy combatant" status, is reviewed for legal sufficiency by the Staff Judge Advocate for the Convening Authority, the body designated by the Secretary of the Navy to appoint tribunal members and Personal Representatives. After that review, the Staff Judge Advocate makes a recommendation to the Convening Authority, which is then required either to approve the panel's decision or to send the decision back to the panel for further proceedings. It is the government's position that in the event a conclusion by the tribunal that a detainee is an "enemy combatant" is affirmed, it is legal to hold the detainee in custody until the war on terrorism has been declared by the President to have concluded or until the President or his designees have determined that the detainee is no longer a threat to national security. If the tribunal finally determines that a detainee should no longer be deemed an "enemy combatant," a written report of the decision is forwarded to the Secretary of Defense or his designee, who is then obligated to contact the Secretary of State for coordination of the transfer of the detainee either to his country of citizenship or elsewhere in accordance with law and U.S. foreign policy.

In the wake of the Supreme Court's decision in *Rasul*, several new *habeas* cases were filed on behalf of Guantanamo detainees in addition to those cases that were remanded by the Court as part of *Rasul*. As of the end of July 2004, thirteen cases involving more than sixty detainees were pending before eight Judges in this District Court. On July 23,

2004, the respondents filed a motion to consolidate all of the cases pending at that time. The motion was denied without prejudice three days later. On August 4, 2004, the respondents filed a motion seeking coordination of legal issues common to all cases. By order dated August 17, 2004, Judge Gladys Kessler on behalf of the Calendar and Case Management Committee granted the motion in part, designating this Judge to coordinate and manage all proceedings in the pending matters and, to the extent necessary, rule on procedural and substantive issues common to the cases. An Executive Session Resolution dated September 15, 2004 further clarified that this Judge would identify and delineate both procedural and substantive issues common to all or some of these cases and, as consented to by the transferring judge in each case, rule on common procedural issues. The Resolution also provided that to the extent additional consent was given by the transferring Judges, this Judge would address specified common substantive issues. The Resolution concluded by stating that any Judge who did not agree with any substantive decision made by this Judge could resolve the issue in his or her own case as he or she deemed appropriate. Although issues and motions were transferred to this Judge, the cases themselves have remained before the assigned Judges.

After two informal status conferences discussing, among other issues, the factual bases for the government's detention of the petitioners, this Judge issued a scheduling order requiring the respondents to file responsive pleadings showing cause why writs of *habeas corpus* and the relief sought by petitioners should not be granted. The order also incorporated the respondent proposed schedule for the filing of factual returns identifying the specific bases upon which they claim the government is entitled to detain each petitioner at Guantanamo Bay as an "enemy combatant." Although most of the detainees had already been held as "enemy combatants" for more than two years and had been subjected to unspecified

"multiple levels of review," the respondents chose to submit as factual support for their detention of the petitioners the record from the CSRT proceedings, which had only commenced in late August or early September 2004. Those factual returns were filed with the Court on a rolling basis as the CSRT proceedings were completed, with the earliest submitted on September 17, 2004 and the latest on December 30, 2004. Because every complete CSRT record contained classified information, respondents filed redacted, unclassified versions on the public record, submitted the full, classified versions for the Court's *in camera* review, and served on counsel for the petitioners with appropriate security clearances versions containing most of the classified information disclosed in the Court's copies but redacting some classified information that respondents alleged would not exculpate the detainees from their "enemy combatant" status.

During the fall, the Court resolved numerous procedural issues common to all cases. Among other matters, the Court ruled that the cases should not be transferred to the Eastern District of Virginia, where the primary respondent, Secretary of Defense Donald Rumsfeld, maintains his office,[11] ruled on protective order issues,[12] and granted the petitioners certain rights relating to access to counsel to assist in the litigation of these cases.[13]

On October 4, 2004, the respondents filed their Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law in all thirteen cases pending before the Court at that time. Counsel for petitioners filed a joint opposition on November 5, 2004, which was supplemented by additional filings specific to the petitions

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[11] *Gherebi v. Bush*, 338 F. Supp.2d 91 (D.D.C. 2004).

[12] November 8, 2004 Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 344 F. Supp.2d 174 (D.D.C. 2004).

[13] *Id.*

filed in *Al Odah v. United States*, 02-CV-0828 (CKK); *El-Banna v. Bush*, 04-CV-1144 (RWR); and *Bournediene v. Bush*, 04-CV-1166 (RJL). Respondents filed replies in support of their original motion. The motions to dismiss in eleven of the thirteen cases were transferred by separate orders issued by the assigned Judges in accordance with the procedures set forth for the resolution of substantive matters in the September 15, 2004 Executive Resolution.[14] This Court hold oral argument for the eleven cases with transferred motions on December 1, 2004. Subsequently, eight more *habeas* cases were filed on behalf of Guantanamo detainees.[15] Although this Memorandum Opinion addresses issues common to those new cases, counsel in those cases have not yet had the opportunity to fully brief or argue the issues on their own behalf. Accordingly, while the Judges assigned to those cases are free, of course, to adopt the reasoning contained in this Memorandum Opinion in resolving those motions, this Memorandum Opinion technically applies only to the eleven cases contained in the above caption.

II. ANALYSIS

The petitioners in these eleven cases allege that the detention at Guantanamo Bay and the conditions thereof violate a variety of laws. All petitions assert violations of the Fifth Amendment, and a majority claim violations of the Alien Tort Claims Act,[16] the Administrative Procedure Act,[17] and

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[14] As was his prerogative, Judge Richard Leon did not transfer the motions to dismiss in his two Guantanamo cases, *Khalid v. Bush*, 04-CV-1142 (RJL) and *Boumediene v. Bush*, 04CV-1166 (RJL), and this Memorandum Opinion therefore does not apply to those two cases.

[15] *Belmar v. Bush*, 04-CV-1897 (RMC); *Al Qosi v. Bush*, 04-CV-1937 (PLF); *Paracha v. Bush*, 04-CV-2022 (PLF); *Al-Marri v. Bush*, 04-CV-2035 (GK); *Zemiri v. Bush*, 04-CV-2046 (CKK); *Deghayes v. Bush*, 04-CV-2215 (RMC); *Mustapha v. Bush*, 05-CV-0022 (JR); and *Abdullah v. Bush*, 05-CV-0023 (RWR).

[16] 28 U.S.C. § 1350 (1993).

the Geneva Conventions.[18] In addition, certain petitions allege violations of the Sixth, Eighth, and Fourteenth Amendments; the War Powers Clause;[19] the Suspension Clause;[20] Army Regulation 190-8, entitled "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees;" the International Covenant on Civil and Political Rights ("ICCPR");[21] the American Declaration on the Rights and Duties of Man ("ADRDM");[22] the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;[23] the International Labour Organization's Convention 182, Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour;[24] and customary international law. The respondents contend that none of these provisions constitutes a valid basis for any of the petitioners' claims and seek dismissal of all counts as a matter of law under Fed. R. Civ. P. 12(b)(6) for failing to state a claim upon which relief can be granted. In the alternative, the respondents seek a judgment based on the pleadings pursuant to Fed. R. Civ. P. 12(c). The respondents have not requested entry of summary judgment pursuant to Fed. R. Civ. P. 56, and they have opposed requests for discovery made by counsel for the petitioners on the ground that those requests are premature at this stage of the proceedings. *See, e.g.*, Respondents' Memo-

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[17] 5 U.S.C. §§ 555, 702, 706 (1996).

[18] (Third) Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, 6 U.S.T. 3316; and Fourth Geneva Convention, 1956 WL 54810 (U.S. Treaty), T.I.A.S. No. 3365, 6 U.S.T. 3516.

[19] U.S. Const. art. I, § 8, cl. 11.

[20] U.S. Const. art. I, § 9, cl. 2.

[21] 999 U.N.T.S. 171, 6 I.L.M. 368 (1992), and 102d Cong., 138 Cong. Rec. S4781 (Apr. 2, 1992).

[22] O.A.S. Off. Rec. OEA/Ser. LV/I.4 Rev. (1965).

[23] S. Treaty Doc. No. 106-37, 2000 WL 33366017.

[24] S. Treaty Doc. No. 106-5, 1999 WL 33292717.

randum in Opposition to Petitioners' Motion for Leave to Take Discovery and For Preservation Order, filed January 12, 2005, at 6.

In addressing a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), the Court must accept as true all factual allegations contained in a petition and must resolve every factual inference in the petitioner's favor. *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000). The moving party is entitled to dismissal "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Croixland Properties Ltd. Partnership v. Corcoran*, 174 F.3d 213, 215 (D.C. Cir. 1999) (*quoting Hishon v. King & Spalding*, 467 U.S. 69 (1984)). Similarly, in resolving a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), the Court must "accept as true the allegations in the opponent's pleadings, and as false all controverted assertions of the movant" and must "accord the benefit of all reasonable inferences to the non-moving party." *Haynesworth v. Miller*, 820 F.2d 1245, 1249 n.11 (D.C. Cir. 1987).

A. EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION TO ALIENS

Notwithstanding the Supreme Court's decision in *Rasul* that the District Court's dismissal of the petitioners' claims was incorrect as a matter of law, the respondents argue in their October 2004 motion that the *Rasul* decision resolved only whether individuals detained at Guantanamo Bay had the right merely to *allege* in a United States District Court under the *habeas* statute that they are being detained in violation of the Constitution and other laws. Respondents argue that the decision was silent on the issue of whether the detainees actually *possess* any underlying substantive rights, and they further contend that earlier Supreme Court precedent and the law of this Circuit make clear that the detainees do

not hold any such substantive rights. Accordingly, it is the respondents' position that although *Rasul* clarified that a detainee has every right to file papers in the Clerk's Office alleging violations of the Constitution, statutes, treaties and other laws, and although the Court has jurisdiction to accept the filing and to consider those papers, the Court must not permit the case to proceed beyond a declaration that no underlying substantive rights exist. While the Court would have welcomed a clearer declaration in the *Rasul* opinion regarding the specific constitutional and other substantive rights of the petitioners, it does not interpret the Supreme Court's decision as narrowly as the respondents suggest it should. To the contrary, the Court interprets *Rasul*, in conjunction with other precedent, to require the recognition that the detainees at Guantanamo Bay possess enforceable constitutional rights.

The significance and scope of the *Rasul* decision is best understood after a review of earlier case law addressing the applicability of the Constitution outside of the United States and to individuals who are not American citizens. At the end of the nineteenth century, the Supreme Court interpreted the Constitution to have no applicability outside of the United States, even to activities undertaken by the United States government with respect to American citizens. In *Ross v. McIntyre*, 140 U.S. 453, 464 (1891), a *habeas* case involving a U.S. citizen convicted of murder by an American consular tribunal in Japan, the Court declared, "By the constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. The guaranties it affords . . . apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. The constitution can have no operation in another country." 140 U.S. at 464 (*citing Cook v. United States* 138 U.S. 157, 181 (1891)).

The Supreme Court reexamined this broad declaration beginning a decade later and recognized the potential for a more liberal view of the Constitution's applicability outside of the United States in a line of precedent known as the "Insular Cases." One of the earliest of those cases, *Downes v. Bidwell*, 182 U.S. 244 (1901), addressed whether the imposition of duties on products from Puerto Rico after it became a U.S. territory was a violation of the Constitution's Uniformity Clause, which requires that "all duties, imposts, and excises shall be uniform throughout the United States." Art. I, § 8, cl. 2. As part of its analysis, the Court held that the "unincorporated" territory of Puerto Rico—meaning a territory not destined for statehood—was not part of the "United States" and that, as a result, the imposition of duties on Puerto Rican goods did not violate the Constitution. In dicta, the Court acknowledged that Congress had traditionally interpreted the Constitution to apply to territories "only when and so far as Congress shall so direct." 182 U.S. at 278-79. The Court noted the apprehension of "many eminent men" caused by such an interpretation, however, and it described that concern as "a fear lest an unrestrained possession of power on the part of Congress may lead to unjust and oppressive legislation in which the natural rights of territories, or their inhabitants, may be engulfed in a centralized despotism." *Id.* at 280. Significant to the resolution of the cases brought by the Guantanamo detainees, the Court went on to minimize such concern by suggesting that the Constitution prevented Congress from denying inhabitants of unincorporated U.S. territories certain "fundamental" rights, including "the right to personal liberty . . . ; to free access to courts of justice, [and] to due process of law." *Id.* at 282. Because such fundamental rights were not at issue in *Downes v. Bidwell*, the Court did not address this concept in greater detail at that time.

Three years later, the Court faced more directly the applicability of the Constitution outside of the United States when it resolved whether the defendant in a criminal libel

action in a Philippines court was entitled to a trial by jury under Article III and the Sixth Amendment of the U.S. Constitution. *Dorr v. United States*, 195 U.S. 138 (1904). At the time of the litigation, the United States had control of the Philippines as an unincorporated territory after the conclusion of the Spanish-American War. Congress, however, had enacted legislation expressly exempting application of the U.S. Constitution to the area. The defendant in that case was prosecuted for libel under the previously existing Spanish system and was not permitted a trial by jury. On appeal, the defendant argued that the right to trial by jury was a "fundamental" right guaranteed by the U.S. Constitution and that Congress did not have the power to deny that right by statute. Although the Court ultimately ruled that the Constitution did not require a right to jury trial in the Philippines, it did so only after examining the legal traditions employed in the Philippines prior to annexation as a U.S. territory, the significance of the constitutional right asserted, and the ability of the existing system to accept the burdens of applying new constitutional constraints. In reaching its conclusion that a right to trial by jury was not a "fundamental" right guaranteed outside of the United States, the Court emphasized that the legal system pursuant to which the defendant was prosecuted already provided numerous procedural safeguards, including fact finding by judges, a right of appeal, a right to testify, a right to retain counsel, a right to confront witnesses, a right against self-incrimination, and a right to due process. *Id.* at 145. After suggesting that a large majority of the population would be unfit to serve as jurors, the Court further noted that recognizing a fundamental constitutional right to a jury trial might, in fact, "work injustice and provoke disturbance rather than . . . aid the orderly administration of justice." *Id.* at 148.[25]

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[25] At a time critics might call less enlightened, the *Dorr* opinion expressed a fear that further expansion of the application of the Constitution might result in requiring "savages" to serve as jurors. *Id.*

That holding was reaffirmed in a similar criminal case involving a prosecution for libel in Puerto Rico. *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922).[26] Like the defendant in *Dorr*, the defendant in the Puerto Rican case claimed his denial of a jury trial violated Article III and the Sixth Amendment of the U.S. Constitution. Unlike the defendant in *Dorr*, however, the defendant in *Balzac* was a United States citizen. The Court rejected that this distinction held any significance, reiterating that a right to trial by jury was not a "fundamental" right and emphasizing that U.S. citizens had no constitutional right to a trial by jury in a proceeding outside of the United States. As the Court explained, "It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it." 258 U.S. at 309.

A plurality opinion issued by the Supreme Court in *Reid v. Covert*, 354 U.S. 7 (1957) sharply criticized this portion of the *Balzac* opinion and argued for the further liberalization of the application of the Constitution outside of the United States. *Reid* involved two wives charged with the capital murders of their husbands. Both men were soldiers in the United States military and were killed at overseas posts, one in England and the other in Japan. The wives, who were American citizens, were tried and convicted abroad by courts martial under the Uniform Code of Military Justice and subsequently sought *habeas* relief, arguing that as civilians they were entitled under the Constitution to civilian trials. Initially, a majority of the Court ruled in the Japanese case during the previous term that the guarantees of an indictment by grand jury and subsequent jury trial under the Fifth and Sixth Amendments in a prosecution by the United States

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[26] Citations to most, if not all, Insular Cases decided during the period between *Dorr* and *Balzac* can be found in *United States v. Pollard*, 209 F. Supp.2d 525, 539 n.17 (D. Virgin Islands 2002), *rev'd*, 326 F.3d 397 (3rd Cir. 2003).

government did not apply in foreign lands for acts committed outside the United States. *Kinsella v. Krueger*, 351 U.S. 470 (1956). Upon further argument and reconsideration the following term, however, the Court overruled its earlier decision, with four Justices subscribing to a plurality opinion and two Justices issuing separate opinions concurring in the result.

The plurality began its analysis of the issues with the following pronouncement, a marked contrast from the language used a half century earlier in *Ross*:

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government.

354 U.S. at 5-6 (footnotes omitted). After noting the language of the Fifth Amendment expressly states that "no person" shall be tried far a capital crime without a grand jury indictment and acknowledging that the Sixth Amendment requires that "in all criminal prosecutions" the defendant shall enjoy the right to a speedy and public trial, *id.* at 7, the plurality was critical of the narrower, "fundamental rights" approach taken in the previous Insular Cases, at least as applied to U.S. citizens, and explained, "While it has been suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of

the Federal Government by the Constitution and its Amendments." *Id.* at 8-9. The plurality went on to clarify that the "fundamental" rights approach limiting the full application of the Constitution to territories under U.S. control had been intended to avoid disruption of long established practices and to expedite the carrying out of justice in the insular possessions. *Id.* at 13. Accordingly, the plurality suggested that any further abridgement of constitutional rights under a "fundamental" rights approach should not be countenanced. They reasoned, "If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes." *Id.* at 14.

In his concurring opinion, Justice Harlan, who had voted to deny *habeas* relief in the case during the previous term, explained that his change of opinion was based on an increased concern about the fact that the underlying crimes for which the defendants were charged were capital offenses. *Id.* at 65. He was careful to emphasize, however, his belief that the Insular Cases still had "vitality," *id.* at 67, and that the precedent remained "good authority for the proposition that there is no rigid rule that jury trial must *always* be provided in the trial of an American overseas, if the circumstances are such that trial by jury would be impractical and anomalous." *Id.* at 75 (emphasis in the original). Justice Harlan posited further that the types of constitutional rights that should apply overseas depended on "the particular local setting, the practical necessities, and the possible alternatives." *Id.* Agreeing with what Justice Frankfurter wrote in a separately concurring opinion, Justice Harlan commented that the issue was analogous to a due process inquiry in which the courts must look to the particular circumstances of a particular case to determine what constitutional safeguards should apply. *Id.*

Because of the lack of a five Justice majority in *Reid*, *Balzac* continues to be interpreted as binding authority. Thus, for example, the Fifth Circuit held that a U.S. citizen charged with distribution of cocaine in the United States District Court for the Canal Zone District at Balboa was not entitled to the nonfundamental rights to a grand jury indictment and to a jury that had the potential to include military personnel. *Government of the Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974) ("non-citizens and citizens of the United States resident in such territories are treated alike, since it is the territorial nature of the Canal Zone and not the citizenship of the defendant that is dispositive"). Indeed, although *Reid* far from settled the issue of the Constitution's application abroad, it certainly did not weaken the long held doctrine that fundamental constitutional rights cannot be denied in territories under the control of the American government, even where the United States technically is not considered "sovereign" and where the claimant is not a United States citizen.

The District of Columbia Circuit so recognized in a case this Court finds to be particularly relevant to the litigation presently under consideration. *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977), required the application of the Fifth Amendment to U.S. government activities in Micronesia, a "Trust Territory" pursuant to a United Nations designation under which the United States acted as administrator. More specifically, the case involved a constitutional challenge to the procedures undertaken by a commission created by Congress to compensate residents who suffered property damage as a result of American military activities against Japan during World War II. The plaintiff in that case owned a home that had been destroyed by the American offensive, and although the commission ultimately awarded compensation, the commission's valuation of the plaintiff's loss was lower than what he had claimed. More significantly, the valuation was based on evidence that the plaintiff was not permitted to examine or rebut. In addressing whether the Due Process Clause of the

Fifth Amendment regulated the commission's valuation procedures, the D.C. Circuit expressly recognized that the United States was not technically "sovereign" over Micronesia, 569 F.2d at 61.9 n.71, and noted that the exact scope of the Constitution's foreign reach was a "matter of some controversy," commenting on the criticism in the *Reid* plurality opinion of the more limited "fundamental" rights approach taken in the Insular Cases. *Id.* at 618 & n.69. Nonetheless, the court concluded that at a minimum, due process was a "fundamental" right even with respect to property and that "it is settled that 'there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law.'" *Id.* at 618-19 (*quoting Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 669 n.5 (1974)). Thus, the court required the commission to give the plaintiff access to the evidence upon which its decision relied.[27]

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[27] At least twice since the *Ralpho* decision, the D.C. Circuit recognized the continuing murkiness of whether the Constitution provides protection to noncitizens abroad in cases involving action by American authorities in locales far from the absolute control of the U.S. Congress. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), involved a claim by Nicaraguan citizens and residents that the alleged support of the Contras by American government officials violated Fourth and Fifth Amendment rights. The Court of Appeals found it unnecessary to resolve whether the Constitution applied in Nicaragua by concluding that even if it did, other grounds prevented the plaintiffs from recovering the relief they sought. *Id.* at 208. The second case, *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988), involved the seizure and alleged mistreatment of a Lebanese citizen by FBI agents on a boat off the coast of Cyprus. At his trial in District Court for alleged hijacking, the defendant sought the suppression of a confession he provided while in international waters on the ground that his interrogation violated asserted Fifth Amendment rights. Again, the majority avoided the threshold issue of extraterritorial application of the Constitution by accepting a stipulation between the prosecution and defendant that the Fifth Amendment was applicable. *Id.* at 957.

The Supreme Court again tried to bring some clarity to the issue of extraterritorial application of the Constitution when it reviewed the legality of the search and seizure by American government officials of items in the Mexican residence of a Mexican citizen charged with various narcotics-related offenses under U.S. law. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Citing language from *Reid* that "the Constitution imposes substantive constraints on the Federal Government, even when it operates abroad," the Court of Appeals for the Ninth Circuit had ruled that the Fourth Amendment required the suppression of the evidence gained through the search, notwithstanding its conclusion that a search warrant obtained in the United States would have had no legal validity in Mexico. 856 F.2d 1214, 1218 (9th Cir. 1988). The Supreme Court reversed and began its analysis with a comparison of the language in the Fourth Amendment with the terminology in the Fifth and Sixth Amendments, noting that the Fourth Amendment is written to apply to "the people" while the Fifth and Sixth Amendments protect "person[s]" and the "accused." 494 U.S. at 265-66. The Court interpreted the linguistic differences as evidence that the drafters of the Fourth Amendment intended it to protect the people of the United States rather than to impose restrictions on the government against nonresident aliens. *Id.* at 266.

Perhaps more significant for purposes of these Guantanamo detainee cases, the majority opinion then addressed the Insular Cases and reaffirmed that in U.S. territories, only "fundamental" constitutional rights are guaranteed. Accordingly, the Court concluded that the ability of noncitizens in foreign countries to invoke Fourth Amendment rights must be even weaker. *Id.* at 268. Citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court then declared, "Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." 494 U.S. at 269. The Court described its rejection in *Eisentrager* of the extraterritorial application of the Fifth Amend-

ment as "emphatic," and concluded that if the Fifth Amendment, with the universal term "person," did not apply to aliens extraterritorially, then neither should the Fourth Amendment, which applies only to "the people." *Id.*

Justice Kennedy joined the majority opinion but also wrote a separate concurring opinion. Minimizing the majority opinion's reliance on the term "the people" as used in the Fourth Amendment, Justice Kennedy preferred to focus on the Insular Cases and *Reid*, giving particular attention to Justice Harlan's concurring opinion. More specifically, Justice Kennedy invoked a contextual due process analysis to resolve the issue, making specific reference to Justice Harlan's comments that there is no rigid and abstract rule that requires Congress to provide all constitutional guarantees overseas where to do so would be "impracticable and anomalous." *Id.* at 277-78 (*quoting Reid*, 354 U.S. at 74). Ultimately, Justice Kennedy concluded that under the facts of the case, it would have been impracticable and anomalous to require the U.S. authorities to obtain a warrant for a search of property in Mexico, citing the lack of Mexican judicial officials to issue such warrants, potentially differing concepts of privacy and what would constitute an "unreasonable" search, and practical difficulties involved in dealing with foreign officials. *Id.* at 278.

So existed the state of relevant constitutional law at the time of Judge Kollar-Kotelly's dismissals of *Rasul, Al Odah*, and *Habib*. As a technical matter, her dismissals were not based on a finding that the Guantanamo detainees lacked underlying substantive constitutional rights, although the opinion does make brief references to some of the Insular Cases and to the Supreme Court's reference in *Verdugo-Urquidez* to the lack of extraterritorial Fifth Amendment rights. Rather, the District Court dismissed on the basis that it lacked jurisdiction under the *habeas* statute, 28 U.S.C. §§ 2241 and 2242, in light of the Supreme Court's decision in

Eisentrager. In that case, the Supreme Court held that federal courts did not have the authority to entertain the *habeas* claims of German nationals captured in China, convicted of war crimes by a U.S. military commission in China, and serving their sentences in a Landsberg prison, located in Germany but administered by the U.S. military. The crucial aspect of the *Eisentrager* decision, according to Judge Kollar-Kotelly, was its conclusion that *habeas* relief could not be granted to individuals in custody outside the sovereign territory of the United States. Her opinion emphasized the importance of the conclusion that the Guantanamo Bay Naval Base is not on sovereign United States territory, and rejected the argument made by counsel for the detainees that under *Ralpho v. Bell, de facto* sovereignty, rather than *de jure* sovereignty, was sufficient support for *habeas* jurisdiction. While recognizing that Micronesia, the location at issue in *Ralpho*, was not *de jure* sovereign U.S. territory, the District Court concluded that those islands are much more similar in character and status to sovereign territories than Guantanamo Bay is. According to the District Court, "The military base at Guantanamo Bay, Cuba, is nothing remotely akin to a territory of the United States, where the United States provides certain rights to the inhabitants. Rather, the United States merely leases an area of land for use as a naval base." 215 F. Supp.2d at 71.

In reviewing the District Court's decision dismissing the cases far lack of *habeas* jurisdiction, the D.C. Circuit took a somewhat different approach, relying more heavily than the District Court on an analysis of the substantive constitutional rights upon which the detainees' petitions were based. The D.C. Circuit interpreted *Eisentrager* to characterize the right to a writ of *habeas corpus* as a "subsidiary procedural right that follows from the possession of substantive constitutional rights." 321 F.3d at 1140 (*quoting Eisentrager*, 339 U.S. at 781). Further noting that *Eisentrager* rejected the proposition "that the Fifth Amendment confers rights upon all persons,

whatever their nationality, wherever they are located and whatever their offenses," *id.*, the Court of Appeals then commented that this language "may be read to mean that the constitutional rights mentioned are not held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens." *Id.* at 1140-41. Invoking the language in *Verdugo-Urquidez* that *Eisentrager* "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States" and that such rejection in *Eisentrager* was "emphatic," the Court of Appeals then noted its previous reliance on *Verdugo-Urquidez* and *Eisentrager* in earlier cases that made clear that "[t]he law of the circuit now is that a 'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.'" *Id.* at 1141 (*quoting People's Mojahedin Org. v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999), and *also citing Harbury v. Deutch*, 233 F.3d 596 (D.C. Cir. 2000), *rev'd sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002); *Pauling v. McElroy*, 278 F.2d 252 (D.C. Cir. 1960); and *32 County Sovereignty Comm. v. Dept of State*, 292 F.3d 797 (D.C. Cir. 2002)). Emphasizing that Guantanamo Bay was not part of sovereign U.S. territory and rejecting any material significance to the U.S. government's practical control over the area, the court thus concluded in *Al Odah*:

> The consequence is that no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States. We cannot see why, or how, the writ maybe made available to aliens abroad when basic constitutional protections are not. This much is at the heart of *Eisentrager*. If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty. *Eisentrager* itself

> directly tied jurisdiction to the extension of constitutional provisions . . . .

Id. at 1141.

The D.C. Circuit's decision was reversed in *Rasul v. Bush*, ___ U.S., ___, 124 S. Ct. 2686 (2004). In reviewing the decision of the Court of Appeals, the majority opinion addressed two grounds upon which a detainee traditionally could assert a right to *habeas* relief: statutory and constitutional. The *Rasul* majority interpreted *Eisentrager* to have focused primarily on the German detainees' lack of a constitutional right to *habeas* review, and distinguished the material facts upon which that portion of the *Eisentrager* decision relied from the circumstances concerning the Guantanamo Bay detainees. Among other distinguishing facts, the *Rasul* opinion emphasized that the Guantanamo Bay detainees were not citizens of countries formally at war with the United States, denied committing any war crimes or other violent acts, were never charged or convicted of wrongdoing, and—most significant to the present motion to dismiss—are imprisoned in "territory over which the United States exercises exclusive jurisdiction and control." 124 S. Ct. at 2693. Next, *Rasul* turned to the issue of statutory *habeas* jurisdiction and ruled that post-*Eisentrager* precedent required the recognition of statutory jurisdiction even over cases brought by petitioners held outside the territorial jurisdiction of any federal district court. Noting that the *habeas* statute made no distinction between citizens and aliens held in federal custody, the Court ultimately ruled that "[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241." *Id.* at 2696.

While conceding as they must in light of the *Rasul* decision that this Court has *habeas* jurisdiction over these cases, the respondents assert in their current motion to dismiss that the Supreme Court did not grant *certiorari* to review the D.C. Circuit's decision that the Guantanamo Bay detainees have no

underlying constitutional rights. Accordingly, the respondents argue, the D.C. Circuit's pronouncement in *Al Odah* that the detainees lack substantive rights is still binding on this Court and the portions of the petitions invoking the Constitution must be dismissed for failure to state a claim upon which relief can be granted. Counsel for the petitioners, on the other hand, assert that in upholding this Court's *habeas* jurisdiction, the Supreme Court also made clear that the Constitution applies to Guantanamo Bay and that the detainees possess substantive constitutional rights. This Court finds the arguments made on behalf of the petitioners in this regard far more persuasive.

As an initial matter, the conclusion that the D.C. Circuit's holding on lack of substantive constitutional rights is no longer the law of the case could be deduced merely from the facts that: (1) the appellate court's opinion emphasized that the existence of *habeas* jurisdiction and substantive constitutional rights were "directly tied," 321 F. 3d at 1141; (2) the appellate court believed *Eisentrager* applied to the facts of these cases and prevented the detainees from asserting substantive constitutional rights; and (3) the Supreme Court held that *habeas* jurisdiction did in fact exist and that *Eisentrager* was inapplicable to these cases. Additionally, and on a more detailed level, careful examination of the specific language used in *Rasul* reveals an implicit, if not express, mandate to uphold the existence of fundamental rights through application of precedent from the Insular Cases.

On appeal to the D.C. Circuit, counsel for the petitioners argued for the application of *Ralpho v. Bell* by challenging the District Court's finding that Guantanamo Bay was simply another naval base on land leased from a foreign sovereign and nowhere near the legal equivalent of a United States territory. 215 F. Supp.2d at 71. The D.C. Circuit rejected the challenge and agreed with the District Court on this point. Although the appellate court conceded that Micronesia, like

Guantanamo Bay, was not technically sovereign U.S. territory, it concluded that *Ralpho* nonetheless did not "justify this court, or any other, to assert habeas corpus jurisdiction at the behest of an alien held at a military base leased from another nation." 321 F.3d at 1144. Instead, the appellate court found Landsberg prison in Germany to be a more suitable analogy, and because *Eisentrager* held that no constitutional rights existed there, the D.C. Circuit concluded that no constitutional rights could exist at Guantanamo Bay. *Rasul*, however, unequivocally rejected the D.C. Circuit's analogy and made clear that Guantanamo Bay cannot be considered a typical overseas military base.

In his concurring opinion in *Rasul*, Justice Kennedy unambiguously repudiated the D.C. Circuit's analogy of Guantanamo Bay to Landsberg prison, and he made a *Ralpho*-type conclusion that Guantanamo Bay was, for all significant purposes, the equivalent of sovereign U.S. territory. He explained:

> Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . . [The Guantanamo Bay lease] is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it.

Id. at 2700 (Kennedy, J., concurring) (*citing Eisentrager*, 339 U.S. at 777-78). Although the majority opinion was not as explicit as Justice Kennedy's concurrence, it too found significant the territorial nature of Guantanamo Bay and dismissed the D.C. Circuit's characterization of Guantanamo Bay as nothing more than a foreign military prison. For example, in refusing the application of *Eisentrager*'s consti-

tutional analysis to these cases, the majority took special note that, unlike the German prisoners, the Guantanamo detainees "have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." 124 S. Ct. at 2693. Additionally, in rejecting an argument made by respondents that applying the *habeas* statute to prisoners at Guantanamo Bay would violate a canon of statutory interpretation against extraterritorial application of legislation, the majority wrote:

> Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within the "territorial jurisdiction" of the United States. . . . By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.

124 S. Ct. at 2696 (*citing Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949), in which the Court refused to interpret a statute mandating an eight hour work day to have application to an American citizen working for a contractor in Iran and Iraq absent evidence that the "United States had been granted by the respective sovereignties any authority, legislative or otherwise, over the labor laws or customs of Iran or Iraq.").

These passages alone would be sufficient for this Court to recognize the special nature of Guantanamo Bay and, in accordance with *Ralpho v. Bell*, to treat it as the equivalent of sovereign U.S. territory where fundamental constitutional rights exist. But perhaps the strongest basis for recognizing that the detainees have fundamental rights to due process rests at the conclusion of the *Rasul* majority opinion. In summarizing the nature of these actions, the Court recognized:

> Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-278, 110 S. Ct. 1056, 108 L.Ed.2d 222 (1990) (Kennedy, J., concurring), and cases cited therein.

124 S. Ct. at 2698 n.15. This comment stands in sharp contrast to the declaration in *Verdugo-Urquidez* relied upon by the D.C. Circuit in *Al Odah* that the Supreme Court's "rejection of extraterritorial application of the Fifth Amendment [has been] emphatic." 494 U.S. at 269. Given the *Rasul* majority's careful scrutiny of *Eisentrager*, it is difficult to imagine that the Justices would have remarked that the petitions "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States'" unless they considered the petitioners to be within a territory in which constitutional rights are guaranteed. Indeed, had the Supreme Court intended to uphold the D.C. Circuit's rejection in *Al Odah* of underlying constitutional rights, it is reasonable to assume that the majority would have included in its opinion at least a brief statement to that effect, rather than delay the ultimate resolution of this litigation and require the expenditure of additional judicial resources in the lower courts. To the contrary, rather than citing *Eisentrager* or even the portion of *Verdugo-Urquidez* that referenced the "emphatic" inapplicability of the Fifth Amendment to aliens outside U.S. territory, the *Rasul* Court specifically referenced the portion of Justice Kennedy's concurring opinion in *Verdugo-Urquidez*, that discussed the continuing validity of the Insular Cases, Justice Harlan's concurring opinion in *Reid*

v. Covert, and Justice Kennedy's own consideration of whether requiring adherence to constitutional rights outside of the United States would be "impracticable and anomalous." This Court therefore interprets that portion of the opinion to require consideration of that precedent in the determination of the underlying rights of the detainees.

There would be nothing impracticable and anomalous in recognizing that the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment. Recognizing the existence of that right at the Naval Base would not cause the United States government any more hardship than would recognizing the existence of constitutional rights of the detainees had they been held within the continental United States. American authorities are in full control at Guantanamo Bay, their activities are immune from Cuban law, and there are few or no significant remnants of native Cuban culture or tradition remaining that can interfere with the implementation of an American system of justice.[28] The situation in these cases is very different from the circumstances in *Verdugo-Urquidez*, where the defendant claimed the United States government was required to get a warrant to perform a search in Mexico, a sovereign country that employs an entirely different legal system, lacks officials to issue warrants, and has potentially different concepts of privacy. Similarly, the imposition of constitutional rights would be less difficult at Guantanamo Bay than it was in any of the Insular Cases, where the courts were required to determine whether imposition of American rights such as the

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[28] Ironically, the Cuban government has alleged that the U.S. military is violating the human rights of the detainees at Guantanamo Bay and has demanded more humane treatment of the prisoners. The U.S. government, however, does not appear to have conceded the Cuban government's sovereignty over these matters. *See What's News*, The Wall Street Journal, Jan. 20, 2005, at A1 (2005 WL 59838432); *Cuba Demands US Stop Alleged Abuses at "Illegally Occupied" Guantanamo Base*, Agence France Presse, Jan. 19, 2005 (2005 WL 69517025).

right to trial by jury and indictment by grand jury were even possible in places such as the Philippines and Puerto Rico with native legal systems and populations previously unexposed to American jurisprudence.

Of course, it would be far easier for the government to prosecute the war on terrorism if it could imprison all suspected "enemy combatants" at Guantanamo Bay without having to acknowledge and respect any constitutional rights of detainees. That, however, is not the relevant legal test. By definition, constitutional limitations often, if not always, burden the abilities of government officials to serve their constituencies. Although this nation unquestionably must take strong action under the leadership of the Commander in Chief to protect itself against enormous and unprecedented threats, that necessity cannot negate the existence of the most basic fundamental rights for which the people of this country have fought and died for well over two hundred years. As articulated by the Supreme Court after the conclusion of the Civil War:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Ex Parte Milligan, 71 U.S. 2, 120-21 (1866). *See also United States v. Robel*, 389 U.S. 258, 264 (1967) ("It would indeed

be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.").

In sum, there can be no question that the Fifth Amendment right asserted by the Guantanamo detainees in this litigation—the right not to be deprived of liberty without due process of law—is one of the most fundamental rights recognized by the U.S. Constitution. In light of the Supreme Court's decision in *Rasul*, it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply. Accordingly, and under the precedent set forth in *Verdugo-Urquidez*, *Ralpho*, and the earlier Insular Cases, the respondents' contention that the Guantanamo detainees have no constitutional rights is rejected, and the Court recognizes the detainees' rights under the Due Process Clause of the Fifth Amendment.

B. SPECIFIC REQUIREMENTS OF THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE

Having found that the Guantanamo detainees are entitled to due process under the Fifth Amendment to the United States Constitution, the Court must now address the exact contours of that right as it applies to the government's determinations that they are "enemy combatants." Due process is an inherently flexible concept, and the specific process due in a particular circumstance depends upon the context in which the right is asserted. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Resolution of a due process challenge requires the consideration and weighing of three factors: the private interest of the person asserting the lack of due process; the risk of erroneous deprivation of that interest through use of existing procedures and the probable value of additional or substitute procedural safeguards; and the competing interests of the government, including the financial, administrative, and other burdens that would be incurred were additional

safeguards to be provided. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The Supreme Court applied a *Mathews v. Eldridge* analysis in *Hamdi v. Rumsfeld*, ___U.S. ___, 124 S. Ct. 2633 (2004), a decision issued the same day as *Rasul* which considered an American citizen's due process challenge to the U.S. military's designation of him as an "enemy combatant." Although none of the detainees in the cases before this Court is an American citizen, the facts under *Hamdi* are otherwise identical in all material respects to those in *Rasul*. Accordingly, *Hamdi* forms both the starting point and core of this Court's consideration of what process is due to the Guantanamo detainees in these cases.

In addressing the detainee's private interest in *Hamdi* for purposes of the *Mathews v. Eldridge* analysis, the plurality opinion called it "the most elemental of liberty interests—the interest in being free from physical detention by one's own government." 124 S. Ct. at 2646. Although the detainees in the cases before this Court are aliens and are therefore not being detained by their own governments, that fact does not lessen the significance of their interests in freedom from incarceration and from being held virtually *incommunicado* from the outside world. There is no practical difference between incarceration at the hands of one's own government and incarceration at the hands of a foreign government; significant liberty is deprived in both situations regardless of the jailer's nationality.

As was the case in *Hamdi*, the potential length of incarceration is highly relevant to the weighing of the individual interests at stake here. The government asserts the right to detain an "enemy combatant" until the war on terrorism has concluded or until the Executive, in its sole discretion, has determined that the individual no longer poses a threat to national security. The government, however, has been unable to inform the Court how long it believes the war on terrorism

will last. *See* December 1, 2004 Transcript of Motion to Dismiss (hereinafter "Transcript") at 22-23. Indeed, the government cannot even articulate at this moment how it will determine when the war on terrorism has ended. *Id.* at 24. At a minimum, the government has conceded that the war could last several generations, thereby making it possible, if not likely, that "enemy combatants" will be subject to terms of life imprisonment at Guantanamo Bay. *Id.* at 21; *Hamdi*, 124 S. Ct. at 2641. Short of the death penalty, life imprisonment is the ultimate deprivation of liberty, and the uncertainty of whether the war on terror—and thus the period of incarceration—will last a lifetime may be even worse than if the detainees had been tried, convicted, and definitively sentenced to a fixed term.

It must be added that the liberty interests of the detainees cannot be minimized for purposes of applying the *Mathews v. Eldridge* balancing test by the government's allegations that they are in fact terrorists or are affiliated with terrorist organizations. The purpose of imposing a due process requirement is to prevent mistaken characterizations and erroneous detentions, and the government is not entitled to short circuit this inquiry by claiming *ab initio* that the individuals are alleged to have committed bad acts. *See Hamdi*, 124 S. Ct. at 2647 ("our starting point for the *Mathews v. Eldridge* analysis is unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to have associated"). Moreover, all petitioners in these cases have asserted that they are not terrorists and have not been involved in terrorist activities, and under the standards provided by the applicable rules of procedure, those allegations must be accepted as true for purposes of resolving the government's motion to dismiss.

On the other side of the *Mathews v. Eldridge* analysis is the government's significant interest in safeguarding national security. Having served as the Chief Judge of the United

States Foreign Intelligence Surveillance Court (also known as "the FISA Court"), the focus of which involves national security and international terrorism,[29] this Judge is keenly aware of the determined efforts of terrorist groups and others to attack this country and to harm American citizens both at home and abroad. Utmost vigilance is crucial for the protection of the United States of America. Of course, one of the government's most important obligations is to safeguard this country and its citizens by ensuring that those who have brought harm upon U.S. interests are not permitted to do so again. Congress itself expressly recognized this when it enacted the AUMF authorizing the President to use all necessary and appropriate force against those responsible for the September 11 attacks. The Supreme Court also gave significant weight to this governmental concern and responsibility in *Hamdi* when it addressed the "interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." 124 S. Ct. at 2647. The plurality warned against naivete regarding the dangers posed to the United States by terrorists and noted that the legislative and executive branches were in the best positions to deal with those dangers. As articulated by the plurality, "[T]he law of war and the realities of combat may render . . . detentions both necessary and appropriate, and our due process analysis need not blink at those realities. Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Id.* Indeed, a majority of the Court affirmed the Executive's authority to seize and detain Taliban fighters as long as the conflict in Afghanistan continues, regardless of how indefinite the length of that war may be. *See* the plurality opinion, *id.* at 2641-42, and the dissenting opinion of Justice Thomas, *id.* at 2674.

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[29] *See* 50 U.S.C. § 1803 (2003).

Given the existence of competing, highly significant interests on both sides of the equation—the liberty of individuals asserting complete innocence of any terrorist activity versus the obligation of the government to protect this country against terrorist attacks—the question becomes what procedures will help ensure that innocents are not indefinitely held as "enemy combatants" without imposing undue burdens on the military to ensure the security of this nation and its citizens. The four member *Hamdi* plurality answered this question in some detail, and although the two concurring members of the Court, Justice Souter and Justice Ginsburg, emphasized a different basis for ruling in favor of Mr. Hamdi, they indicated their agreement that, at a minimum, he was entitled to the procedural protections set forth by the plurality. *Id.* at 2660.

According to the plurality in *Hamdi*, an individual detained by the government on the ground that he is an "enemy combatant" "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* at 2648. Noting the potential burden these requirements might cause the government at a time of ongoing military conflict, the plurality stated that it would not violate due process for the decision maker to consider hearsay as the most reliable available evidence. *Id.* at 2649. In addition, the plurality declared it permissible to adopt a presumption in favor of "enemy combatant" status, "so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." *Id.* For that presumption to apply and for the onus to shift to the detainee, however, the plurality clarified that the government first would have to "put[] forth credible evidence that the [detainee] meets the enemy-combatant criteria." *Id.*[30]

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[30] Justice Souter, whose opinion was joined by Justice Ginsburg, indicated he did not believe that such a presumption was constitutionally

After setting forth these standards, the plurality suggested the "possibility" that constitutional requirements of due process could be met by an "appropriately authorized and properly constituted military tribunal" and referenced the military tribunals used to determine whether an individual is entitled to prisoner of war status under the Geneva Convention. *Id.* at 2651 (*citing* Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997)). In the absence of a tribunal following constitutionally mandated procedures, however, the plurality declared that it was the District Court's obligation to provide those procedural rights to the detainee in a *habeas* action. Again recognizing the enormous significance of the interests of both detainees and the government, the plurality affirmed the proper role of the judiciary in these matters, stating "We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns." *Id.* at 2652. The plurality concluded by affirming that the detainee "unquestionably [had] the right to access to counsel in connection with the proceedings on remand." *Id.*

Hamdi was decided before the creation of the Combatant Status Review Tribunal, and the respondents contend in their motion to dismiss that were this Court to conclude that the detainees are entitled to due process under the Fifth Amendment, the CSRT proceedings would fully comply with all constitutional requirements. More specifically, the respondents claim that the CSRT regulations were modeled after Army Regulation 190-8 governing the determination of prisoner of war status, referenced in *Hamdi*, and actually

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permissible when he wrote, "I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on [the detainee]." *Id.* at 2660.

exceed the requirements set forth by the *Hamdi* plurality. For example, respondents cite the facts that under CSRT rules, tribunal members must certify that they have not been involved in the "apprehension, detention, interrogation, or previous determination of status of the detainee[s]," that detainees are provided a "Personal Representative" to assist in the preparation of their cases, that the "Recorder"—that is, the person who presents evidence in support of "enemy combatant" status—must search for exculpatory evidence, that the detainee is entitled to an unclassified summary of the evidence against him, and that the tribunal's decisions are reviewed by a higher authority. Motion to Dismiss at 34-35. Notwithstanding the procedures cited by the respondents, the Court finds that the procedures provided in the CSRT regulations fail to satisfy constitutional due process requirements in several respects.

C. SPECIFIC CONSTITUTIONAL DEFECTS IN THE CSRT PROCESS AS WRITTEN IN THE REGULATIONS AND AS APPLIED TO THE DETAINEES

The constitutional defects in. the CSRT procedures can be separated into two categories. The first category consists of defects which apply across the board to all detainees in the cases before this Judge. Specifically, those deficiencies are the CSRT's failure to provide the detainees with access to material evidence upon which the tribunal affirmed their "enemy combatant" status and the failure to permit the assistance of counsel to compensate for the government's refusal to disclose classified information directly to the detainees. The second category of defects involves those which are detainee specific and may or may not apply to every petitioner in this litigation. Those defects include the manner in which the CSRT handled accusations of torture and the vague and potentially overbroad definition of "enemy combatant" in the CSRT regulations. While additional specific defects may or may not exist, further inquiry is unnec-

essary at this stage of the litigation given the fundamental deficiencies detailed below.

1. General Defects Existing in All Cases Before the Court: Failure to Provide Detainees Access to Material Evidence Upon Which the CSRT Affirmed "Enemy Combatant" Status and Failure to Permit the Assistance of Counsel

The CSRT reviewed classified information when considering whether each detainee presently before this Court should be considered an "enemy combatant," and it appears that all of the CSRT's decisions substantially relied upon classified evidence. No detainee, however, was ever permitted access to any classified information nor was any detainee permitted to have an advocate review and challenge the classified evidence on his behalf. Accordingly, the CSRT failed to provide any detainee with sufficient notice of the factual basis for which he is being detained and with a fair opportunity to rebut the government's evidence supporting the determination that he is an "enemy combatant."

The inherent lack of fairness of the CSRT's consideration of classified information not disclosed to the detainees is perhaps most vividly illustrated in the following unclassified colloquy, which, though taken from a case not presently before this Judge, exemplifies the practical and severe disadvantages faced by all Guantanamo prisoners. In reading a list of allegations forming the basis for the detention of Mustafa Ait Idr,[31] a petitioner in *Boumediene v. Bush*, 04-CV-1166 (RJL), the Recorder of the CSRT asserted, "While living in Bosnia, the Detainee associated with a known Al

[31] Although the petition for writ of *habeas corpus* filed on behalf of this detainee and related documents refer to him as "Mustafa Ait Idir," the proper spelling of his *name* appears to be "Mustafa Ait Idr."

Qaida operative." In response, the following exchange occurred:

> Detainee: Give me his name.
>
> Tribunal President: I do not know.
>
> Detainee: How can I respond to this?
>
> Tribunal President: Did you know of anybody that was a member of Al Qaida?
>
> Detainee: No, no.
>
> Tribunal President: I'm sorry, what was your response?
>
> Detainee: No.
>
> Tribunal President: No?
>
> Detainee: No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.
>
> Tribunal President: We are asking you the questions and we need you to respond to what is on the unclassified summary.

Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner Mustafa Aft Idir, filed October 27, 2004, Enclosure (3) at 13. Subsequently, after the Recorder read the allegation that the detainee was arrested because of his alleged involvement in a plan to attack the U.S. Embassy in Sarajevo, the detainee expressly asked in the following

colloquy to see the evidence upon which the government's assertion relied:

> Detainee: . . . The only thing I can tell you is I did not plan or even think of [attacking the Embassy]. Did you find any explosives with me? Any weapons? Did you find me in front of the embassy? Did you find me in contact with the Americans? Did I threaten anyone? I am prepared now to tell you, if you have anything or any evidence, even if it is just very little, that proves I went to the embassy and looked like that [Detainee made a gesture with his head and neck as if he were looking into a building or a window] at the embassy, then I am ready to be punished. I can just tell you that I did not plan anything. Point by point, when we get to the point that I am associated with Al Qaida, but we already did that one.
>
> Recorder: It was [the] statement that preceded the first point.
>
> Detainee: If it is the same point, but I do not want to repeat myself. These accusations, my answer to all of them is I did not do these things. But I do not have anything to prove this. The only thing is the citizenship. I can tell you where I was and I had the papers to prove so. But to tell me I planned to bomb, I can only tell you that I did not plan.
>
> Tribunal President: Mustafa, does that conclude your statement?
>
> Detainee: That is it, but I was hoping you had evidence that you can give me. If I was in your place—and I apologize in advance for these words—but if a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about that.

[Everyone in the Tribunal room laughs.]

Tribunal President: We had to laugh, but it is okay.

Detainee: Why? Because these are accusations that I can't even answer. I am not able to answer them. You tell me I am from Al Qaida, but I am not an Al Qaida. I don't have any proof to give you except to ask you to catch Bin Laden and ask him if I am a part of Al Qaida. To tell me that I thought, I'll just tell you that I did not. I don't have proof regarding this. What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it.

Id. at. 14-15. The laughter reflected in the transcript is understandable, and this exchange might have been truly humorous had the consequences of the detainee's "enemy combatant" status not been so terribly serious and had the detainee's criticism of the process not been so piercingly accurate.[32]

Another illustration of the fundamental unfairness of the CSRT's reliance on classified information not disclosed to the detainees arises in the government's classified factual return to the petition filed by Murat Kurnaz in *Kurnaz v. Bush*, 04-CV-1135 (ESH). Mr. Kurnaz is a Turkish citizen and permanent resident of Germany who was arrested by police in Pakistan and turned over to American authorities. The CSRT concluded that he was a member of al Qaeda and stated that this determination was based on unclassified evidence and on

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[32] This is not to say whether or not the government was able to present any inculpatory evidence during the CSRT proceeding against the detainee. The primary purpose of the Memorandum Opinion's reference to the transcript at this stage of the litigation is to illustrate the detainees' lack of any reasonable opportunity to confront the government's evidence against them and not to resolve whether or not this particular detainee did in fact plan to attack the U.S. Embassy.

one classified document, attached to the factual return as Exhibit R19. Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner Murat Kurnaz (hereinafter "Kurnaz Factual Return"), filed October 18, 2004, Enclosure (2).[33]

The Court does not find that the unclassified evidence alone is sufficiently convincing in supporting the CSRT's conclusion that he is a member of al Qaeda.[34] That evidence establishes that Mr. Kurnaz attended a mosque in Bremen, Germany which the CSRT found to be moderate in its views but also to have housed a branch of Jama'at-Al-Tabliq (hereinafter "JT"), a missionary organization alleged to have supported terrorist organizations. Kurnaz Factual Return, Enclosure (1) at 2. The unclassified evidence also establishes that Mr. Kurnaz had been friends with an individual named Selcuk Belgin, who is alleged to have been a suicide bomber, and that the detainee traveled to Pakistan to attend a JT school. *Id.* at 2-3. Nowhere does the CSRT express any finding based on unclassified evidence that the detainee planned to be a suicide bomber himself, took up arms against the United States, or otherwise intended to attack American interests. Thus, the most reasonable interpretation of the record is that the classified document formed the most important basis for the CSRT's ultimate determination. That document, however, was never provided to the detainee, and

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[33] Although the tribunal makes several references to its reliance on Exhibit R12, those references were typographical errors and the document actually relied upon was Exhibit R19, as recognized by the tribunal's Legal Advisor. *See* October 14, 2004 Memorandum from James R. Crisfield Jr. to the Director, Combatant Status Review Tribunal, attached to the Kurnaz Factual Return.

[34] In fact, for reasons stated later in this opinion, even if all of the unclassified evidence were accepted as true, it alone would not form a constitutionally permissible basis for the indefinite detention of the petitioner. *See infra* section II.C.2.b.

had he received it, he would have had the opportunity to challenge its credibility and significance.

* * *

* * *

call into serious question the nature and thoroughness of the prior "multiple levels of review" of "enemy combatant" status referenced in Deputy Secretary of Defense Paul Wolfowitz's July 7, 2004 Order establishing the CSRT system. At a minimum, the documents raise the question of

* * *

Interpreted in a light most favorable to the petitioners, the CSRT's decision to deem Exhibit R19 the most credible evidence without a sufficient explanation for * * * * supports the petitioners' allegation that the "CSRTs do not involve an impartial decisionmaker." Al Odah Petitioners' Reply to the Government's "Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss," filed in *Al Odah v. United States*, 02-CV-0828 (CKK), on October 20, 2004, at 23-24. But however the record in *Kurnaz* is interpreted, it definitively establishes that the detainee was not provided with a fair opportunity to contest the material allegations against him.

The Court fully appreciates the strong governmental interest in not disclosing classified evidence to individuals believed to be terrorists intent on causing great harm to the United States. Indeed, this Court's protective order prohibits the disclosure of any classified information to any of the petitioners in these *habeas* cases. Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 344 F. Supp.2d 174 (D.D.C. 2004) at ¶ 30. To compensate for the resulting hardship to the petitioners and to ensure due process in the litigation of these cases, however, the protective order

requires the disclosure of all relevant classified information to the petitioners' counsel who have the appropriate security clearances. *Id.* at ¶¶ 17-34. Although counsel are not permitted to share any classified information with their clients, they at least have the opportunity to examine all evidence relied upon by the government in making an "enemy combatant" status determination and to investigate and ensure the accuracy, reliability and relevance of that evidence. Thus, the governmental and private interests have been fairly balanced in a manner satisfying constitutional due process requirements. In a similar fashion, the rules regulating the military commission proceedings for aliens—rules which the government so vigorously defended in *Hamdan v. Rumsfeld*—expressly provide that although classified evidence may be withheld from the defendant, it may not be withheld from defense counsel. Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. § 9.6(b)(3) ("A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof."). In contrast, the CSRT regulations do not properly balance the detainees' need for access to material evidence considered by the tribunal against the government's interest in protecting classified information.

The CSRT regulations do acknowledge to some extent the detainees' need for assistance during the tribunal process, but they fall far short of the procedural protections that would have existed had counsel been permitted to participate. The implementing regulations create the position of "Personal Representative" for the purpose of "assist[ing] the detainee in reviewing all relevant unclassified information, in preparing and presenting information, and in questioning witnesses at the CSRT." July 29, 2004 Implementing Regulations at Enclosure (1), ¶ C(3). But notwithstanding the fact that the

Personal Representative may review classified information considered by the tribunal, that person is neither a lawyer nor an advocate and thus cannot be considered an effective surrogate to compensate for a detainee's inability to personally review and contest classified evidence against him. *Id.* at Enclosure (3), ¶ D. Additionally, there is no confidential relationship between the detainee and the Personal Representative, and the Personal Representative is obligated to disclose to the tribunal any relevant inculpatory information he obtains from the detainee. *Id.* Consequently, there is inherent risk and little corresponding benefit should the detainee decide to use the services of the Personal Representative.

The lack of any significant advantage to working with the Personal Representative is illustrated by the record of Kurnaz. Despite the existence of * * * the Personal Representative made no request for further inquiry regarding * * * Kurnaz Factual Return, Enclosure (5). Clearly, the presence of counsel for the detainee, even one who could not disclose classified evidence to his client, would have ensured a fairer process in the matter by highlighting weaknesses in evidence considered by the tribunal and helping to ensure that erroneous decisions were not made regarding the detainee's "enemy combatant" status. The CSRT rules, however, prohibited that opportunity.

In sum, the CSRT's extensive reliance on classified information in its resolution of "enemy combatant" status, the detainees" inability to review that information, and the prohibition of assistance by counsel jointly deprive the detainees of sufficient notice of the factual bases for their detention and deny them a fair opportunity to challenge their incarceration. These grounds alone are sufficient to find a violation of due process rights and to require the denial of the respondents' motion to dismiss these cases.

2. Specific Defects That May Exist in Individual Cases: Reliance on Statements Possibly Obtained Through Torture or Other Coercion and a Vague and Overly Broad Definition of "Enemy Combatant"

Additional defects in the CSRT procedures support the denial of the respondents' motion to dismiss at least some of the petitions, though these grounds mayor may not exist in every case before the Court and though the respondents might ultimately prevail on these issues once the petitioners have been given an opportunity to litigate them fully in the *habeas* proceedings.

a. Reliance on Statements Possibly Obtained Through Torture or Other Coercion

The first of these specific grounds involves the CSRT's reliance on statements allegedly obtained through torture or otherwise alleged to have been provided by some detainees involuntarily. The Supreme Court has long held that due process prohibits the government's use of involuntary statements obtained through torture or other mistreatment. In the landmark case of *Jackson v. Denno*, 378 U.S. 368 (1964), the Court gave two rationales for this rule: first, "because of the probable unreliability of confessions that are obtained in a manner deemed coercive," and second "because of the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.'" 378 U.S. at 386 (*quoting Blackburn v. Alabama*, 361 U.S. 199 (1960)). *See also Lam v. Kelchner*, 304 F.3d 256, 264 (3rd Cir. 2002) ("The voluntariness standard is intended to ensure the reliability of incriminating statements and to deter improper police conduct."). Arguably, the second rationale may not be as relevant to these habeas cases as it is to criminal prosecutions in U.S. courts, given that the judiciary clearly does not have the supervisory powers over the U.S. military as it does over

prosecutors, who are officers of the court. *Cf. United States v. Toscanino*, 500 F.2d 267, 276 (2d Cir. 1974) (the supervisory power of the district courts "may legitimately be used to prevent [them] from themselves becoming 'accomplices in willful disobedience of law'") (*quoting McNabb v. United States*, 318 U.S. 332, 345 (1943)). At a minimum, however, due process requires a thorough inquiry into the accuracy and reliability of statements alleged to have been obtained through torture. *See Clanton v. Cooper*, 129 F.3d 1147, 1157-58 (10th Cir. 1997) ("[B]ecause the evidence is unreliable and its use offends the Constitution, a person may challenge the government's use against him or her of a coerced confession given by another person."); *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994) ("Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause.").

Interpreting the evidence in a light most favorable to the petitioners as the Court must when considering the respondents' motion to dismiss, it can be reasonably inferred that the CSRT did not sufficiently consider whether the evidence upon which the tribunal relied in making its "enemy combatant" determinations was coerced from the detainees. The allegations and factual return of Mamdouh Habib, a petitioner in *Habib v. Bush*, 02-CV-1130 (CKK) are illustrative in this regard. Mr. Habib has alleged that after his capture by allied forces in Pakistan, he was sent to Egypt for interrogation and was subjected to torture there, including routine beatings to the point of unconsciousness. Petitioner's Memorandum of Points and Authorities in Support of His Application for Injunctive Relief, filed with the Court Security Officer on November 23, 2004 and on the public record on January 5, 2005. Additionally, the petitioner contends that he was locked in a room that would gradually be filled with water to a level just below his chin as he stood for hours on the tips of his toes. *Id.* He further claims that he was suspended from a wall

with his feet resting on the side of a large electrified cylindrical drum, which forced him either to suffer pain from hanging from his arms or pain from electric shocks to his feet. *Id.* The petitioner asserts that as a result of this treatment, he made numerous "confessions" that can be proven false. *Id.* at n.3. According to the classified factual return for Mr. Habib, * * * and the CSRT found the allegations of torture serious enough to refer the matter on September 22, 2004 to the Criminal Investigation Task Force. *Id.*, Enclosure (1) at 3. * * * Examined in the light most favorable to the petitioner, this reliance cannot be viewed to have satisfied the requirements of due process.

Mr. Habib is not the only detainee before this Court to have alleged making confessions to interrogators as a result of torture. * * * Notwithstanding the inability of counsel for petitioners to take formal discovery beyond interviewing their clients at Guantanamo Bay, they have introduced evidence into the public record indicating that abuse of detainees occurred during interrogations not only in foreign countries but at Guantanamo Bay itself. One illustration of alleged mistreatment during interrogation by U.S. authorities is Exhibit D to the petitioners' Motion for Leave to Take Discovery and for Preservation Order, filed in several of these cases with the Court Security Officer on January 6, 2005 and filed on the public record on January 10, 2005. In that document, dated August 2, 2004, the author apparently affiliated with the Federal Bureau of Investigation but whose identity has been redacted, summarized his or her observations of interrogation activities at Guantanamo Bay as follows:

> On a couple of occassions [sic], I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defacated [sic] on themselves, and had been left there for 18-24 hours or more. On one occassion [sic], the air conditioning had been turned down so far and the temperature was so cold in the

> room, that the barefooted detainee was shaking with cold. When I asked the MP's what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occassion [sic], the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconcious [sic] on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occassion [sic], not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.

The identities of the detainees referenced in this document are unknown to the Court and therefore, it is not certain whether they are even petitioners in any of these cases and, if so, whether the results of the above-described interrogations were used against them in CSRT proceedings. Of course, the veracity of Exhibit D itself must be investigated before it can be definitively relied upon. Indeed, at this stage of the litigation it is premature to make any final determination as to whether any information acquired during interrogations of any petitioner in these cases and relied upon by the CSRT was in fact the result of torture or other mistreatment. What this Court needs to resolve at this juncture, however, is whether the petitioners have made sufficient allegations to allow their claims to survive the respondents' motion to dismiss. On that count, the Court concludes that the petitioners have done so.

b. Vague and Overly Broad Definition of "Enemy Combatant"

Although the government has been detaining individuals as "enemy combatants" since the issuance of the AUMF in

2001, it apparently did not formally define the term until the July 7, 2004 Order creating the CSRT. The lack of a formal definition seemed to have troubled at least the plurality of the Supreme Court in *Hamdi*, but for purposes of resolving the issues in that case, the plurality considered the government's definition to be an individual who was "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who engaged in an armed conflict against the United States there." 124 S. Ct. 2633, 2639 (*quoting* Brief for the Respondents) (emphasis added). The Court agreed with the government that the AUMF authorizes the Executive to detain individuals falling within that limited definition, *id.*, with the plurality explaining that "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here." *Id.* at 2641. The plurality cautioned, however, "that indefinite detention for the purpose of interrogation is not authorized" by the AUMF, and added that a congressional grant of authority to the President to use "necessary and appropriate force" might not be properly interpreted to include the authority to detain individuals for the duration of a particular conflict if that conflict does not take a form that is based on "longstanding law-of-war principles." *Id.*

The definition of "enemy combatant" contained in the Order creating the CSRT is significantly broader than the definition considered in *Hamdi*. According to the definition currently applied by the government, an "enemy combatant" "shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This *includes* any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." July 7, 2004 Order at 1 (emphasis

added). Use of the word "includes" indicates that the government interprets the AUMF to permit the indefinite detention of individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies. This Court explored the government's position on the matter by posing a series of hypothetical questions to counsel at the December 1, 2004 hearing on the motion to dismiss. In response to the hypotheticals, counsel for the respondents argued that the Executive has the authority to detain the following individuals until the conclusion of the war on terrorism: "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities," Transcript at 25, a person who teaches English to the son of an al Qaeda member, *id.* at 27, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source. *Id.* at 29.

The Court can unequivocally report that no factual return submitted by the government in this litigation reveals the detention of a Swiss philanthropist, an English teacher, or a journalist. The Court can also acknowledge the existence of specific factual returns containing evidence indicating that certain detainees fit the narrower definition of "enemy combatant" approved by the Supreme Court in *Hamdi*. The petitioners have argued in opposition to the respondents' motion to dismiss, however, that at least with respect to some detainees, the expansive definition of "enemy combatant" currently in use in the CSRT proceedings violates long standing principles of due process by permitting the detention of individuals based solely on their membership in anti-American organizations rather than on actual activities supporting the use of violence or harm against the United States. Al Odah Petitioners' Reply to the Government's "Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss" at 25-26 (*citing Scales v. United States*, 367 U.S. 203, 224-225 (1961); *Carlson v. Landon*, 342 U.S. 524, 541 (1952)).

Whether the detention of each individual petitioner is authorized by the AUMF and satisfies the mandates of due process must ultimately be determined on a detainee by detainee basis. At this stage of the litigation, however, sufficient allegations have been made by at least some of the petitioners and certain evidence exists in some CSRT factual returns to warrant the denial of the respondents'. motion to dismiss on the ground that the respondents have employed an overly broad definition of "enemy combatant." Examples of cases where this issue is readily apparent are *Kurnaz v. Bush*, 04-CV-1135 (ESH), and *El-Banna v. Bush*, 04-CV-1144 (RWR).

As already discussed above, the unclassified evidence upon which the CSRT relied in determining Murat Kurnaz's "enemy combatant" status consisted of findings that he was "associated" with an Islamic missionary group named Jama'at-Al-Tabliq, that he was an "associate" of and planned to travel to Pakistan with an individual who later engaged in a suicide bombing, and that he accepted free food, lodging, and schooling in Pakistan from an organization known to support terrorist acts. Kurnaz Factual Return, Enclosure (1) at 1. While these facts may be probative and could be used to bolster the credibility of other evidence, if any, establishing actual activities undertaken to harm American interests, by themselves they fall short of establishing that the detainee took any action or provided any direct support for terrorist actions against the U.S. or its allies. Nowhere does any unclassified evidence reveal that the detainee even had knowledge of his associate's planned suicide bombing, let alone establish that the detainee assisted in the bombing in any way. In fact, the detainee expressly denied knowledge of a bombing plan when he was informed of it by the American authorities. *Id.*, Enclosure (3) at 1. * * * Absent other evidence,[36] it would

[36] It is true that Exhibit R19 to the Kurnaz Factual Return does assert that * * * and the respondents urge this Court to uphold the detention of any petitioner, including Mr. Kurnaz, as long as "some evidence" exists to

appear that the government is indefinitely holding the detainee—possibly for life—solely because of his contacts with individuals or organizations tied to terrorism and not because of any terrorist activities that the detainee aided, abetted, or undertook himself. Such detention, even if found to be authorized by the AUMF, would be a violation of due process. Accordingly, the detainee is entitled to fully litigate the factual basis for his detention in these habeas proceedings and to have a fair opportunity to prove that he is being detained on improper grounds.

Similar defects might also exist with respect to the detention of Jamil El-Banna, a petitioner in *El-Banna v. Bush*, 04-CV-1144 (RWR). At the CSRT proceedings, the tribunal concluded that the detainee was an "enemy combatant" on the ground that he was "part of or supporting Al Qaida forces." Respondents' *In Camera* Factual Return to Petition for Writ of Habeas Corpus by Petitioner Jamil El-Banna (hereinafter "El-Banna Factual Return"), filed December 17, 2004, Enclosure (1) at 5. The CSRT reached this conclusion notwithstanding the Personal Representative's position that it was unsupported by the record before the tribunal. *See* October 16, 2004 Memorandum of James R. Crisfield Jr., attached to the El-Banna Factual Return. During the CSRT proceedings, the tribunal rejected two grounds cited by the Recorder in support of the detainee's "enemy combatant" status. First, although the detainee was alleged to have been indicted by a

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support a conclusion that he actively participated in terrorist activities. Motion to Dismiss at 47-51. *Hamdi*, however, holds that the "some evidence" standard cannot be applied where the detainee was not given an opportunity to challenge the evidence in an administrative proceeding, 124 S. Ct. at 2651, and Mr. Kurnaz was never provided access to Exhibit R19. Additionally, in resolving a motion to dismiss, the Court must accept as true the petitioner's allegations and must interpret the evidence in the record in the light most favorable to the nonmoving party. Because Exhibit R19 * * * the Court cannot at this stage of the litigation give the document the weight the CSRT afforded it.

Spanish National High Court Judge for membership in a terrorist organization, *id.*, Enclosure (3) at 2, the tribunal did not find any evidence relating to that indictment "helpful in establishing the detainee"s association with Al Qaida." *Id.*, Enclosure (1) at 4.* * * Second, although the detainee was alleged to have attempted "to board an airplane with equipment that resembled a homemade electronic device," *id.*, Enclosure (3) at 3,

* * *

Even accepting these factual conclusions as true, a serious legal question exists as to whether such activities would be sufficient to detain the petitioner at Guantanamo Bay indefinitely without formally charging him with a crime. *See Hamdi*, 124 S. Ct. at 2640 ("The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.") and at 2642 ("If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [that the AUMF allows indefinite detention] may unravel."). In any event, however, final resolution of that question must be left for another day because at this stage of the proceedings, the Court must interpret the facts in the light most favorable to the party opposing a motion to dismiss. Under that approach, evidence in the record can be fairly interpreted to conclude that the petitioner is being detained indefinitely not because

* * *

It may well turn out that after the detainee is given a fair opportunity to challenge his detention in a habeas proceeding the legality of his detention as an "enemy combatant" will be upheld and he will continue to be held at Guantanamo Bay until the end of the war on terrorism or until the government determines he no longer poses a threat to U.S. security. It is also possible, however, that once given a fair opportunity to

litigate his case, the detainee will establish that he is being indefinitely detained not because of anything he has done and not to prevent his return to any "battlefield," metaphorical or otherwise, but simply because * * * such detention is not permissible * * * and the respondents' motion to dismiss must therefore be denied.

This concludes the Court's analysis of the due process issues arising from the respondents' motion to dismiss. Nothing written above should be interpreted to require the immediate release of any detainee, nor should the conclusions reached be considered to have fully resolved whether or not sufficient evidence exists to support the continued detention of any petitioner. The respondents' motion to dismiss asserted that no evidence exists and that the petitioners could make no factual allegations which, if taken as true, would permit the litigation of these habeas cases to proceed further. For the reasons stated above, the Court has concluded otherwise. The Court, however, has not addressed all arguments made by the petitioners in opposition to the respondents' motion to dismiss, and it maybe that the CSRT procedures violate due process requirements for additional reasons not addressed in this Memorandum Opinion. In any event, and as *Hamdi* acknowledged, in the absence of military tribunal proceedings that comport with constitutional due process requirements, it is the obligation of the court receiving a habeas petition to provide the petitioner with a fair opportunity to challenge the government's factual basis for his detention. *Id.* at 2651-52. Accordingly, the accompanying Order requests input from counsel regarding how these cases should proceed in light of this Memorandum Opinion.

D. CLAIMS BASED ON THE GENEVA CONVENTIONS

The petitioners in all of the above captioned cases except *Al Odah v. United States*, 02CV-0828, have also asserted claims based on the Geneva Conventions, which regulate the

treatment of certain prisoners of war and civilians. The respondents contend that all Geneva Convention claims filed by the petitioners must be dismissed because Congress has not enacted any separate legislation specifically granting individuals the right to file private lawsuits based on the Conventions and because the Conventions are not "self-executing," meaning they do not by themselves create such a private right of action. Motion to Dismiss at 68-71. In the alternative, the respondents argue that even if the Geneva Conventions are self-executing, they do not apply to members of al Qaeda because that international terrorist organization is not a state party to the Conventions. *Id.* at 70 n.80. Finally, although respondents concede that Afghanistan is a state party to the Conventions and adroit that the Geneva Conventions apply to Taliban detainees, they emphasize that President Bush has determined that Taliban fighters are not entitled to prisoner of war status under the Third Geneva Convention and contend that this decision is the final word on the matter. *Id.*

The Constitution provides that "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Unless Congress enacts authorizing legislation, however, an individual may seek to enforce a treaty provision only if the treaty expressly or impliedly grants such a right. *See Head Money Cases*, 112 U.S. 580, 598-99 (1884). If a treaty does not create an express right of private enforcement, an implied right might be found by examining the treaty as a whole. *See Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976).

The Third and Fourth Geneva Conventions do not expressly grant private rights of action, and whether they impliedly create such rights has never been definitively resolved by the D.C. Circuit.[37] The Court of Appeals is currently re-

[37] The closest the Court of Appeals came to ruling on the issue was the case of *Tel-Oren v. Libyan Arab Republic*, 726 F.2d. 774 (D.C. Cir. 1984), a suit brought by victims of a brutal attack in Israel by the Palestin-

viewing the matter in the appeal of *Hamdan v. Rumsfeld*, 344 F. Supp.2d 152 (D.D.C. 2004), but until that court issues a definitive ruling,[38] this Court must make its own determination. After reviewing *Hamdan* and the briefs filed by petitioners and respondents in the instant cases, the Court concludes that the Conventions are self-executing and adopts the following reasoning provided by Judge Robertson:

> Because the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty.

Id. at 165.

Although the Court rejects the primary basis argued by the respondents for dismissal of claims based on the Geneva Conventions, it does accept one of the alternative grounds put

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ian Liberation Organization. The main issue on appeal was whether the District Court correctly ruled that there was no subject-matter jurisdiction to hear the case, and although the three judge panel ultimately affirmed the lower court's decision, each judge relied on a separate rationale and no judge joined any other judge's opinion. In reaching his own conclusion, Judge Robert Bork determined that the Third Geneva Convention was not self-executing. *Id.* at 808-09. The other two judges on the panel did not address the issue, however, and the matter remains unsettled as of this date.

[38] Oral argument on the respondents appeal in *Hamdan* is currently scheduled for March 8, 2005.

forth in their motion, namely that the Geneva Conventions do not apply to al Qaeda. Article 2 of the Third and Fourth Geneva Conventions provides, "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Clearly, al Qaeda is not a "High Contracting Party" to the Conventions, and thus individuals detained on the ground that they are members of that terrorist organization are not entitled to the protections of the treaties.

This does not end the analysis for purposes of resolving the respondents' motion to dismiss, however, because some of the petitioners in the above-captioned cases are being detained either solely because they were Taliban fighters or because they were associated with both the Taliban and al Qaeda. Significantly, the respondents concede that the Geneva Conventions apply to the Taliban detainees in light of the fact that Afghanistan is a High Contracting Party to the Conventions. Motion to Dismiss at 70-71 n.80 (*citing* White House Fact Sheet (Feb. 7, 2002), available at http://www.whitehouse.gov/news/releases/2002/02120020207-13.html). They argue in their motion to dismiss, however, that notwithstanding the application of the Third Geneva Convention to Taliban detainees, the treaty does not *protect* Taliban detainees because the President has declared that no Taliban fighter is a "prisoner of war" as defined by the Convention. *Id.* The respondents' argument in this regard must be rejected, however, for the Third Geneva Convention does not permit the determination of prisoner of war status in such a conclusory fashion.

Article 4 of the Third Geneva. Convention defines who is considered a "prisoner of war" under the treaty. Paragraph (1) provides that the term "prisoners of war" includes "[m]embers of the armed forces of a Party to the conflict, as

well as members of militias or volunteer corps forming part of such armed forces." As provided in Paragraph (2), the definition of "prisoners of war" also includes "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements," but only if they fulfill the following conditions: "(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war." If there is any doubt as to whether individuals satisfy the Article 4 prerequisites, Article 5 entitles them to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal." Army Regulation 190-8 created the rules for the "competent tribunal" referenced in Article 5 of the Third Geneva Convention, and the CSRT was established in accordance with that provision. *See* Army Regulation 190-8 § 1-1.b, Motion to Dismiss at 32.

Nothing in the Convention itself or in Army Regulation 190-8 authorizes the President of the United States to rule by fiat that an entire group of fighters covered by the Third Geneva Convention falls outside of the Article 4 definitions of "prisoners of war." To the contrary, and as Judge Robertson ruled in *Hamdan*, the President's broad characterization of how the Taliban generally fought the war in Afghanistan cannot substitute for an Article 5 tribunal's determination on an individualized basis of whether a particular fighter complied with the laws of war or otherwise falls within an exception denying him prisoner of war status. 344 F. Supp.2d at 161-62. Clearly, had an appropriate determination been properly made by an Article 5 tribunal that a petitioner was not a prisoner of war, that petitioner's claims based on the Third Geneva Convention could not survive the respondents' motion to dismiss. But although numerous petitioners in the above-captioned cases were found by the CSRT to have been Taliban fighters, nowhere do the CSRT records for many of

those petitioners reveal specific findings that they committed some particular act or failed to satisfy some defined prerequisite entitling the respondents to deprive them of prisoner of war status.[39] Accordingly, the Court denies that portion of the respondents' motion to dismiss addressing the Geneva Convention claims of those petitioners who were found to be Zaliban fighters but who were not specifically determined to be excluded from prisoner of war status by a competent Article 5 tribunal.

E. DISMISSAL OF REMAINING CLAIMS

Upon review of the remaining causes of action asserted by the various petitioners in these cases, the Court concludes that the respondents are entitled to dismissal of the claims not addressed in the preceding sections of this Memorandum Opinion. The Court agrees with the respondents that claims based on the Sixth, Eighth, and Fourteenth Amendments to the Constitution are not sustainable because the Sixth Amendment applies only to criminal proceedings, because the Eighth Amendment applies only after an individual is convicted of a crime, and because the Fourteenth Amendment applies only to the states and not to the federal government. In addition, any claims based on the Suspension Clause, U.S. Const. art. I, § 9, cl. 2, must be dismissed because the habeas jurisdiction of this court has not been suspended. Except as discussed in part II.D above regarding the Geneva Conventions, the Court agrees that the remaining treaty-based claims and the claim based on Army Regulation 190-8 asserted by the petitioners should be dismissed primarily for the reasons stated by the

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[39] *See, e.g.*, * * * This list provides only examples of petitioners for whom the CSRT did not make a full Article 5 type inquiry regarding prisoner of war status. There may be additional petitioners who fought for the Taliban and who were not given individualized determinations as to their prisoner of war status. Absence from this list should not be interpreted to imply that a petitioner can no longer assert his Geneva Convention claims in this habeas litigation.

respondents in their motion to dismiss. See Motion to Dismiss at 71-72. The Court also agrees with the reasoning of Judge Kollar-Kotelly in her original *Rasul* decision and with Judge Randolph's concurrence in the *Al Odah* appeal that the doctrine of sovereign immunity bars claims based on the Alien Tort Claims Act and that the general waiver of sovereign immunity contained in the Administrative Procedure Act is inapplicable because of the "military authority" exception in 5 U.S.C. § 701(b)(1)(G). *Al Odah*, 321 F.3d at 1149-50 (Randolph, J. concurring); *Rasul*, 215 F. Supp.2d at 64 n.11. Finally, having found that all detainees possess Fifth Amendment due process rights and that some detainees possibly possess rights under the Geneva Conventions, it is unnecessary to look to customary international law to resolve the petitioners' claims. *See The Paquete Habana*, 175 U.S. 677, 699 (1900) ("where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations").

III. CONCLUSION

For the reasons provided above, the Court holds that the petitioners have stated valid claims under the Fifth Amendment and that the CSRT procedures are unconstitutional for failing to comport with the requirements of due process. Additionally, the Court holds that Taliban fighters who have not been specifically determined to be excluded from prisoner of war status by a competent Article 5 tribunal have also stated valid claims under the Third Geneva Convention. Finally, the Court concludes that the remaining claims of the petitioners must be denied. Accordingly, this Memorandum Opinion is accompanied by a separate Order denying in part and granting in part the respondents' Motion to Dismiss or for Judgment as a Matter of Law.

This Judge began her participation as the coordinator of these cases on August 17, 2004, and her involvement will soon be ending. These cases have always remained before the

original Judges assigned to them and only particular issues or motions were referred to this Judge for resolution. Therefore, there will be no need to transfer the cases back to those Judges. In the interest of the effective management of this litigation, however, the accompanying Order requests briefing from counsel on an expedited basis regarding their views as to how these cases should proceed in light of this Memorandum Opinion and this Judge's imminent departure.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

January 31, 2005

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action Nos.
02-CV-0299 (CKK), 02-CV-0828 (CKK),
02-CV-1130 (CKK), 04-CV-1135 (ESH),
04-CV-1136 (JDB), 04-CV-1137 (RMC),
04-CV-1144 (RWR), 04-CV-1164 (RBW),
04-CV-1194 (HHK), 04-CV-1227 (RBW),
04-CV-1254 (HHK)

In re Guantanamo Detainee Cases

ORDER DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW AND REQUESTING BRIEFING ON THE FUTURE PROCEEDINGS IN THESE CASES

For reasons stated in the Memorandum Opinion issued this date, it is hereby

ORDERED that the respondents' Motion to Dismiss or for Judgment as a Matter of Law is denied in part and granted in part. It is

FURTHER ORDERED that counsel for the petitioners and for the respondents shall file on or before 12:00 noon, Thursday, February 3, 2005, submissions regarding how they believe these cases should proceed in light of the Memorandum Opinion and this Judge's imminent departure.

IT IS SO ORDERED.

January 31, 2005

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

APPENDIX E

CONSTITUTION OF THE UNITED STATES

ARTICLE I, SECTION 9, CLAUSE 2

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

United States Public Laws
107th Congress—First Session
Convening January, 2001
Authorization for Use of Military Force

Joint Resolution to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force".

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS. —Nothing in this resolution supercedes any requirement of the War Powers Resolution.

(Pub.L. 107-40, Sept. 18, 2001, 115 Stat. 224.)

APPENDIX G

United States Public Laws
109th Congress—First Session
Convening January 7, 2005
Detainee Treatment Act of 2005

SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

(a) SUBMITTAL OF PROCEDURES FOR STATUS REVIEW OF DETAINEES AT GUANTANAMO BAY, CUBA, AND IN AFGHANISTAN AND IRAQ.—

(1) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committee on Armed Services and the Committee on the Judiciary of the Senate and the Committee on Armed Services and the Committee on the Judiciary of the House of Representatives a report setting forth—

(A) the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay or to provide an annual review to determine the need to continue to detain an alien who is a detainee; and

(B) the procedures in operation in Afghanistan and Iraq for a determination of the status of aliens detained in the custody or under the physical control of the Department of Defense in those countries.

(2) DESIGNATED CIVILIAN OFFICIAL.—The procedures submitted to Congress pursuant to paragraph (1)(A) shall ensure that the official of the Department of Defense who is designated by the President or Secretary

of Defense to be the final review authority within the Department of Defense with respect to decisions of any such tribunal or board (referred to as the "Designated Civilian Official") shall be a civilian officer of the Department of Defense holding an office to which appointments are required by law to be made by the President, by and with the advice and consent of the Senate.

(3) CONSIDERATION OF NEW EVIDENCE.—The procedures submitted under paragraph (1)(A) shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee.

(b) CONSIDERATION OF STATEMENTS DERIVED WITH COERCION.—

(1) ASSESSMENT.—The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess—

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

(2) APPLICABILITY.—Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

(c) REPORT ON MODIFICATION OF PROCEDURES. —The Secretary of Defense shall submit to the committees specified in subsection (a)(1) a report on any modification of the procedures submitted under subsection

(a). Any such report shall be submitted not later than 60 days before the date on which such modification goes into effect.

(d) ANNUAL REPORT.—

(1) REPORT REQUIRED.—The Secretary of Defense shall submit to Congress an annual report on the annual review process for aliens in the custody of the Department of Defense outside the United States. Each such report shall be submitted in unclassified form, with a classified annex, if necessary. The report shall be submitted not later than December 31 each year.

(2) ELEMENTS OF REPORT.—Each such report shall include the following with respect to the year covered by the report:

(A) The number of detainees whose status was reviewed.

(B) The procedures used at each location.

(e) JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS.—

(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

"(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.".

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien—

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and proce-

dures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW.—Review under this paragraph—

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) LIMITATION ON APPEALS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien—

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

(4) RESPONDENT.—The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

(f) CONSTRUCTION.—Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.

(g) UNITED STATES DEFINED.—For purposes of this section, the term "United States", when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba.

(h) EFFECTIVE DATE.—

(1) IN GENERAL.—This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

(Pub.L. 109-148, Dec. 30, 2005, 119 Stat. 2740.)

APPENDIX H

United States Public Laws
109th Congress—Second Session
Convening January 7, 2005
Military Commissions Act of 2006

SEC. 3. MILITARY COMMISSIONS.

(a) MILITARY COMMISSIONS.—

(1) IN GENERAL.—Subtitle A of title 10, United States Code, is amended by inserting after chapter 47 the following new chapter:

"CHAPTER 47A—MILITARY COMMISSIONS

. . .

"§ 950j. Finality or proceedings, findings, and sentences

. . .

"(b) PROVISIONS OF CHAPTER SOLE BASIS FOR REVIEW OF MILITARY COMMISSION PROCEDURES AND ACTIONS.—Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

SEC. 7. HABEAS CORPUS MATTERS.

(a) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109-148 (119 Stat. 2742) and the subsection (e) added by added by section 1405(e)(1) of Public Law 109-163 (119 Stat. 3477) and inserting the following new subsection (e):

> "(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> "(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

(Pub.L. 109-366, Oct. 17, 2006, 120 Stat. 2600.)

APPENDIX I

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASINGTON, DC 20301-1010

[LOGO]

MEMORANDUM FOR THE SECRETARY OF THE NAVY

SUBJECT: Order Establishing Combatant Status Review Tribunal

This Order applies only to foreign nationals held as enemy combatants in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba ("detainees").

a. Enemy Combatant. For purposes of this Order, the term "enemy combatant" shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.

b. Notice. Within ten days after the date of this Order, all detainees shall be notified of the opportunity to contest designation as an enemy combatant in the proceeding described herein, of the opportunity to consult with and be assisted by a personal representative as described in paragraph (c), and of the right to seek a writ of habeas corpus in the courts of the United States.

c. Personal Representative. Each detainee shall be assigned a military officer, with the appropriate security clearance, as a personal representative for the purpose of assisting the detainee in connection with the review process described

herein. The personal representative shall be afforded the opportunity to review any reasonably available information in the possession of the Department of Defense that may be relevant to a determination of the detainee's designation as an enemy combatant, including any records, determinations, or reports *generated* in *connection* with earlier determinations or reviews, and to consult with the detainee concerning that designation and any challenge thereto. The personal representative may share any information with the detainee, except for classified information, and may participate in the Tribunal proceedings as provided in paragraph (g)(4).

d. Tribunals. Within 30 days after the detainee's personal representative has been afforded the opportunity to review the reasonably available information in the possession of the Department of Defense and had an opportunity to consult with the detainee, a Tribunal shall be convened to review the detainee's status as an enemy combatant.

e. Composition of Tribunal. A Tribunal shall be composed of three neutral commissioned officers of the U.S. Armed Forces, each of whom possesses the appropriate security clearance and none of whom was involved in the apprehension, detention, interrogation, or previous determination of status of the detainee. One of the members shall be a judge advocate. The senior member *(in* the grade of 0-5 and above) shall serve as President of the Tribunal. Another nonvoting officer, preferably a judge advocate, shall serve as the Recorder and shall not be a member of the Tribunal.

f. Convening Authority. The Convening Authority shall be designated by the Secretary of the Navy. The Convening Authority shall appoint each Tribunal and its members, and a personal representative for *each detainee.* The *Secretary of* the Navy, with the concurrence of the General Counsel of the Department of Defense, may issue instructions to implement this Order.

g. Procedures.

(1) The Recorder shall provide the detainee in advance of the proceedings with notice of the unclassified factual basis for the detainee's designation as an enemy combatant.

(2) Members of the Tribunal and the Recorder shall be sworn. The Recorder shall be sworn first by the President of the Tribunal. The Recorder will then administer an oath, to faithfully and impartially perform their duties, to all members of the Tribunal to include the President.

(3) The record in each case shall consist of all the documentary evidence presented to the Tribunal, the Recorder's summary of all witness testimony, a written report of the Tribunal's decision, and a recording of the proceedings (except proceedings involving deliberation and voting by the members), which shall be preserved.

(4) The detainee shall be allowed to attend all proceedings, except for proceedings involving deliberation and voting by the members or testimony and other matters that would compromise national security if held in the presence of the detainee. The detainee's personal representative shall be allowed to attend all proceedings, except for proceedings invoking deliberation and voting by the members of the Tribunal.

(5) The detainee shall be provided with an interpreter, if necessary.

(6) The detainee shall be advised at the beginning of the hearing of the nature of the proceedings and of the procedures accorded him in connection with the hearing.

(7) The Tribunal, through its Recorder, shall have access to and consider any reasonably available information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any reasonably

available records, determinations, or reports generated in connection therewith.

(8) The detainee shall be allowed to call witnesses if reasonably, and to question those witnesses called by the Tribunal. The Tribunal shall determine the reasonable availability of witnesses. If such witnesses are from within the U.S. Armed Forces they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. *In* the case of witnesses who are not reasonably available, written statements, preferably sworn, may be submitted and considered as evidence.

(9) The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances. The Tribunal does not have the authority to declassify or change the classification of any national security information it reviews.

(10) The detainee shall have a right to testify or otherwise address the Tribunal in oral or written form, and to introduce relevant documentary evidence.

(11) The detainee may not be compelled to testify before the Tribunal.

(12) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine in closed session by majority vote whether the detainee is properly detained as an enemy combatant. Preponderance of evidence shall be the standard used in reaching this determination, but there shall be a rebuttable presumption in favor of the Government's evidence.

(13) The President of the Tribunal shall, without regard to any other provision of this Order, have authority and the duty to ensure that all proceedings of or in relation to the Tribunal under this Order shall comply with Executive Order 12958 regarding national security information.

h. The Record. The Recorder shall, to the maximum extent practicable, prepare the record of the Tribunal within three working days of the announcement of the Tribunal's decision. The record shall include those items described in paragraph (g)(3) above. The record will then be forwarded to the Staff Judge Advocate for the Convening Authority, who shall review the record for legal sufficiency and make a recommendation to the Convening Authority. The Convening Authority shall review the Tribunal's decision and, in accordance with this Order *and* any implementing instructions issued by the Secretary of the Navy, may return the record to the Tribunal for further proceedings or approve the decision and take appropriate action.

i. Non-Enemy Combatant Determination. If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, the written report of its decision shall he forwarded directly to the Secretary of Defense or his designee. The Secretary or his designee shall so advise the Secretary of State, in order to permit the Secretary of State to coordinate the transfer of the detainee for release to the detainee's country of citizenship or other disposition consistent with domestic and international obligations and the foreign policy of the United States.

j. This Order is intended solely to improve management within the Department of Defense concerning its detention of enemy combatants at Guantanamo Bay Naval Base. Cuba, and is not intended to,. and does not, create any ri[8]ht or benefit, substantive or procedural, enforceable at law, in equity, or otherwise by any party against the United States, as

departments, agencies, instrumentalities or entities, its officers employees or agents, or any other person.

k. Nothing in this Order shall be construed to limit, impair, or otherwise affect the constitutional authority of the President as Commander in Chief or any authority granted by statute to the President or the Secretary of Defense.

This Order is effective immediately.

/s/ Paul [Illegible]

APPENDIX J

THE SECRETARY OF THE NAVY
WASHINGTON, D.C. 20350-1000

[LOGO] 29 July 2004

MEMORANDUM FOR DISTRIBUTION

Subj: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba

Ref: (a) Deputy Secretary of Defense Order of July 7, 2004
(b) Convening Authority Appointment Letter of July 9, 2004

Encl: (1) Combatant Status Review Tribunal Process
(2) Recorder Qualifications, Roles and Responsibilities
(3) Personal Representative Qualifications, Roles and Responsibilities
(4) Combatant Status Review Tribunal Notice to Detainees
(5) Sample Detainee Election Form
(6) Sample Nomination Questionnaire
(7) Sample Appointment Letter for Combatant Status Review Tribunal Panel
(8) Combatant Status Review Tribunal Hearing Guide
(9) Combatant Status Review Tribunal Decision Report Cover Sheet

1. Introduction

By reference (a), the Secretary of Defense has established a Combatant Status Review Tribunal (CSRT) process to determine, in a fact-based proceeding, whether the individuals detained by the Department of Defense at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation. The Secretary of the Navy has been appointed to operate and oversee this process.

The Combatant Status Review Tribunal process provides a detainee: the assistance of a Personal Representative; an interpreter if necessary; an opportunity to review unclassified info oration relating to the basis for his detention; the opportunity to appear personally to present reasonably available information relevant to why he should not be classified as an enemy combatant; the opportunity to question witnesses testifying at the Tribunal; and, to the extent they are

Subj: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba reasonably available, the opportunity to call witnesses on his behalf.

2. Authority

The Combatant Status Review Tribunal process was established by Deputy Secretary of Defense Order dated July 7, 2004 (reference (a)), which designated the undersigned to operate and oversee the Combatant Status Review Tribunal process. The Tribunals will be governed by the provisions of reference (a) and this implementing directive, which sets out procedures for Tribunals and establishes the position of Director, Combatant Status Review Tribunals. Reference (b) designates the Director, CSRT, as the convening authority for the Tribunal process.

3. Implementing Process

The Combatant Status Review Tribunal Process is set forth in enclosure (1). Enclosures (2) and (3) set forth detailed descriptions of the roles and responsibilities of the Recorder and Personal Representative respectively. Enclosure (4) is a Notice to detainees regarding the CSRT process. Enclosure (5) is a Sample Detainee Election Form. Enclosure (6) is a Sample Nominee Questionnaire for approval of Tribunal members, Recorders, and Personal Representatives. Enclosure (7) is an Appointment Letter that will be signed by the Director of CSRT as the convening authority. Enclosure (8) is

a CSRT Hearing Guide. Tribunal decisions will be reported to the convening authority by means of enclosure (9). This implementing directive is subject to revision at any time.

/s/ [Illegible]

CC:
Secretary of State
Secretary of Defense
Attorney General
Secretary of Homeland Security
Director, Central Intelligence. Agency
Assistant to the President for National Security Affairs
Counsel to the President
Deputy Secretary of Defense
Secretary of the Army
Secretary of the Navy
Secretary of the Air Force
Chairman of the Joint Chiefs of Staff
Director, Federal Bureau of Investigation
Director of Defense Agencies
Director, DOD Office of Detainee Affairs

Combatant Status Review Tribunal Process

A. Organization

Combatant Status Review Tribunals (CSRT) will be administered by the Director, Combatant Status Review Tribunals. The Director will staff and structure the Tribunal organization to facilitate its operation. The CSRT staff will schedule Tribunal proceedings, provide for interpreter services, provide legal advice to the Director and to Tribunal panels, provide clerical assistance and other administrative support, ensure information security, and coordinate with other agencies as appropriate.

B. Purpose and Function

This process will provide a non-adversarial proceeding to determine whether each detainee in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba, meets the criteria to be designated as an enemy combatant, defined in reference (a) as follows:

> An "enemy combatant" for purposes of this order shall mean an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Each detainee whose status will be reviewed by a Tribunal has previously been determined, since capture, to be an enemy combatant through multiple levels of review by military officers and officials of the Department of Defense.

The Director, CSRT, shall convene Tribunals pursuant to this implementing directive to conduct such proceedings as necessary to make a written assessment as to each detainee's status as an enemy combatant. Each Tribunal shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant.

Adoption of the procedures outlined in this directive is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

C. Combatant Status Review Tribunal Structure

(1) Each Tribunal shall be composed of a panel of three neutral commissioned officers of the U.S. Armed

Forces convened to make determinations of enemy combatant status pursuant to this implementing directive. Each of the officers shall possess the appropriate security clearance and none of the officers appointed shall have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The senior member of each Tribunal shall be an officer serving in the grade of 0-6 and shall be its President. The other members of the Tribunal shall be officers in the grade of 0-4 and above. One of the officers appointed to the Tribunal shall be a judge advocate. All Tribunal members have an equal vote as to a detainee's enemy combatant status.

(2) Recorder. Each Tribunal shall have a commissioned officer serving in the grade of O3 or above, preferably a judge advocate, appointed by the Director, CSRT, to obtain and present all relevant evidence to the Tribunal and to cause a record to be made of the proceedings. The Recorder shall have an appropriate security clearance and shall have no vote. The Recorder shall not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The role and responsibilities of the Recorder are set forth in enclosure (2).

(3) Personal Representative. Each Tribunal shall have a commissioned officer appointed by the Director, CSRT, to assist the detainee in reviewing all relevant unclassified information, in preparing and presenting information, and in questioning witnesses at the CSRT. The Personal Representative shall be an officer in the grade of 0-4 or above, shall have the appropriate security clearance, shall not be a judge advocate, and shall have no vote. The Personal Representative shall

not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The role and responsibilities of the Personal Representative are set forth in enclosure (3).

(4) Legal Advisor. The Director, CSRT, shall appoint a judge advocate officer as the Legal Advisor to the Tribunal process. The Legal Advisor shall be available in person, telephonically, or by other means, to each Tribunal as an advisor on legal, evidentiary, procedural or other matters. In addition, the Legal Advisor shall be responsible for reviewing each Tribunal decision for legal sufficiency. The Legal Advisor shall have an appropriate security clearance and shall have no vote. The Legal Advisor shall also not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process.

(5) Interpreter. If needed, each Tribunal will have an interpreter appointed by the President of the Tribunal who shall be competent in English and a language understood by the detainee. The interpreter shall have no vote and will have an appropriate security clearance.

D. Handling of Classified Material

(1) All parties shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Tribunal, Recorder and Personal Representative shall coordinate with an Information Security Officer in the handling and safeguarding of classified material before, during and after the Tribunal proceeding.

(2) The Director, CSRT, and the Tribunal President have the authority and duty to ensure that all proceedings of, or in relation to, a Tribunal under this Order shall

comply with Executive Order 12958 regarding national security information in all respects. Classified information may be used in the CSRT process with the concurrence of the originating agency. Classified information for which the originating agency declines to authorize for use in the CSRT process is not reasonably available. For any information not reasonably available, a substitute or certification will be requested from the originating agency as cited in paragraph E (3)(a) below.

(3) The Director, CSRT, the CSRT staff, and the participants in the CSRT process do not have the authority to declassify or change the classification of any classified information.

E. Combatant Status Review Tribunal Authority

The Tribunal is authorized to:

(1) Determine the mental and physical capacity of the detainee to participate in the hearing. This determination is intended to be the perception of a layperson, not a medical or mental health professional. The Tribunal may direct a medical or mental health evaluation of a detainee, if deemed appropriate. If a detainee is deemed physically or mentally unable to participate in the CSRT process, that detainee's case will be held as a Tribunal in which the detainee elected not to participate. The Tribunal President shall ensure that the circumstances of the detainee's absence are noted in the record.

(2) Order U.S. military witnesses to appear and to request the appearance of civilian witnesses it in the judgment of the Tribunal President those witnesses are reasonably available as defined in paragraph G (9) of this enclosure.

(3) Request the production of such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings (cumulatively called hereinafter the "Government Information").

(a) For any relevant information not provided in response to a Tribunal's request, the agency holding the information shall provide either an acceptable substitute for the information requested or a certification to the Tribunal that none of the withheld information would support a determination that the detainee is not an enemy combatant. Acceptable substitutes may include an unclassified or, if not possible, a lesser classified, summary of the information; or a statement as to the relevant facts the information would tend to prove.

(4) Require each witness (other than the detainee) to testify under oath. The detainee has the option of testifying under oath or unworn. Forms of the oath for Muslim and non-Muslim witnesses are in the Tribunal Hearing Guide (enclosure (8)). The Tribunal Recorder will administer the oath.

F. The Detainee's Participation in the CSRT Process

(1) The detainee may elect to participate in a Combatant Status Review Tribunal or may waive participation in the process. Such waiver shall be submitted to the Tribunal in writing by the detainee's Personal Representative and must be made after the Personal Repre-

sentative has explained the Tribunal process and the opportunity of the detainee to contest this enemy combatant status. The waiver can be either an affirmative statement that the detainee declines to participate or can be inferred by the Personal Representative from the detainee's silence or actions when the Personal Representative explains the CSRT process to the detainee. The detainee's election shall be noted by the Personal Representative on enclosure (5).

(2) If a detainee waives participation in the Tribunal process, the Tribunal shall still review the detainee's status without requiring the presence of the detainee.

(3) A detainee who desires to participate in the Tribunal process shall be allowed to attend all Tribunal proceedings except for proceedings involving deliberation and voting by the members and testimony or other matters that would compromise national security if held in the presence of the detainee.

(4) The detainee may not be compelled to testify or answer questions before the Tribunal other than to confirm his identity.

(5) The detainee shall not be represented by legal counsel but will be aided by a Personal Representative who may, upon the detainee's election, assist the detainee at the Tribunal. He shall be provided with an interpreter during the Tribunal hearing if necessary.

(6) The detainee may present evidence to the Tribunal, including the testimony of witnesses who are reasonably available and whose testimony is considered by the Tribunal to be relevant. Evidence on the detainee's behalf (other than his own testimony, if offered) may be presented in documentary form and through written statements, preferably sworn.

(7) The detainee may present oral testimony to the Tribunal and may elect to do so under oath or affirmation or as unsworn testimony. If the detainee testifies, either under oath or unsworn, he may be questioned by the Recorder, Personal Representative, or Tribunal members, but may not be compelled to answer questions before the Tribunal.

(8) The detainee's Personal Representative shall be afforded the opportunity to review the Government Information, and to consult with the detainee concerning his status as an enemy combatant and any challenge thereto. The Personal Representative may share the unclassified portion of the Government Information with the detainee.

(9) The detainee shall be advised of the foregoing by his Personal Representative before the Tribunal is convened, and by the Tribunal President at the beginning of the hearing.

G. Tribunal Procedures

(1) By July 17, 2004, the convening authority was required to notify each detainee of the opportunity to contest his status as an enemy combatant in the Combatant Status Review Tribunal process, the opportunity to consult with and be assisted by a Personal Representative, and of the jurisdiction of the courts of the United States to entertain a habeas corpus petition filed on the detainee's behalf. The English language version of this Notice to Detainees is at enclosure (4). All detainees were so notified July 12-14, 2004.

(2) An officer appointed as a Personal Representative will meet with the detainee and, through an interpreter if necessary, explain the nature of the CSRT process to the detainee, explain his opportunity to personally appear before the Tribunal and present evidence, and

assist the detainee in collecting relevant and reasonably available information and in preparing for and presenting information to the CSRT.

(3) The Personal Representative will have the detainee make an election as to whether he wants to participate in the Tribunal process. Enclosure (5) is a Detainee Election Form. If the detainee elects not to participate, or by his silence or actions indicates that he does not want to participate, the Personal Representative will note this on the election form and this detainee will not be required to appear at his Tribunal hearing. The Director, CSRT, as convening authority, shall appoint a Tribunal as described in paragraph C (1) of this enclosure for all detainees after reviewing Nomination Questionnaires (enclosure (6)) and approving Tribunal panel members. Enclosure (7) is a sample Appointment Letter.

(4) The Director, CSRT, will schedule a Tribunal hearing for a detainee within 30 days after the detainee's Personal Representative has reviewed the Government Information, had an opportunity to consult with the detainee, and notified the detainee of his opportunity to contest his status, even if the detainee declines to participate as set forth above. The Personal Representative will submit a completed Detainee Election Form to the Director, CSRT, or his designee when the Personal Representative has completed the actions above. The 30-day period to schedule a Tribunal will commence upon receipt of this form.

(5) Once the Director, CSRT, has scheduled a Tribunal, the President of the assigned Tribunal panel may postpone the Tribunal for good cause shown to provide the detainee or his Personal Representative a reasonable time to acquire evidence deemed relevant and neces-

sary to the Tribunal's decision, or to accommodate military exigencies as presented by the Recorder.

(6) All Tribunal sessions except those relating to deliberation or voting shall be recorded on audiotape. Tribunal sessions where classified information is discussed shall be recorded on separate and properly marked audiotapes.

(7) Admissibility of Evidence. The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issues before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances.

(8) Control of Case. The President of the Tribunal is authorized to order the removal of any person from the hearing if that person is disruptive, uncooperative, or otherwise interferes with the Tribunal proceedings following a warning. In the case of the removal of the detainee from the Tribunal hearing, the detainee's Personal Representative shall continue in his role of assisting the detainee in the hearing.

(9) Availability of Witnesses. The President of the Tribunal is the decision authority on reasonable availability of witnesses.

(a) If such witnesses are from within the U.S. Armed Forces, they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would adversely affect combat or support operations.

(b) If such witnesses are not from within the U.S. Armed Forces, they shall not be considered reason-

ably available if they decline properly made requests to appear at a hearing, if they cannot be contacted following reasonable efforts by the CSRT stag or if security considerations preclude their presence at a hearing. Non-U.S. Government witnesses will appear before the Tribunal at their own expense. Payment of expenses for U.S. Government witnesses will be coordinated by the CSRT staff and the witness's organization.

(c) For any witnesses who do not appear at the hearing, the President of the Tribunal may allow introduction of evidence by other means such as e-mail, fax copies, and telephonic or video-telephonic testimony. Since either video-telephonic or telephonic testimony is equivalent to in-person testimony, the witness shall be placed under oath and is subject to questioning by the Tribunal.

(10) CSRT Determinations on Availability of Evidence. If the detainee requests witnesses or evidence deemed not reasonably available, the President of the Tribunal shall document the basis for that decision; to include, for witnesses, efforts undertaken to procure the presence of the witness and alternatives considered or used in place of that witness's in-person testimony.

(11) Burden of Proof. Tribunals shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant. There is a rebuttable presumption that the Government Evidence, as defined in paragraph H (4) herein, submitted by the Recorder to support a determination that the detainee is an enemy combatant, is genuine and accurate.

(12) Voting. The decisions of the Tribunal shall be determined by a majority of the voting members of the

Tribunal. A dissenting member shall prepare a brief summary of the basis for his/her opinion, which shall be attached to the record forwarded for legal review. Only the Tribunal members shall be present during deliberation and voting.

H. Conduct Of Hearing

A CSRT Hearing Guide is attached at enclosure (8) and provides guidance on the conduct of the Tribunal hearing. The Tribunal's hearing shall be substantially as follows:

(1) The President shall call the Tribunal to order, and announce the order appointing the Tribunal (see enclosure (7)). The President shall also ensure that all participants are properly sworn to faithfully perform their duties.

(2) The Recorder shall cause a record to be made of the time, date, and place of the hearing, and the identity and qualifications of all participants. All proceedings shall be recorded on audiotape except those portions relating to deliberations and voting. Tribunal sessions where classified information is discussed shall be recorded on separate and properly marked audiotapes.

(3) The President shall advise the detainee of the purpose of the hearing, the detainee's opportunity to present evidence, and of the consequences of the Tribunal's decision. In cases requiring an interpreter, the President shall ensure the detainee understands these matters through the interpreter.

(4) The Recorder shall present to the Tribunal such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces (the evidence so presented shall constitute the "Government Evidence"). In the event the Government

Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also separately provide such evidence to the Tribunal.

(5) The Recorder shall present to the Tribunal an unclassified report summarizing the Government Evidence and any evidence to suggest that the detainee should not be designated as an enemy combatant. This report shall have been provided to the detainee's Personal Representative in advance of the Tribunal hearing.

(6) The Recorder shall call the witnesses, if any. Witnesses shall be excluded from the hearing except while testifying. An oath or affirmation shall be administered to each witness by the Recorder. When deemed necessary or appropriate, the Tribunal members can call witnesses who are reasonably available to testify or request the production of reasonably available documentary or other evidence.

(7) The detainee shall be permitted to present evidence and question any witnesses. The Personal Representative shall assist the detainee in obtaining unclassified documents and in arranging the presence of witnesses reasonably available and, if the detainee elects, the Personal Representative shall assist the detainee in the presentation of information to the Tribunal. The Personal Representative may, outside the presence of the detainee, present or comment upon classified information that bears upon the detainee's status if it would aid the Tribunal's deliberations.

(8) When deemed necessary and appropriate by any member of the Tribunal, the Tribunal may recess the Tribunal hearing to consult with the Legal Advisor as to any issues relating to evidence, procedure, or other matters. The President of the Tribunal shall summarize

on the record the discussion with the Legal Advisor when the Tribunal reconvenes.

(9) The Tribunal shall deliberate in closed session with only voting members present. The Tribunal shall make its determination of status by a majority vote. The President shall direct a Tribunal member to document the Tribunal's decision on the Combatant Status Review Tribunal Decision Report cover sheet (enclosure (9)), which will serve as the basis for the Recorder's preparation of the Tribunal record. The unclassified reasons for the Tribunal's decision shall be noted on the Tribunal Decision Report cover sheet, and should include, as appropriate, the detainee's organizational membership or affiliation with a governmental, military, or terrorist organization (e.g., Taliban, al Qaida, etc.). A dissenting member shall prepare a brief summary of the basis for his/her opinion.

(10) Both documents shall be provided to the Recorder as soon as practicable after the Tribunal concludes.

I. Post-Hearing Procedures

(1) The Recorder shall prepare the record of the hearing and ensure that the audiotape is preserved and properly classified in conformance with security regulations.

(2) The detainee's Personal Representative shall be provided the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

(3) The Recorder shall provide the completed record to the President of the Tribunal for signature and forwarding for legal review.

(4) In all cases the following items will be attached to the decision which, when complete and signed by the Tribunal President, shall constitute the record:

(a) A statement of the time and place of the hearing, persons present, and their qualifications;

(b) The Tribunal Decision Report cover sheet;

(c) The classified and unclassified reports detailing the fmdings of fact upon which the Tribunal decision was based;

(d) Copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony. If classified material is part of the evidence submitted or considered by the Tribunal, the report will be properly marked and handled in accordance with all applicable security regulations; and

(e) A dissenting member's summary report, if any.

(5) The President of the Tribunal shall forward the Tribunal's decision and all supporting documents as set forth above to the Director, CSRT, acting as Convening Authority, via the CSRT Legal Advisor, within three working days of the date of the Tribunal decision. If additional time is needed, the President of the Tribunal shall request an extension from the Director, CSRT.

(6) The Recorder shall ensure that all audiotapes of the Tribunal hearing are properly marked with identifying information and classification markings, and stored in accordance with all applicable security regulations. These tapes may be reviewed and transcribed as necessary for the legal sufficiency and Convening Authority reviews.

(7) The CSRT Legal Advisor shall conduct a legal sufficiency review of all cases. The Legal Advisor shall render an opinion on the legal sufficiency of the Tri-

bunal proceedings and forward the record with a recommendation to the Director, CSRT. The legal review shall specifically address Tribunal decisions regarding reasonable availability of witnesses and other evidence.

(8) The Director, CSRT, shall review the Tribunal's decision and may approve the decision and take appropriate action, or return the record to the Tribunal for further proceedings. In cases where the Tribunal decision is approved and the case is considered final, the Director, CSRT, shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies.

(9) If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, and the Director, CSRT, approves the Tribunal's decision, the Director, CSRT, shall forward the written report of the Tribunal's decision directly to the Secretary of the Navy. The Secretary of the Navy shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies, in order to permit the Secretary of State to coordinate the transfer of the detainee with representatives of the detainee's country of nationality for release or other disposition consistent with applicable laws. In these cases the Director, CSRT, will ensure coordination with the Joint Staff with respect to detainee transportation issues.

(10) The detainee shall be notified of the Tribunal decision by the Director, CSRT. If the detainee has been determined to no longer be designated as an enemy combatant, he shall be notified of the Tribunal decision upon finalization of transportation arrangements or at such earlier time as deemed appropriate by the Commander, JTF-GTMO.

Recorder Qualifications, Roles and Responsibilities

A. Qualifications of the Recorder

(1) For each case, the Director, CSRT, shall select a commissioned officer in the grade of 0-3 or higher, preferably a judge advocate, to serve as a Recorder.

(2) Recorders must have at least a TOP SECRET security clearance. The Director shall ensure that only properly cleared officers are assigned as Recorders.

B. Roles of the Recorder

(1) Subject to section C (l), below, the Recorder has a duty to present to the CSRT such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces (the "Government Evidence"). In the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also provide such evidence to the Tribunal.

(2) The Recorder shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Recorder shall coordinate with an Information Security Officer (ISO) in the handling and safeguarding of classified material before, during, and following the Tribunal process.

C. Responsibilities of the Recorder

(1) For each assigned detainee case under review, the Recorder shall obtain and examine the Government Information as defined in paragraph E (3) of enclosure (1).

(2) The Recorder shall draft a proposed unclassified summary of the relevant evidence derived from the Government Information.

(3) The Recorder shall ensure appropriate coordination with original classification authorities for any classified information presented that was used in the preparation of the proposed unclassified summary.

(4) The Recorder shall permit the assigned Personal Representative access to the Government Information and will provide the unclassified summary to the Personal Representative in advance of the Tribunal hearing.

(5) The Recorder shall ensure that coordination is maintained with Joint Task Force-Guantanamo Bay and the Criminal Investigative Task Force to deconflict any other ongoing activities and arrange for detainee movements and security.

(6) The Recorder shall present the Government Evidence orally or in documentary form to the Tribunal. The Recorder shall also answer questions, if any, asked by the Tribunal.

(7) The Recorder shall administer an appropriate oath to the Tribunal members, the Personal Representative, the paralegal/reporter, the interpreter, and all witnesses (including the detainee if he elects to testify under oath).

(8) The Recorder shall prepare a Record of Proceedings, and, if applicable, a record of the dissenting member's report. The Record of Proceedings should include:

(a) A statement of the time and place of the hearing, persons present, and their qualifications;

(b) The Tribunal Decision Report cover sheet;

(c) The classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based;

(d) Copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony. If classified material is part of the evidence submitted or considered by the Tribunal, the report will be properly marked and handled in accordance with applicable security regulations; and

(e) A dissenting member's summary report, if any.

(9) The Recorder shall provide the detainee's Personal Representative the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

(10) The Recorder shall submit the completed Record of Proceedings to the President of the Tribunal who shall sign and forward it to the Director, CSRT via the CSRT Legal Advisor. Once signed by the Tribunal President, the completed record is considered the official record of the Tribunal's decision.

(11) The Recorder shall ensure that all audiotapes of the Tribunal hearing are properly marked with identifying information and classification markings, and stored in accordance with applicable security regulations. These tapes are considered part of the case record and may be reviewed and transcribed as necessary for the legal sufficiency and convening authority reviews.

Personal Representative Qualifications, Roles and Responsibilities

A. Qualifications of Personal Representative

(1) For each case, the Director, CSRT, shall select a commissioned officer serving in the grade of 0-4 or higher to serve as a Personal Representative. The Personal Representative shall not be a judge advocate.

(2) Personal Representatives must have at least a TOP SECRET security clearance. The Director shall ensure that only properly cleared officers are assigned as Personal Representatives.

B. Roles of the Personal Representative

(1) The detainees were notified of the Tribunal process per reference (a). When detailed to a detainee's case the Personal Representative shall further explain the nature of the CSRT process to the detainee, explain his opportunity to present evidence and assist the detainee in collecting relevant and reasonably available information and in preparing and presenting information to the Tribunal.

(2) The Personal Representative shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Personal Representative shall coordinate with an Information Security Officer (ISO) in the handling and safeguarding of classified material before, during, and after the Tribunal process.

C. Responsibilities of the Personal Representative

(1) The Personal Representative is responsible for explaining the nature of the CSRT process to the detainee. Upon first contact with the detainee, the Personal Representative shall explain to the detainee that no confidential relationship exists or may be formed

between the detainee and the Personal Representative. The Personal Representative shall explain the detainee's opportunity to make a personal appearance before the Tribunal. The Personal Representative shall request an interpreter, if needed, to aid the detainee in making such appearance and in preparing his presentation. The Personal Representative shall explain to the detainee that he may be subject to questioning by the Tribunal members, but he cannot be compelled to make any statement or answer any questions. Paragraph D, below, provides guidelines for the Personal Representative meeting with the enemy combatant prior to his appearance before the Tribunal.

(2) After the Personal Representative has reviewed the Government Information, had an opportunity to consult with the detainee, and notified the detainee of his opportunity to contest his status, even if the detainee declines to participate as set forth above, the Personal Representative shall complete a Detainee Election Form (enclosure (5)) and provide this form to the Director, CSRT.

(3) The Personal Representative shall review the Government Evidence that the Recorder plans to present to the CSRT and shall permit the Recorder to review documentary evidence that will be presented to the CSRT on the detainee's behalf.

(4) Using the guidelines set forth in paragraph D, the Personal Representative shall meet with the detainee, using an interpreter if necessary, in advance of the CSRT. In no circumstance shall the Personal Representative disclose classified information to the detainee.

(5) If the detainee elects to participate in the Tribunal process, the Personal Representative shall present information to the Tribunal if the detainee so requests.

The Personal Representative may, outside the presence of the detainee, comment upon classified information submitted by the Recorder that bears upon the presentation made on the detainee's behalf, if it would aid the Tribunal's deliberations.

(6) If the detainee elects not to participate in the Tribunal process, the Personal Representative shall assist the detainee by presenting information to the Tribunal in either open or closed sessions and may, in closed sessions, comment upon classified information submitted by the Recorder that bears upon the detainee's presentation, if it would aid the Tribunal's deliberations.

(7) The Personal Representative shall answer questions, if any, asked by the Tribunal.

(8) The Personal Representative shall be provided the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

D. Personal Representative Guidelines for Assisting the Enemy Combatant

In discussing the CSRT process with the detainee and completing the Detainee Election Form, the Personal Representative shall use the guidelines provided below to assist the detainee in preparing for the CSRT:

You have already been advised that a Combatant Status Review Tribunal has been established by the United States government to review your classification as an enemy combatant.

A Tribunal of military officers shall review your case in "x" number of days [or other time frame as known], and I have been assigned to ensure you understand this process. The Tribunal shall review your case file, offer you an opportunity to speak on your own behalf if you desire, and ask questions. You also can choose not to appear at the Tribunal hearing. In that case I will be at the hearing and will assist you if you want me to do so.

You will be provided with an opportunity to review unclassified information that relates to your classification as an enemy combatant. I will be able to review additional information that is classified. I can discuss the unclassified information with you.

You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence and I will attend.

You will have the opportunity to question witnesses testifying at the Tribunal.

You will have the opportunity to present evidence to the Tribunal, including calling witnesses to testify on your behalf if those witnesses are reasonably available. If a witness is not considered by the Tribunal as reasonably available to testify in person, the Tribunal can consider evidence submitted by telephone, written statements, or other means rather than having a witness testify in person. I am available to assist you in gathering and presenting these materials, should you desire to do so. After the hearing, the Tribunal shall determine whether you should continue to be designated as an enemy combatant.

I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing.

I am available to assist you in preparing an oral or written presentation to the Tribunal should you desire to do so. I am also available to speak for you at the hearing if you wish that kind of assistance.

Do you understand the process or have any questions about it?

The Tribunal is examining one issue: whether you are an enemy combatant against the United States or its coalition partners. Any information you can provide to the Tribunal relating to your activities prior to your capture is very important in answering this question. However, you may not be compelled to testify or answer questions at the Tribunal hearing.

Do you want to participate in the Tribunal process and appear before the Tribunal?

Do you wish to present information to the Tribunal or have me present information for you?

Is there anyone here in the camp or elsewhere who can testify on your behalf regarding your capture or status?

Do you want to have anyone else submit any information to the Tribunal regarding your status? [If so,] how do I contact them? If feasible and you can show the Tribunal how the information is relevant to your case, the Tribunal will endeavor to arrange for evidence to be provided by other means such as mail, e-mail, faxed copies, or telephonic or video-telephonic testimony.

Do you have any questions?

Combatant Status Review Tribunal Notice to Detainees*

You are being held as an enemy combatant by the United States Armed Forces. An enemy combatant is an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. The definition includes any person who has committed a belligerent act or has directly supported such hostilities.

The U.S. Government will give you an opportunity to contest your status as an enemy combatant. Your case will go before a Combatant Status Review Tribunal, composed of military officers. This is not a criminal trial and the Tribunal will not punish you, but will determine whether you are properly held. The Tribunal will provide you with the following process:

1. You will be assigned a military officer to assist you with the presentation of your case to the Tribunal. This officer will be known as your Personal Representative. Your Personal Representative will review information that may be relevant to a determination of your status. Your Personal Representative will be able to discuss that information with you, except for classified information.

2. Before the Tribunal proceeding, you will be given a written statement of the unclassified factual basis for your classification as an enemy combatant.

3. You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence. Your Personal Representative will attend in either case.

4. You will be provided with an interpreter during the Tribunal hearing if necessary.

5. You will be able to present evidence to the Tribunal, including the testimony of witnesses. If those witnesses you propose are not reasonably available, their written testimony may be sought. You may also present written statements and other documents. You may testify before the Tribunal but will not be compelled to testify or answer questions.

As a matter separate from these Tribunals, United States courts have jurisdiction to consider petitions brought by enemy combatants held at this facility that challenge the legality of their detention. You will be notified in the near future what procedures are available should you seek to challenge your detention in U.S. courts. Whether or not you decide to do so, the Combatant Status Review Tribunal will still review your status as an enemy combatant.

If you have any questions about this notice, your Personal Representative will be able to answer them.

[* Text of Notice translated, and delivered to detainees 12-14 July 2004]

App. 175

Sample Detainee Election Form

Date/Time: _____

ISN#: _____

Personal Representative: _____
[Name/Rank]

Translator Required?Language?

CSRT Procedures Read to Detainee or Written Copy Read by Detainee? _____

_____

Detainee Election:

_ Wants to Participate in Tribunal

_ Wants Assistance of Personal Representative

_ Affirmatively Declines to Participate in Tribunal

_ Uncooperative or Unresponsive

Personal Representative Comments:

_____

_____

_____

_____

_____

_____

_____
Personal Representative

Sample Nomination Questionnaire

Department of Defense
Director, Combatant Status Review Tribunals

As a candidate to become a Combatant Status Review Tribunal member, Recorder, or Personal Representative, please complete the following questionnaire and provide it to the Director, Combatant Status Review Tribunal (CSRT). Because of the sensitive personal information requested, no copy will be retained on file outside of the CSRT.

1. Name (Last, First MI)_____ 2. Rank/Grade_____

3. Date of Rank_____ 4. Service _____ 5. Active Duty Service Date _____

6. Desig/MOS _____ 7. Date Current Tour Began: _____

8. Security Clearance Level _____ 9. Date of clearance: _____

10. Military Awards / Decorations:_____

_____

11. Current Duty Position_____ 12. Unit: _____

13. Date of Birth _____ 14. Gender ____ 15. Race or Ethnic Origin _____

16. Civilian Education. College/Vocational/Civilian Professional School: _____

17. Date graduated or dates attended (and number of years), school, location, degree/major:_____

_____

_____

18. Military Education. Dates attended, school/course title._____

_____

_____

19. Duty Assignments. Last four assignments, units, and dates of assignments. _____

_____

_____

_____

20. Have you had any relative or friend killed or wounded in Afghanistan or Iraq? _____ Explain.

_____

_____

_____

ATTA

21. Have you had any close relative or friend killed, wounded, or impacted by the events of September 11, 2001? ____ Explain._____

_____

_____

_____

22. Have you ever been in an assignment related to enemy prisoners of war or enemy combatants, to include the apprehension, detention, interrogation, or previous determination of status of a detainee at Guantanamo Bay? _____ Explain._____

_____

_____

_____

23. Do you believe you may be disqualified to serve as a Tribunal member, Recorder, or Personal Representative for any reason? Explain. _____

_____

_____

_____

24. Your name or image as well as information related to the enemy combatant may be released to the public in conjunction with the Combatant Status Review Tribunal process. Could this potential public affairs release affect your ability to objectively serve in any capacity in the Tribunal process? Y/N_____Explain._____

_____

_____

_____

SIGNATURE OF OFFICER:_____DATE: _____

Approved____ Disapproved_____ Director, CSRT

Sample Appointment Letter for Combatant Status Review Tribunal Panel

[logo] Department of Defense
Director, Combatant Status Review Tribunals

From: Director, Combatant Status Review Tribunals

Subj: APPOINTMENT OF COMBATANT STATUS REVIEW TRIBUNAL

Ref: (a) Convening Authority Appointment Letter of 7 July 2004

By the authority given to me in reference (a), a Combatant Status Review Tribunal established by DCN XXX "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba" is hereby convened. It shall hear such cases as shall be brought before it without further action of referral or otherwise.

The following commissioned officers shall serve as members of the Tribunal:

MEMBERS:

XXX, 999-99-9999; President*

YYY, 999-99-9999; Member*

ZZZ, 999-99-9999; Member*

J.M. MCGARRAH
RADM, CEC, USNR

[* The Order should note which member is the Judge Advocate required to be on the Tribunal.]

Combatant Status Review Tribunal Hearing Guide

RECORDER: All rise. (The Tribunal enters)

[In Tribunal sessions where the detainee has waived participation, the Tribunal can generally omit the italicized portions.]

PRESIDENT: This hearing shall come to order.

RECORDER: This Tribunal is being conducted at [Time/Date] on board Naval Base Guantanamo Bay, Cuba. The following personnel are present:

_____, President

_____, Member

_____, Member

_____, Personal Representative

_____, Interpreter,

_____, Reporter/Paralegal, and

_____, Recorder

[Rank/Name] is the Judge Advocate member of the Tribunal.

PRESIDENT: The Recorder will be sworn. Do you, (name and rank of the Recorder) swear (or affirm) that you will faithfully perform the duties assigned in this Tribunal (so help you God)?

RECORDER: I do.

PRESIDENT: The reporter/paralegal will now be sworn.

RECORDER: Do you (name and rank of reporter/paralegal) swear or affirm that you will faithfully discharge your duties as assigned in this tribunal?

REPORTER/PARALEGAL: I do.

PRESIDENT: *The interpreter will be sworn. [If needed for witness testimony when detainee not present]*

RECORDER: Do you swear (or affirm) that you will faithfully perform the duties of interpreter in the case now hearing (so help you God)?

INTERPRETER: I do.

PRESIDENT: We will take a brief recess while the detainee is brought into the room.

RECORDER: All Rise.

[Tribunal members depart, followed by the Recorder, Personal Representative, Interpreter, and Court Reporter. The detainee is brought into the room. All participants except the Tribunal members return to the Tribunal room.]

RECORDER: All Rise. [The Tribunal members enter the room.]

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: This hearing will come to order. You may be seated.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: *(NAME OF DETAINEE)*, this Tribunal is convened by order of the Director, Combatant Status Review Tribunals under the provisions of his Order of XX July 2004. It will determine whether *you [or Name of Detainee]* meet the criteria to be designated as an enemy combatant against the United States or its allies or otherwise meet the criteria to be designated as an enemy combatant.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: This Tribunal shall now be sworn. All rise.

INTERPRETER: (TRANSLATION OF ABOVE).

[All persons in the room stand while Recorder administers the oath. Each voting member raises his or her right hand as the Recorder administers the following oath:]

RECORDER: Do you swear (affirm) that you will faithfully perform your duties as a member of this Tribunal; that you will impartially examine and inquire into the matter now before you according to your conscience, and the laws and regulations provided; that you will make such findings of fact and conclusions as are supported by the evidence presented; that in determining those facts, you will use your professional knowledge, best judgment, and common sense; and that you will make such findings as are appropriate according to the best of your understanding of the rules, regulations, and laws governing this proceeding, and guided by your concept of justice (so help you God)?

MEMBERS OF TRIBUNAL: I do.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: The Recorder will now administer the oath to the Personal Representative.

INTERPRETER: (TRANSLATION OF ABOVE).

[The Tribunal members lower their hands but remain standing while the following oath is administered to the Personal Representative:]

RECORDER: Do you swear (or affirm) that you will faithfully perform the duties of Personal Representative in this Tribunal (so help you God)?

PERSONAL REPRESENTATIVE: I do.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: Please be seated. The Reporter, Recorder, and Interpreter have previously been sworn. This Tribunal hearing shall come to order.

[All personnel resume their seats.]

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT (NAME OF DETAINEE), you are hereby advised that the following applies during this hearing:

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may be present at all open sessions of the Tribunal. However, if you become disorderly, you will be removed from the hearing, and the Tribunal will continue to hear evidence.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may not be compelled to testify at this Tribunal. However, you may testify if you wish to do so. Your testimony can be under oath or unworn.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may have the assistance of a Personal Representative at the hearing. Your assigned Personal Representative is present.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may present evidence to this Tribunal, including the testimony of witnesses who are reasonably available. You may question witnesses testifying at the Tribunal.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may examine documents or statements offered into evidence other than classified information. However, certain documents may be partially masked for security reasons.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: Do you understand this process?

INTERPRETER: (TRANSLATION OF ABOVE)

PRESIDENT: Do you have any questions concerning the Tribunal process?

INTERPRETER: (TRANSLATION OF ABOVE)

[In Tribunal sessions where the detainee has waived participation substitute:

PRESIDENT: [Rank/Name of Personal Representative] you have advised the Tribunal that [Name of Detainee] has elected to not participate in this Tribunal proceeding. Is that still the situation?

PERSONAL REPRESENTATIVE: Yes/No. [Explain].

PRESIDENT: Please provide the Tribunal with the Detainee Election Form marked as Exhibit D-a.]

[Presentation of Unclassified Information by Recorder and Detainee or his Personal Representative. Recorder evidence shall be marked in sequence R-1, R-2, etc. while evidence presented for the detainee shall be marked in sequence D-a, D-b, etc.]

[The Interpreter shall translate as necessary during this portion of the Tribunal.]

PRESIDENT: Recorder, please provide the Tribunal with the unclassified evidence.

RECORDER: I am handing the Tribunal what has previously been marked as Exhibit R-l, the unclassified summary of the evidence that relates to this detainee's status as an enemy combatant. A translated copy of this exhibit was provided to the Personal Representative in advance of this hearing for presentation to the detainee. In addition, I am handing to the Tribunal the following unclassified exhibits, marked as Exhibit R-2 through R-x. Copies of these Exhibits have previously been provided to the Personal Representative.

PRESIDENT: Does the Recorder have any witnesses to present?

RECORDER: Yes/no.

If witnesses appear before the Tribunal, the Recorder shall administer an appropriate oath:

Form of Oath for a Muslim

Do you [Name], in the Name of Allah, the Most Compassionate, the Most Merciful, swear that your testimony before this Tribunal will be the truth?

Form of Oath or Affirmation for Others

Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

INTERPRETER: (TRANSLATION AS NECESSARY)

[Witnesses may be questioned by the Tribunal members, the Recorder, the Personal Representative, or the detainee.]

RECORDER: Mr./Madam President, I have no further unclassified information for the Tribunal but request a closed Tribunal session at an

appropriate time to present classified information relevant to this detainee's status as an enemy combatant.

PRESIDENT: [*Name of detainee*] (or Personal Representative), *do you* (or does the detainee) want to present information to this Tribunal?

[If detainee not present, Personal Representative may present information to the Tribunal.]

INTERPRETER: (TRANSLATION OF ABOVE).

[If the detainee elects to make an oral statement:]

PRESIDENT: [Name of detainee] would you like to make your statement under oath?

INTERPRETER: (TRANSLATION OF ABOVE).

[After statement is completed:]

PRESIDENT: [Name of detainee] does that conclude your statement?

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: [Determines whether Tribunal members, Recorder, or Personal Representative have any questions for detainee.]

PRESIDENT: [Name of detainee] do you have any other evidence to present to this Tribunal?

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: All unclassified evidence having been provided to the Tribunal, this concludes this Tribunal session.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: *(Name of detainee), you shall be notified of the Tribunal decision upon completion of the review of these proceedings by the convening authority in Washington, D.C.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *If the Tribunal determines that you should not be classified as an enemy combatant, you will be released to your home country as soon as arrangements can be made.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *If the Tribunal confirms your classification as an enemy combatant you shall be eligible for an Administrative Review Board hearing at a future date.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *That Board will make an assessment of whether there is continued reason to believe that you pose a threat to the United States or its allies in the ongoing armed conflict against terrorist organizations such as al Qaida and its affiliates and supporters or whether there are other factors bearing upon the need for continued detention.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *You will have the opportunity to be heard and to present information to the Administrative Review Board. You can present information from your family that might help you at the Board. You are encouraged to contact your family as soon as possible to begin to gather information that may help you.*

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: A military officer will be assigned at a later date to assist you in the Administrative Review Board process.

INTERPRETER: (TRANSLATION OF ABOVE)

PRESIDENT: This Tribunal hearing is adjourned.

RECORDER: All Rise. [If moving into Tribunal session in which classified material will be discussed add:] This Tribunal is commencing a closed session. Will everyone but the Tribunal members, Personal Representative, and Reporter/Paralegal please leave the Tribunal room.

PRESIDENT: [When Tribunal room is ready for closed session.] You may be seated. The Tribunal for [Name of detainee] is now reconvened without the detainee being present to prevent a potential compromise of national security due to the classified nature of the evidence to be considered. The Recorder will note the date and time of this session for the record.

[Closed Tribunal Session Commences, as necessary, with only properly cleared personnel present. Presentation of classified information by Recorder and, when appropriate, Personal Representative. Recorder evidence shall be marked in sequence R-1, R-2, etc. while evidence presented for the detainee shall be marked in sequence D-a, D-b, etc. All evidence will be properly marked with the security classification.]

PRESIDENT: This Tribunal session is adjourned and the Tribunal is closed for deliberation and voting.

RECORDER: Notes time and date when Tribunal closed.

App. 188

[CLASSIFICATION]

Combatant Status Review Tribunal
Decision Report Cover Sheet

[CLASSIFICATION]: UNCLASSIFIED Upon Removal of Enclosure(s) (2) [and (3)]

TRIBUNAL PANEL: _____

ISN #: _____ DATE: _____

Ref: (a) Convening Order of XX YYY 2004
(b) CSRT Implementation Directive of XX July 2004
(c) DEPSECDEF Memo of 7 July 2004

End: (1) Unclassified Summary of Basis for Tribunal Decision (U)
(2) Classified Summary of Basis for Tribunal Decision (U)
(3) Copies of Documentary Evidence Presented (U)

This Tribunal was convened by references (a) and (b) to make a determination as to whether the detainee meets the criteria to be designated as an enemy combatant as defined in reference (c).

The Tribunal has determined that he (is) (is not) designated as an enemy combatant as defined in reference (c).

[If yes] In particular the Tribunal finds that this detainee is a member of, or affiliated with, _____(al Qaida, Taliban, other), as more fully discussed below and in the enclosures.

Enclosure (1) provides an unclassified account of the basis for the Tribunal's decision, as summarized below. A detailed account of the evidence considered by the Tribunal and its findings of fact are contained in enclosure (2).

_____

_____

_____

_____

_____
(Rank, Name) President

APPENDIX K

May 11, 2004

ORDER

SUBJECT: Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba

1. INTRODUCTION AND BACKGROUND

This Order establishes an administrative review process to assess annually the need to continue to detain each enemy combatant during the course of the current and ongoing hostilities. This process will permit each enemy combatant in the control of the Department of Defense ("DoD") at the Guantanamo Bay Naval Base, Cuba ("GTMO") to explain why he is no longer a threat to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters or to explain why his release would otherwise be appropriate.*

The law of war permits the detention of enemy combatants until the end of an armed conflict. It permits that detention for the practical purpose of preventing the enemy from rejoining the conflict. It does not require the use of a review process to support continued detention. Nevertheless, to address some unique and unprecedented characteristics of the current conflict, DoD has determined, as a matter of policy, to implement these procedures. These procedures may be amended from time to time, also as a matter of policy, as circumstances in the conflict warrant.

A. *Existing Procedures.*

The procedures established by this Order offer a layer of review in addition to the other layers of review already in

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* Similar administrative review procedures will be issued for enemy combatants in the control of DoD in the United States.

place for enemy combatants detained at GTMO. Under pre-existing guidance, captured individuals are assessed at the time of their capture by military officers in the field. Those officers determine whether those captured individuals were part of or supporting forces hostile to the United States or coalition partners, or otherwise engaged in an armed conflict against the United States. If the individuals detained meet those criteria, they are enemy combatants. If they do not, they are released.

Those persons determined to be enemy combatants are subsequently sent to a centralized holding facility where a military screening team reviews all available information regarding each detainee to again review whether the individual is an enemy combatant. With the assistance of other U.S. government officials (including military lawyers, intelligence officers, and federal law enforcement officials) and considering all relevant information (including the facts from capture and detention, the threat the individual poses, his intelligence value, and any law enforcement interest) the military screening team assesses whether the detainee is an enemy combatant and should continue to be detained and whether transfer to GTMO is warranted.

After the screening team makes this assessment, a general officer designated by the combatant commander reviews the central holding area screening team's recommendation. When determining whether a detainee should be transferred to GTMO, the combatant commander considers the threat posed by the detainee, his seniority within hostile forces, possible intelligence that may be gained from the detainee, possible law of war violations committed by the detainee, and any other relevant factors. DoD officials in Washington review those proposed for transfer to GTMO prior to their transfer. An internal DoD review panel, including legal advisors, reviews the recommendations of the combatant commander and advises the Secretary of Defense on proposed detainee

transfers to GTMO. All available information is considered in those reviews, including information submitted by other governments or obtained from the detainees themselves. In the event that enemy combatants are transferred to GTMO, immediately upon their arrival at GTMO, they are interviewed and further assessments are made based on relevant information, including detainee interviews, U. S. intelligence and law enforcement sources, and information supplied by foreign governments.

Each enemy combatant detained at GTMO also undergoes an extensive assessment of the threat he poses. This threat assessment process is used to determine whether, notwithstanding his status as an enemy combatant, he can be transferred to the custody of another government, can be released, or should remain detained in the control of DoD. Threat assessments of each detainee are made by an integrated team of interrogators, analysts, behavioral scientists, and regional experts. Those threat assessments are provided to the Commander, U.S. Southern Command for review and recommendation. The Southern Command then forwards its recommendations to an interagency committee in Washington that includes law enforcement, intelligence, and defense representatives. That interagency committee makes an assessment and recommendation. The Secretary of Defense or his designee then decides whether transfer of the detainee to the custody of another government, release of that individual, or his continued detention in DoD control is appropriate.

B. *Relationship of this Order to Existing Procedures.*

Once an enemy combatant has been reviewed by the interagency process described above and the Secretary of Defense or his designee has determined that his continued detention in the control of DoD is appropriate, he will be eligible for review of the need for his continued detention under the procedures this Order establishes. This Order provides the authority to empanel as many review board panels as are

deemed necessary to accomplish the review of the enemy combatants in the control of DoD at GTMO.

2. ESTABLISHMENT OF ADMINISTRATIVE REVIEW PROCESS

A. *Administrative Review Process.* There is established the Administrative Review Board ("Review Board"). The Review Board will assess whether each enemy combatant remains a threat to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters or if there is any other reason that it is in the interest of the United States and its allies for the enemy combatant to remain in the control of DoD. Based on that assessment, the Review Board will recommend whether the enemy combatant should continue to be detained in the control of DoD.

B. *Administrative Review Board.* The Review Board shall be composed of three or more military officers.

i. *Establishment of Review Board.*

a. The Review Board shall report to and be selected by a presidentially-appointed Senate-confirmed civilian in the Department of Defense whom the Secretary of Defense has designated to operate and oversee the administrative review process ("designated civilian official" or "DCO").

b. The Review Board may sit in panels of three members each.

c. The DCO may establish as many review board panels as he deems necessary.

ii. *Qualifications of Review Board Members.*

a. Military officers assigned to serve as Review Board members shall be those who are, in the

DCO's view, qualified for the duty by reason of education, training, experience, length of service, temperament, and objectivity.

b. At least one member of a Review Board panel shall be experienced in the field of intelligence.

C. *Presiding Officer.* For the purpose of its deliberations and any hearing held pursuant to this Order, the senior member of the Review Board, or any Review Board panel, shall be the presiding officer. The sole role of the presiding officer as presiding officer shall be to ensure the orderliness of board proceedings. The presiding officer's vote in board determinations will be accorded the same weight as the votes of the other members of the Review Board.

D. *Legal Counsel.* The General Counsel of DoD shall ensure that the Review Board has the assistance of legal counsel.

E. *Enemy Combatants Eligible for the Procedures in this Order.* Enemy combatants who are in the control of DoD at GTMO are eligible for the review procedures established in this Order.

i. Enemy combatants whom the President has determined to be subject to his Military Order of November 13, 2001 are excepted from the procedures established in this Order until the disposition of any charges against them or the service of any sentence imposed by a military commission.

ii. An enemy combatant in the control of DoD at GTMO will become eligible for the review process once he has been reviewed through the previously established procedures described in Section 1 and the Secretary or his designee has determined that his continued detention is appropriate.

iii. An enemy combatant may decline in writing to participate in the procedures established by this Order. If the enemy combatant is unable to provide a written declination, the assisting military officer provided under Section 3.B shall prepare and execute such a writing on the enemy combatant's behalf.

3. ADMINISTRATIVE REVIEW BOARD PROCEEDINGS

A. *Review Board Proceedings.* The proceedings before the Review Board shall be non-adversarial.

i. *Provision of Information by the Government of the State of Which the Enemy Combatant is a National.*

a. Unless the DCO determines that it is not consistent with national security, the DCO shall request that the Department of State notify the State of which the enemy combatant is a national ("the State") of the proceedings.

1) The notice shall be provided in advance of the proceedings to permit the State to prepare and present information to the Review Board.

2) The notice to the State shall provide that information submitted by the State shall be in writing, except as otherwise deemed appropriate by the Review Board, and that it shall be provided on or before a date specified by the Review Board.

3) Unless the DCO concludes that it is not consistent with national security, the notice shall also include a request for the State to notify the enemy combatant's relatives of the proceedings and inform them that they

may provide information relevant to the proceedings through the State's written submissions.

b. Unless the DCO determines that it is not consistent with national security, the State may submit to the Review Board information of any nature, including information related to the threat posed by the enemy combatant to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters.

c. In the event that the submission of a State is not received by the date established by the Review Board, the Review Board may disregard the State's submission.

ii. *Provision of Information by a Designated Military Officer.*

a. A designated military officer ("Designated Military Officer") shall provide to the Review Board all reasonably available threat information in the possession of DoD regarding the enemy combatant under review and any other information indicating whether it would be in the interest of the United States and its allies to release, transfer, or continue to detain the enemy combatant. That information shall include any information that tends to support continued detention as well as any information that tends to support release or transfer.

b. The Designated Military Officer is not an advocate for or against the continued detention of the enemy combatant under review.

c. The Designated Military Officer who shall be selected by the DCO must meet the same qualifications set forth for members of the Review Board under Section 2.B.ii.a.

d. In addition to any other information or documentation presented to the Review Board, the Designated Military Officer shall prepare, in unclassified form, a written summary of the primary factors favoring continued detention of the enemy combatant and the primary factors favoring release or transfer. When the Review Board deems it appropriate, the Designated Military Officer may present information orally.

iii. *Presentation of Information by the Enemy Combatant.*

a. *Notice.* Prior to the enemy combatant's hearing, the Review Board shall provide notice to the enemy combatant of the hearing and shall make available to the enemy combatant the written summary prepared by the Designated Military Officer.

1) The summary provided to the enemy combatant shall be in a language he understands.

2) The summary provided to the enemy combatant shall be provided sufficiently in advance of the hearing so as to permit him to prepare his presentation to the Review Board.

3) In no circumstances shall classified information be made available to the enemy combatant.

b. *Opportunity to be Heard.* The enemy combatant shall be permitted to present to the Review Board information on why he is no longer a threat to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters, why it is otherwise appropriate that he be released, or any other relevant information.

1) The enemy combatant will be permitted to present this information in person at a hearing before the Review Board.

2) Members of the Review Board may question the enemy combatant during the hearing.

3) If necessary, an interpreter shall be supplied for the combatant's presentation of information to the Review Board.

B. *Assistance to the Enemy Combatant.* The Review Board shall assign a military officer ("Assisting Military Officer") to assist the enemy combatant in preparing his presentation to the Review Board.

i. The Review Board shall select the Assisting Military Officer from a pool of military officers selected by the DCO to serve as Assisting Military Officers.

a. The Assisting Military Officer shall meet the same qualifications established for members of the Review Board under Section 2.B.ii.a.

b. The Assisting Military Officer and the Designated Military Officer may not be the same person in the review of an enemy combatant.

ii. The Assisting Military Officer shall be responsible for explaining to the enemy combatant the nature of his hearing before the Review Board.

iii. The Assisting Military Officer shall be permitted to see all information and documentation provided to the Review Board by the Designated Military Officer.

iv. The Assisting Military Officer shall be permitted to meet with the enemy combatant prior to the enemy combatant's presentation to the board. If necessary, an interpreter shall be supplied for those meetings.

v. If the enemy combatant so elects, the Assisting Military Officer may also present information to the Review Board on behalf of the enemy combatant. If the enemy combatant has made such an election and the Assisting Military Officer believes that it would aid the Review Board's deliberations, the Assisting Military Officer may also, outside the presence of the enemy combatant, comment upon classified information that has been submitted to the Board and that bears upon the enemy combatant's presentation.

C. *Information from Other Relevant U.S. Government Agencies.* The Review Board shall provide to the Department of State, the Department of Justice, the Department of Homeland Security, and the Central Intelligence Agency notice of the proceedings for the enemy combatant.

i. That notice shall be provided in advance of the proceedings for that enemy combatant so as to permit the agencies sufficient time to provide to the Review Board any information they deem relevant prior to the hearing.

ii. Any submissions that these agencies elect to provide shall be in written form except in extraordinary cases.

iii. In the event that the summary prepared by the Designated Military Officer and provided to the enemy combatant includes information that originated in U.S. government agencies other than DoD, the Review Board must obtain the originating agency's permission to share that information with the enemy combatant in any form.

D. *Additional Fact-Gathering.* If, after the initial presentation of information, the Review Board believes additional information is necessary before it can make a recommendation, the Review Board may seek additional facts. It may, among other things:

i. submit written questions to the Designated Military Officer or the Assisting Military Officer;

ii. request further behavioral assessments of the combatant;

iii. request further questioning of any other combatants who have had contact with the enemy combatant under review while in detention to the extent that the Combatant Commander determines that such questioning is consistent with ongoing intelligence collection; and

iv. seek other information that may be obtained readily.

E. *Review Board Recommendations.* The Review Board shall make a written assessment of whether there is reason to believe that the enemy combatant poses a threat to the United States or its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters and any other factors bearing upon the

need for continued detention. Based on that assessment, the Review Board shall provide to the DCO a written recommendation on whether detention should be continued.

i. The Review Board's assessment and recommendation shall be independent, based on the Review Board's review of all reasonably available information.

ii. The Review Board's assessment and recommendation shall be reached by a majority of the members of the Review Board panel. In the event that a recommendation is not unanimous, any dissenting board member may submit a minority report to the DCO. That report shall take the same form as the written assessment and recommendation to be submitted by the majority.

iii. The Review Board's written assessment and recommendation shall include:

   a. the Review Board's conclusion regarding the threat posed by the enemy combatant;

   b. supporting reasons for that conclusion regarding the threat, including, but not limited to, a summary of information relied upon in reaching that conclusion;

   c. any other reasons that the continued detention of the enemy combatant remains or does not remain in the interest of the United States and its allies; and

   d. the supporting reasons for the recommendation.

iv. The written assessment and recommendation shall be provided to the DCO along with the record of the proceedings. Notice of the assessment and recommendation shall also be provided to any

U.S. government agency that submitted information to the Review Board.

v. The determination to continue to detain, release, or seek the transfer of the enemy combatant to the control of another government rests with the DCO. The DCO shall examine whether there is reason to believe that the enemy combatant poses a threat to the United States or its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters and any other factors bearing upon the need for continued detention. Based on that examination, the DCO shall determine whether to continue to detain, release, or seek the transfer of the enemy combatant to the control of another country. He shall give full consideration to the written assessment and recommendation of the Review Board.

vi. Notification of the DCO's determination will be provided to the Secretary of Defense, the enemy combatant, the Review Board, the relevant government agencies, and to the extent consistent with national security, the State of which the enemy combatant is a national.

F. *Frequency of Review.* The Review Board shall examine the need for the continued detention of each combatant at least annually insofar as is practicable.

4. ROLE OF THE DCO

A. The DCO shall oversee and operate the administrative review process established by this Order.

B. The DCO may establish as many review board panels as he deems necessary.

C. The DCO shall, as he deems necessary and appropriate, coordinate his actions and determinations with other U.S. government departments and agencies.

D. The DCO may seek the assistance of the General Counsel of DoD as appropriate.

E. The DCO shall have the authority to request support, including but not limited to military and civilian personnel, administrative assistance, and logistical assistance, from the head of any DoD component or office to oversee and operate the administrative review process and to accomplish the transfer or release of an enemy combatant. DoD component heads shall promptly provide such assistance. In addition, the DCO may seek the establishment of an executive agency or agencies under DoD Directive 5101.1 to assist him in implementing this Order.

F. The authority granted to the DCO in this Order may not be delegated except with the approval of the Secretary of Defense.

5. CLASSIFIED INFORMATION

Classified information shall be handled in accordance with all applicable laws and regulations. The DCO should issue implementing guidance to ensure the proper handling and protection of classified information.

6. OTHER

This Order is neither intended to nor does it create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. These procedures involve military authority exercised in the field in time of war. No provision in this Order shall be construed to be a requirement of the United States Constitution or a requirement of any other body of law nor shall this Order be construed to alter the requirements that the law of war imposes. The procedures established by this Order, along with the other procedures described above, have been implemented as a matter of discretion. Because the

procedures described in this Order have been instituted as a matter of discretion, the Secretary of Defense may suspend or amend the procedures set forth in this Order at any time.

7. IMPLEMENTING GUIDANCE

The DCO may, as he deems appropriate, issue guidance to implement this Order.

8. EFFECTIVE DATE

This Order is effective immediately.

Paul Wolfowitz
Deputy Secretary of Defense

APPENDIX L

REPORT ON GUANTANAMO DETAINEES

A Profile of 517 Detainees through Analysis of Department of Defense Data

By
Mark Denbeaux
Professor, Seton Hall University School of Law and
Counsel to two Guantanamo detainees

Joshua Denbeaux, Esq.
Denbeaux & Denbeaux

David Gratz, John Gregorek, Matthew Darby, Shana Edwards, Shane Hartman, Daniel Mann and Helen Skinner
Students, Seton Hall University School of Law

THE GUANTANAMO DETAINEES: THE GOVERNMENT'S STORY

Professor Mark Denbeaux* and Joshua Denbeaux*

An interim report

EXECUTIVE SUMMARY

The media and public fascination with who is detained at Guantanamo and why has been fueled in large measure by the refusal of the Government, on the grounds of national security, to provide much information about the individuals and the charges against them. The information available to date has been anecdotal and erratic, drawn largely from interviews with the few detainees who have been released or from statements or court filings by their attorneys in the pending *habeas corpus* proceedings that the Government has not declared "classified."

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* The authors are counsel for two detainees in Guantanamo.

This Report is the first effort to provide a more detailed picture of who the Guantanamo detainees are, how they ended up there, and the purported bases for their enemy combatant designation. The data in this Report is based entirely upon the United States Government's own documents.[1] This Report provides a window into the Government's success detaining only those that the President has called "the worst of the worst."

Among the data revealed by this Report:

1. Fifty-five percent (55%) of the detainees are not determined to have committed any hostile acts against the United States or its coalition allies.

2. Only 8% of the detainees were characterized as al Qaeda fighters. Of the remaining detainees, 40% have no definitive connection with al Qaeda at all and 18% are have no definitive affiliation with either al Qaeda or the Taliban.

3. The Government has detained numerous persons based on mere affiliations with a large number of groups that in fact, are not on the Department of Homeland Security terrorist watchlist. Moreover, the nexus between such a detainee and such organizations varies considerably. Eight percent are detained because they are deemed "fighters for;" 30% considered "members of;" a large majority—60%—are detained merely because they are "associated with" a group or groups the Government asserts are terrorist organizations. For 2% of the prisoners their nexus to any terrorist group is unidentified.

4. Only 5% of the detainees were captured by United States forces. 86% of the detainees were arrested by either Pakistan or the Northern Alliance and turned over to United States custody. This 86% of the detainees captured by Pak-

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[1] See, Combatant Status Review Board Letters, Release date January 2005, February 2005, March 2005, April 2005 and the Final Release available at the Seton Hall Law School library, Newark, NJ.

istan or the Northern Alliance were handed over to the United States at a time in which the United States offered large bounties for capture of suspected enemies.

5. Finally, the population of persons deemed not to be enemy combatants—mostly Uighers—are in fact accused of more serious allegations than a great many persons still deemed to be enemy combatants.

INTRODUCTION

The United States Government detains over 500 individuals at Guantanamo Bay as so-called "enemy combatants." In attempting to defend the necessity of the Guantanamo detention camp, the Government has routinely referred this group as "the worst of the worst" of the Government's enemies.[2] The Government has detained most these individuals for more than four years; only approximately 10 have been charged with any crime related to violations of the laws of war. The rest remain detained based on the Government's own conclusions, without prospect of a trial or judicial hearing. During these lengthy detentions, the Government has had sufficient time for the Government to conclude whether, in fact, these men were enemy combatants and to document its rationale.

On March 28, 2002, in a Department of Defense briefing, Secretary of Defense Donald Rumsfeld said:

> As has been the case in previous wars, the country that takes prisoners generally decides that they would prefer

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[2] The Washington Post, in an article dated October 23, 2002 quoted Secretary Rumsfeld as terming the detainees "the worst of the worst." In an article dated December 22, 2002, the Post quoted Rear Adm. John D. Stufflebeem, Deputy Director of Operations for the Joint Chiefs of Staff, "They are bad guys. They are the worst of the worst, and if let out on the street, they will go back to the proclivity of trying to kill Americans and others." Donald Rumsfeld Holds Defense Department Briefing. (2002, March 28). FDCH Political Transcripts. Retrieved January 10, 2006 from Lexis-Nexis database.

> them not to go back to the battlefield. They detain those enemy combatants for the duration of the conflict. They do so for the very simple reason, which I would have thought is obvious, namely to keep them from going right back and, in this case, killing more Americans and conducting more terrorist acts.[3]

The Report concludes, however, that the large majority of detainees never participated in any combat against the United States on a battlefield. Therefore, while setting aside the significant legal and constitutional issues at stake in the Guantanamo litigation presently being considered in the federal courts, this Report merely addresses the factual basis underlying the public representations regarding the status of the Guantanamo detainees.

Part I of this Report describes the sources and limitations of the data analyzed here. Part II describes the "findings" the Government has made. The "findings" in this sense, constitutes the Government's determination that the individual in question is an enemy combatant, which is in turn based on the Government's classifications of terrorist groups, the asserted connection of the individual with the purported terrorist groups, as well as the commission of "hostile acts," if any, that the Government has determined an individual has committed. Part III then examines the evidence, including sources for such evidence, upon which the Government has relied in making these findings. Part IV addresses the continued detention of individuals deemed *not* to be enemy combatants, comparing the Government's allegations against such persons to similar or more serious allegations against persons still deemed to be "enemy combatants."

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[3] Threats and Responses: The Detainees; Some Guantanamo Prisoners Will Be Freed, Rumsfeld Says, (2002, October 23). The New York Times, p 14. Retrieved February 7, 2006 from Lexis-Nexis database.

I. THE DATA

The data in this Report are based on written determinations the Government has produced for detainees it has designated as enemy combatants.[4] These written determinations were prepared following military hearings commenced in 2004, called Combatant Status Review Tribunals, designed to ascertain whether a detainee should continue to be classified as an "enemy combatant." The data are obviously limited.[5] The data are framed in the Government's terms and therefore are no more precise than the Government's categories permit. Finally, the charges are anonymous in the sense that the summaries upon which this interim report relies are not identified by name or ISN for any of the prisoners. It is therefore not possible at this time to determine which summary applies to which prisoner.

Within these limitations, however, the data are very powerful because they set forth the best case for the status of the individuals the Government has processed. The data reviewed are the documents prepared by the Government containing the evidence upon which the Government relied in making its decision that these detainees were enemy combatants. The Report assumes that the information contained in the CSRT

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[4] The files reviewed are available at the Seton Hall Law School library, Newark, NJ.

[5] There is other data currently being compiled based on different information. Each prisoner at Guantanamo who has had summaries of evidence filed against them has had an internal administrative evaluation of the charges. The process is that a Combatant Status Review Tribunal, or CSRT, has received the charges and considered them. Some of those enemy detainees who are represented by counsel in pending habeas corpus Federal District Courts have received (when so ordered by the Federal District Court Judge) the classified and declassified portion of the CSRT proceedings. The CSRT proceedings are described as CSRT returns. The declassified portion of those CSRT returns are being reviewed and placed into a companion data base.

Summaries of Evidence is an accurate description of the evidence relied upon by the Government to conclude that each prisoner is an enemy combatant.

Such summaries were filed by the Government against each individual detainee's in advance of the Combatant Status Review Tribunal (CRST) hearing.

II. THE GOVERNMENT'S FINDINGS OF ENEMY COMBATANT STATUS

A. Structure of the Government's Findings

As to each detainee, the Government provides what it denominates as a "summary of evidence." Each summary contains the following sentence:

> The United States Government has *previously determined* that the detainee is an enemy combatant. This determination is based on information possessed by the United States that indicates that the detainee is. . . .

[Emphasis supplied]

Since the Government had "previously determined" that each detainee at Guantanamo Bay was an enemy combatant before the CSRT hearing, the "summary of evidence" released by the Government is not the Government's *allegations* against each detainee but a summary of the Government's *proofs* upon which the Government found that each detainee, is in fact, an enemy combatant.

Each summary of evidence has four numbered paragraphs. The first[6] and fourth[7] are jurisdictional. The sec-

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[6] Paragraph 1: "Under the provisions of the Department of the Navy Memorandum, dated 29 July 2004, *Implementation of Combatant Status Review Tribunal Procedures for enemy Combatants Detained at Guantanamo Bay Naval Base Cuba*, a Tribunal has been appointed to review the detainee's designation as an enemy combatant."

[7] Paragraph 4: "The detainee has the opportunity to contest his deter-

ond[8] paragraph states the Government's definition of "enemy combatant" for the purpose of the CSRT proceedings.

The third paragraph summarizes the evidence that satisfied the Government that each detainee is an enemy combatant. Paragraph 3(a) is the Government's determination of the detainee relationship with a "defined terrorist organization."[9] Paragraph 3(b) is the place in which Government's finds that a detainee has or has not committed "hostile acts" against U. S. or coalition forces.

Forty five percent of the time the Government concluded that the detainee committed 3(b) hostile acts against United States or coalition forces. In those cases, there is a paragraph 3(b) ("¶3(b)") in the CSRT summary so stating. Fifty five percent of the time, the Government concluded that the detainee did not commit such an act and omitted the entire ¶3 (b) section from the CSRT summary. For these detainees whose CSRT summaries include a finding under ¶3(b), the Government listed its specific findings 'proving' hostile acts in a brief series of sub-paragraphs. Of those CSRT summaries that contain a ¶3(b) "hostile acts" determination, the mean number of subparagraphs is two; that is, for the 55% of

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mination as an enemy combatant. The Tribunal will endeavor to arrange for the presence of any reasonably available witnesses or evidence that the detainee desires to call or introduce to prove that he is not an enemy combatant. The Tribunal President will determine the reasonable availability of evidence or witnesses."

[8] Paragraph 2: "(A)n Enemy Combatant has been defined as: [A]n individual who was part of *or* supporting the Taliban *or* al Qaeda forces, *or* associated forces that are engaged in hostilities against the United States *or* its coalition partners. This includes any person who committed a belligerent act *or* has directly supported hostilities in aid of enemy forces." [Emphasis supplied]

[9] Many of the "defined terrorist organizations" referenced in the CSRT summaries of evidence are not considered terrorist organizations by the Department of Homeland Security. See *Infra*.

detainees the Government has found committed ¶3(b) "hostile acts" the Government lists, on average two pieces of evidence. Fewer than 2% of all 517 CSRT summaries contained more than five ¶3(b) sub-paragraphs; while the vast majority contained 1, 2 or 3 such 'proofs' of hostile acts.

B. The Definition of an 'Enemy Combatant'

For the purposes of the Combatant Status Review Tribunal, an "enemy combatant" has been defined as:

> [A]n individual who was part of *or* supporting the Taliban *or* al Qaeda forces, *or* associated forces that are engaged in hostilities against the United States *or* its coalition partners. This includes any person who committed a belligerent act *or* has directly supported hostilities in aid of enemy forces.[10]

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[10] The definition of "enemy combatants" for the purpose of the Guantanamo detainment has evolved over time. In January 2002, when the first detainees were sent from Pakistan and Afghanistan to Cuba they were termed, as were the detainees in *Ex Parte Quirin*, (47 F.Supp. 431) "unlawful belligerents." In *Hamdi v. Rumsfeld*, (542 U.S. 507) the Government defined "enemy combatant" far more narrowly as someone who was "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan *and* who 'engaged in an armed conflict against the United States' there." Later, in response to *Rasul v. Bush* (542 U.S. 466), the detainees were called "enemy combatants." (Emphasis supplied)

In February 2004, Secretary Rumsfeld, said, "The circumstances in which individuals are apprehended on the battlefield can be ambiguous, as I'm sure people here can understand. This ambiguity is not only the result of the inevitable disorder of the battlefield; it is an ambiguity created by enemies who violate the laws of war by fighting in civilian clothes, by carrying multiple identification documentations, by having three, six, eight, in one case 13 different . . . aliases. . . . Because of this ambiguity, even after enemy combatants are detained, it takes time to check stories, to resolve inconsistencies or, in some cases, even to get the detainee to provide any useful information to help resolve the circumstance."

In an August 13, 2004 News Briefing, Gordon England, Secretary of the Navy and Secretary Rumsfeld's designee for the tribunal process at

This could be interpreted alternatively as requiring either a combatant be *both* a member of prohibited group *and* engaged in hostilities against the U. S. or coalition forces *or* only that a combatant be anyone *either* a member of prohibited group *or* engaged in hostilities to U. S. or coalition forces. Indeed, under this definition, one could be detained for an undefined level of "support of" groups considered hostile to the United States or its coalition partners.

C. Categories of Evidence Supporting Enemy Combatant Designation

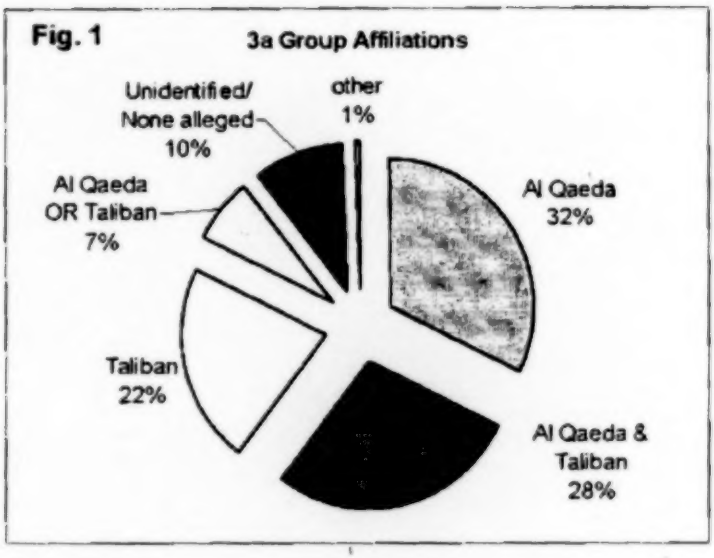
The Government divides the evidence against detainees into two sections: a ¶3(a) nexus with prohibited organizations and a ¶3(b) participation in military operations or commission of hostile acts. Paragraph 3 always begins with the allegations that each detainee met all the requirements contained in the definition of paragraph two. More often than not the Government finds that the detainees did not commit the hostile or belligerent acts.

1. ¶3(a): Enemy Combatant because of Nexus with Prohibited Organization

a. Definition of Prohibited Organizations

The data reveals that the Government divides a detainee's enemy combatant status into six distinct categories that describe the terrorist organization with whom the detainee is affiliated. Figure 1 illustrates the breakdown of each group's representation by the data:

Guantanamo stated that, "The definition of an enemy combatant is in the implementing orders, which have been passed out to everyone. But, in short, it means anyone who is part of supporting the Taliban or al Qaeda forces or associated forces engaging in hostilities against the United States or our coalition partners."



1. al Qaeda (32%)
2. al Qaeda & Taliban (28%)
3. Taliban (22%)
4. al Qaeda OR Taliban (7%)
5. Unidentified Affiliation (10%)
6. Other (1%)

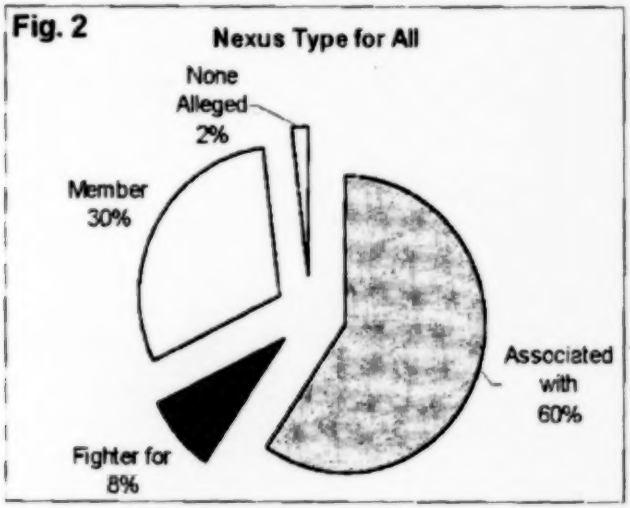
The CSRT Summary of Evidence provides no way to determine the difference between "unidentified/none alleged" and "other" and no explanation for why there are separate categories for both "al Qaeda *and* Taliban" and "al Qaeda *or* Taliban."

If, after four years of detention, the Government is unable to determine if a detainee is either al Qaeda or Taliban, then it is reasonable to conclude that the detainee is neither. Under this assumption, the data reveals that 40% of the detainees are not affiliated with al Qaeda and 18% percent of the detainees are not affiliated with either al Qaeda or the Taliban.

b. Nexus with the Identified Organization

The Government also describes each prisoner's nexus to the respective organization: "fighter for;" "member of;" and

"associated with." The data explain that there are three main degrees of connection between the detainee and the organization with which he is connected.[11]



1. "Fighters for"
2. "Members of"
3. "Associated with"

Figure 2 illustrates that of the nexus type for all the prisoners, regardless of the group to which they are "connected," by far the greatest number of prisoners are identified only as being "associated with" one group or another. A much smaller percentage—30%—is identified as "members of." Only 8% are classified as "fighters for."

The definition of "fighters for" would seem to be obvious, while definitions of "members of" and "associated with" are less clear and could justify a very broad level of attenuation. According to the Government's expert on al Qaeda mem-

[11] While more than 95% of the summaries of the evidence used one of these three categories, approximately 4% used other nexus descriptions. Most notably, 2% used a "supported" descriptor which was re-categorized as "associated with." See Appendix C for a full account of recategorizations of data.

bership, Evan Kohlman, simply being told that one had been selected as a member would qualify one as a member:

> Al-Qaeda leaders could dispatch one of their own—someone who is not top tier . . . to recruit someone and to tell them, I have been given a mandate to do this on behalf of senior al-Qaeda leaders . . . even though perhaps this individual has never sworn an official oath and this person has never been to an al-Quaeda training camp, nor have they actually met, say, Osama bin Ladin.[12]

This expansive definition of membership in al Qaeda could thus be applied to anyone who the Government believed ever spoke to an al Qaeda member. Even under this broad framework, the Government concluded that a full 60% of the detainees do not have even that minimum level of contact with an al Qaeda member.

Membership in the Taliban is different and also not clearly defined. According to the Government, one can be a conscripted (and therefore presumably unwilling) member of the Taliban and still be an enemy combatant.

Figures 3 and 4 compare the nexus between enemy combatants with Al Qaeda and the Taliban. In contrast to the "al Qaeda only" category, the "Taliban only" category shows that a significantly higher percentage of the prisoners are designated "members of" and "fighters for" with a reduced number being "associated with."

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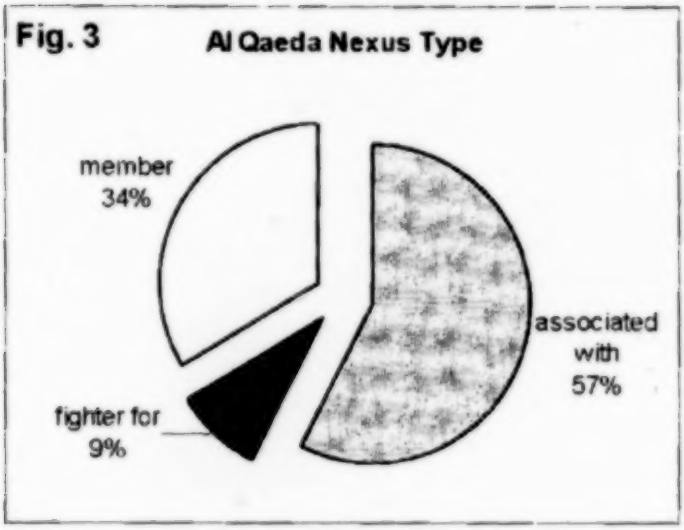
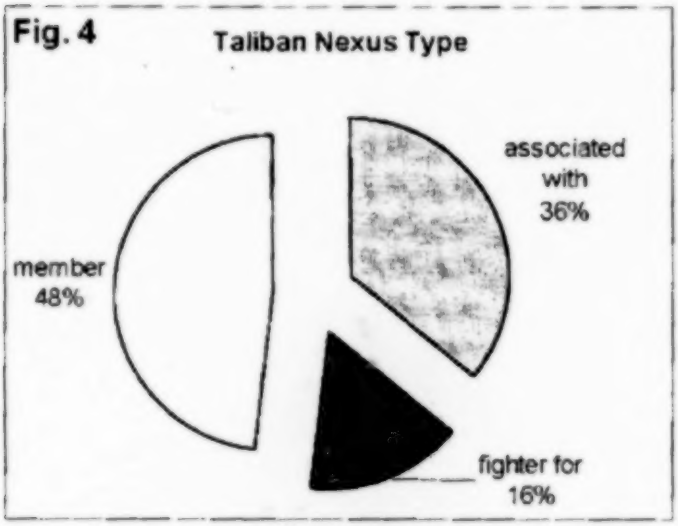
[12] *US vs. Pachir*, Dkt. No., T113.





Seventy eight percent of those prisoners who are identified as being both "al Qaeda and Taliban" are merely "associated with;" 19% are "members of;" and 3% are "fighters for." (Fig. 5) When the Government cannot specifically identify a detainee as a member of one or the other, al Qaeda or the Taliban, the degree of connection attributed to such detainees appears tenuous. (Fig. 6) recognizes that more often than not members of the Taliban are not members of al Qaeda. The Government categorizes as stand alone al Qaeda or stand

alone Taliban more than 54% of the detainees, and only 28% of the detainees as members of both.

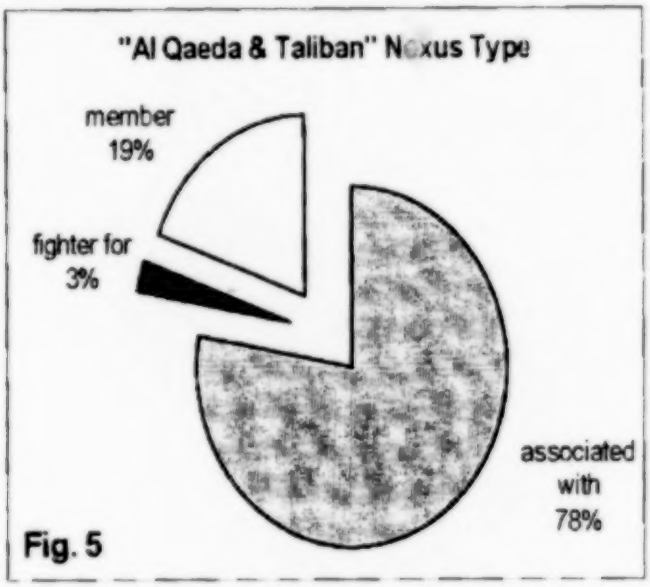


Fig. 5

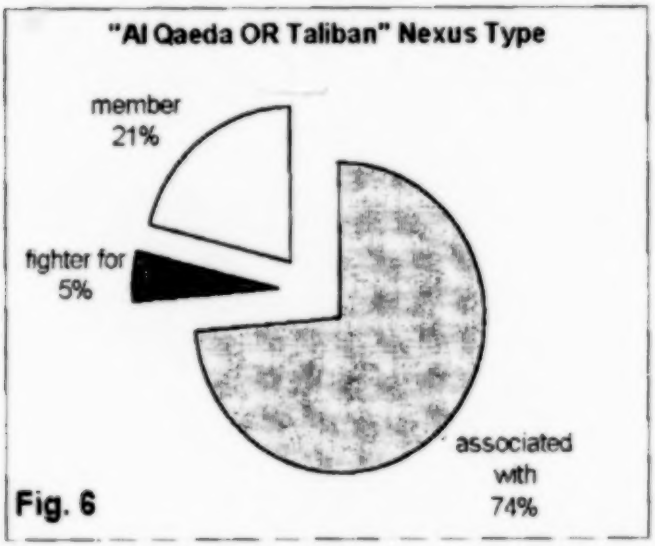


Fig. 6

The data provides no explanation for the explicit distinction between those persons identified as being connected to "al Qaeda *and* the Taliban" as opposed to "al Qaeda *or* the Taliban". [Emphasis supplied]

2. ¶ 3(b): The Government's Findings on Detainees' 3(b) Hostile Acts against the United States or Coalition Forces

Although the Government's public position is that these detainees are "the worst of the worst," *see supra* note 2, the data demonstrates that the Government has already concluded that a majority of those who continue to be detained at Guantanamo have no history of any 3(b) hostile act against the United States or its allies.

According to the Government, fewer than half of the detainees engaged in 3(b) hostile acts against the United States or any members of its coalition. As figure 7 depicts, the Government has concluded that no more than 45% of the detainees have committed some 3(b) hostile act.

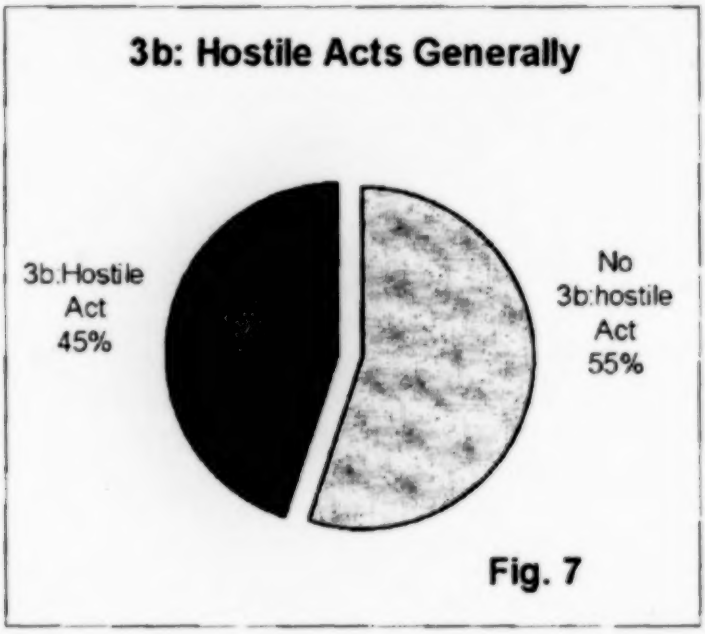


Fig. 7

This is true even though the Government's definition of a 3(b) hostile act is not demanding. As an example, the following was the evidence that the Government determined was sufficient to constitute a 3(b) hostile act:

The detainee participated in military operations against the United States and its coalition partners.

1. The detainee *fled*, along with others, when the United States forces bombed their camp.

2. The detainee was captured in Pakistan, along with other Uigher fighters.[13]

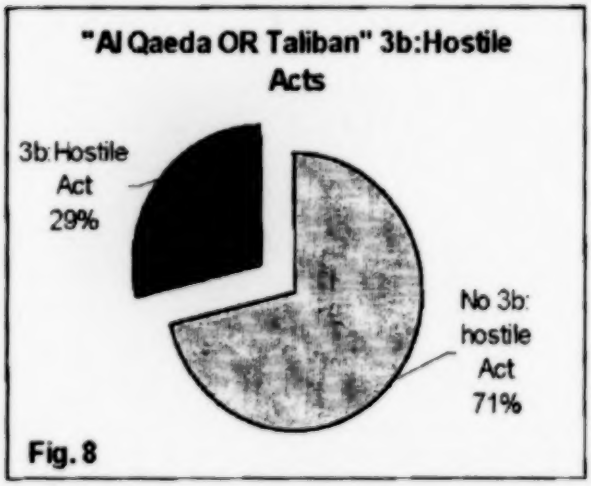
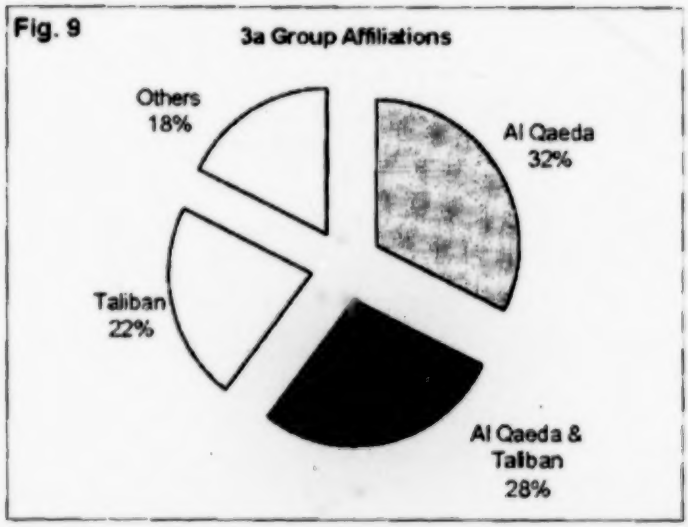


Fig. 8

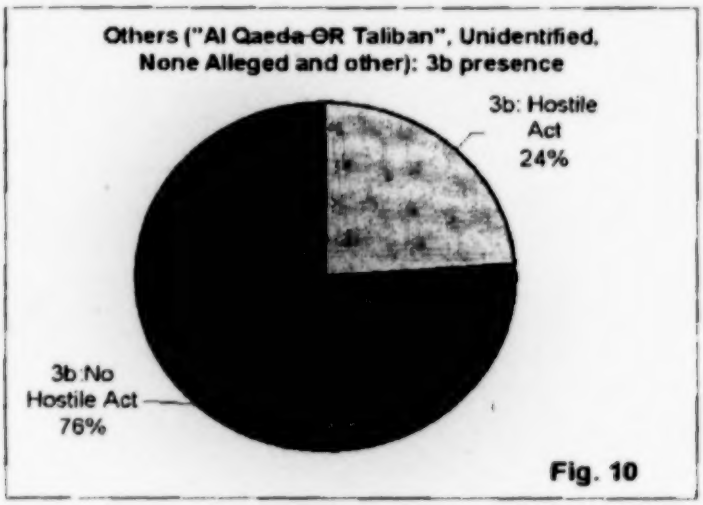
Cross-analyzing the ¶3(a) and ¶3(b) data, individuals in some groups are less likely to have committed hostile acts than those in others. In the group "al Qaeda *or* Taliban," for example, 71% of the detainees have not been found to have committed any hostile act. (See Fig. 8)

Of the "other" detainees in Figure 9, that is, the 18% whose 3(a) is either "Unidentified", "None alleged", "al Qaeda OR Taliban" or "other," only 24% have been determined to have committed a 3(b) hostile act. (See Fig 10)

[13] See CSRT Summary of Evidence available at the Seton Hall Law School library, Newark, NJ [Emphasis supplied].



Thus, the less clear the Government's characterization of a detainee's affiliation with a prohibited group is, the less likely the detainee is to have committed a hostile act. This is notable because the percentage of detainees with whom the Government cannot clearly connect with a prohibited group is so large.[14]



[14] See Fig. 1: "3(a) Group Affiliations" supra, p. 7: the sum of "al Qaeda OR Taliban" (7%); Unidentified/"None alleged" (10%); and "Other" (1%) equals 18%. This is the 18% that is represented as "Others" in Fig. 9.

The same pattern holds true when the degree of connection between the detainee and the affiliated group lessens. Thirty-two percent of the detainees are stand alone al Qaeda. Fifty seven percent of those detainees have a nexus to al Qaeda described as "associated with." Of those 57% whom are merely associated with al Qaeda, 72% of them have not committed 3(b) hostile acts. (See Fig. 3 and 11) Thus, the data illustrates that not only are the majority of the al Qaeda detainees merely "associated with" al Qaeda, but the Government concludes that a substantial percentage of those detainees did not commit 3(b) hostile acts.

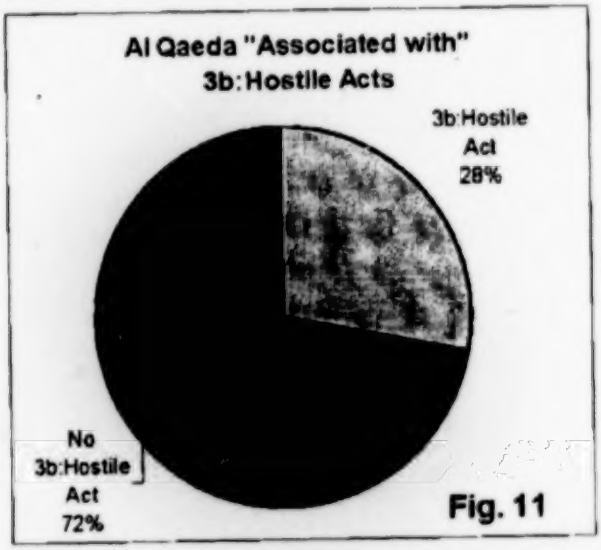


Fig. 11

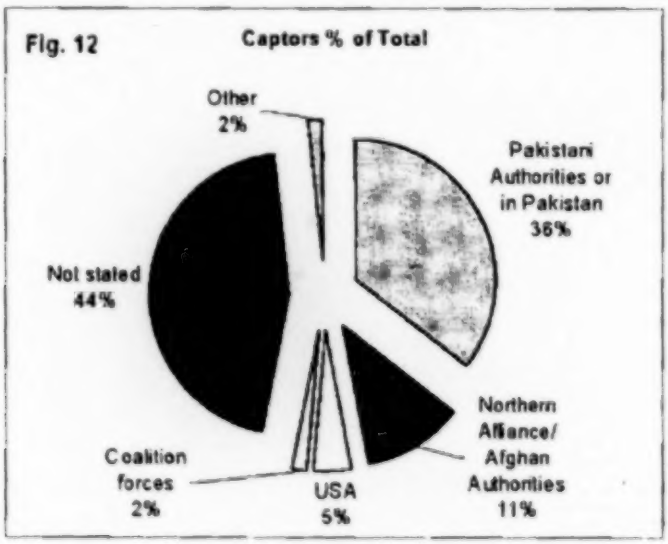
III. THE GOVERNMENT'S EVIDENCE THAT THE DETAINEES ARE ENEMY COMBATANTS

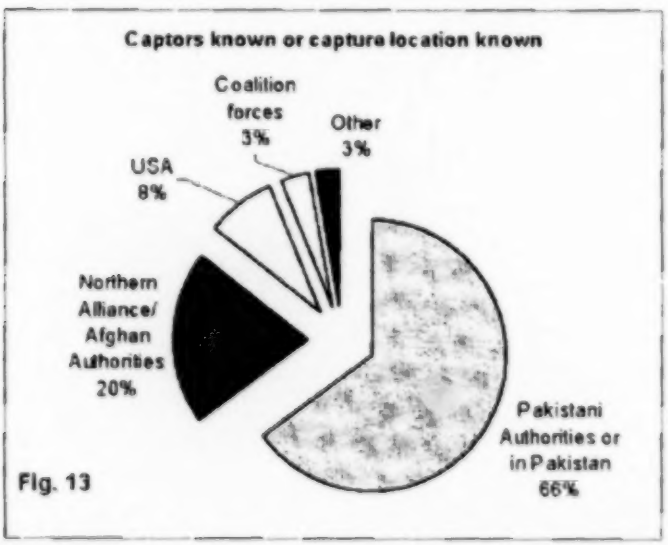
The data permit at least some answers to two questions: How was the evidence of their enemy combatant status obtained? What evidence does the Government have as to the detainees commission of 3(b) violations?

A. Sources of Detainees and Reliability of the Information about Them

Figure 12 explains who captured the detainees. Pakistan was the source of at least 36% of all detainees, and the

Afghanistan Northern Alliance was the source of at least 11 % more. The pervasiveness of Pakistani involvement is made clear in Figure 13 which shows that of the 56% whose captor is identified, 66% of those detainees were captured by Pakistani Authorities or in Pakistan. Thus, if 66% of the unknown 44% were derived from Pakistan, the total captured in Pakistan or by Pakistani Authorities is fully 66%.





Since the Government presumably knows which detainees were captured by United States forces, it is safe to assume

that those whose providence is not known were captured by some third party. The conclusion to be drawn from the Government's evidence is that 93% of the detainees were not apprehended by the United States.[15] (See Fig. 12) Hopefully, in assessing the enemy combatant status of such detainees, the Government appropriately addressed the reliability of information provided by those turning over detainees although the data provides no assurances that any proper safeguards against mistaken identification existed or were followed.

The United States promised (and apparently paid) large sums of money for the capture of persons identified as enemy combatants in Afghanistan and Pakistan. One representative flyer, distributed in Afghanistan, states:

> Get wealth and power beyond your dreams. . . . You can receive millions of dollars helping the anti-Taliban forces catch al-Qaida and Taliban murders. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people.[16]

Bounty hunters or reward-seekers handed people over to American or Northern Alliance soldiers in the field, often soon after disappearing;[17] as a result, there was little opportunity on the field to verify the story of an individual who presented the detainee in response to the bounty award. Where that story constitutes the sole basis for an individual's detention in Guantanamo, there would be little ability either

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[15] Presuming a fixed 7% of detainees were captured by US or coalition forces, the remaining detainees whose captor is unknown can be extrapolated to 68% "Pakistani Authorities or in Pakistan", 21% "Northern Alliance/Afghan Authorities", and 4% "other."

[16] *See Infra.*, Appendix A.

[17] *See, e.g.* Mahler, Jonathan, The Bush Administration versus Salim Hamdan (2006, Jan. 8), *New York Times*, p. 44.

for the Government to corroborate or a detainee to refute such an allegation.

As shall be seen in consideration of the Uighers, the Government has found detainees to be enemy combatants based upon the information provided by the bounty hunters. As to the Uighers, at least, there is no doubt that bounties were paid for the capture and detainment of individuals who were not enemy combatants.[18] The Uigher have yet to be released.

The evidence satisfactory to the Government for some of the detainees is formidable. For this group, the Government's evidence portrays a detainee as a powerful, dangerous and knowledgeable man who enjoyed positions of considerable power within the prohibited organizations. The evidence against them is concrete and plausible. The evidence provided for most of the detainees, however, is far less impressive.

The summaries of evidence against a small number of detainees indicate that some of the prisoners played important roles in al Qaeda. This evidence, on its face, seems reliable. For instance, the Government found that 11% of the detainees met with Bin Laden. Other examples include:

- A detaineee who is alleged to have driven a rocket launcher to combat against the Northern Alliance.
- A detainee who held a high ranking position in the Taliban and who tortured, maimed, and murdered Afghani nationals who were being held in Taliban jails
- A detainee who was present and participated in al Qaeda meetings discussing the September 11th attacks before they occurred.

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[18] White, Josh and Robin Wright. Detainee Cleared for Release Is in Limbo at Guantanamo. (2005, December 15), *Washington Post*, p. A09.

- A detainee who produced al Qaeda propaganda, including the video commemorating the USS Cole attack.
- A detaineee who was a senior al Qaeda lieutenant.
- 11 detainees who swore an oath to Osama Bin Laden.

The previous examples are atypical of the CSRT summaries. There are only a very few individuals who are actively engaged in any activities for al Qaeda and for the Taliban.

The 11 detainees who swore an oath to Osama Bin Laden are only a tiny fraction of the total number of the detainees at Guantanamo.

The Taliban is a different story.

The Taliban was a religious state which demanded the most extreme compliance of all of its citizens and as such controlled all aspects of their lives through pervasive Governmental and religious operation.[19] Under Mullah Omar, there were 11 governors and various ministers who dealt with such various issues as permission for journalists to travel, overseeing the dealings between the Taliban and NGOs for UN aid projects and the like.[20] By 1997, all international "aid projects had to receive clearance not just from the relevant ministry, but also from the ministries of Interior, Public Health, Police, and the Department of the Promotion of Virtue and Prevention of Vice."[21] There was a Health Minister, Governor of the State Bank, an Attorney General, an Education Minister, and an Anti-Drug Control Force.[22] Each

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[19] *See generally* Rashid, A. (2001). *Taliban.* Yale University Press.

[20] *See Id.*, p. 99.

[21] *See Id.*, p. 114.

[22] *See generally* Rashid, A. (2001). *Taliban.* Yale University Press.

city had a mayor, chief of police, and senior administrators.[23]

None of these individuals are at Guantanamo Bay.

The Taliban detainees seem to be people not responsible for actually running the country. Many of the detainees held at Guantanamo were involved with the Taliban unwillingly as conscripts or otherwise.

General conscription was the rule, not the exception, in Taliban controlled Afghanistan.[24] "All the warlords had used boy soldiers, some as young as 12 years old, and many were orphans with no hope of having a family, or education, or a job, except soldiering."[25]

Just as strong evidence proves much, weak evidence suggests more. Examples of evidence that the Government cited as proof that the detainees were enemy combatants includes the following:

- Associations with unnamed and unidentified individuals and/or organizations;
- Associations with organizations, the members of which would be allowed into the United States by the Department of Homeland Security;
- Possession of rifles;
- Use of a guest house;
- Possession of Casio watches; and
- Wearing of olive drab clothing.

The following is an example of the entire record for a detainee who was conscripted into the Taliban:

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[23] *Id.*

[24] *See Id.*, p 100.

[25] *See Id.*, p 109.

a. Detainee is associated with the Taliban

   i. The detainee indicates that he was conscripted into the Taliban.

b. Detainee engaged in hostilities against the US or its coalition partners.

   i. The detainee admits he was a cook's assistant for Taliban forces in Narim, Afghanistan under the command of Haji Mullah Baki.

   ii. Detainee fled from Narim to Kabul during the Northern Alliance attack and surrendered to the Northern Alliance.[26]

All declassified information supports the conclusion that this detainee remains at Guantanamo Bay to this date.

Other detainees have been classified as enemy combatants because of their association with unnamed individuals. A typical example of such evidence is the following:

> The detainee is associated with forces that are engaged in hostilities against the United States and its coalition partners:
>
> 1) The detainee voluntarily traveled from Saudi Arabia to Afghanistan in November 2001.
>
> 2) The detainee traveled and shared hotel rooms with an Afghani.
>
> 3) The Afghani the detainee traveled with is a member of the Taliban Government.
>
> 4) The detainee was captured on 10 December 2001 on the border of Pakistan and Afghanistan.[27]

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[26] See CSRT Summary of Evidence available at the Seton Hall Law School library, Newark, NJ.

[27] See CSRT Summary of Evidence available at the Seton Hall Law School library, Newark, NJ.

Some of these detainees were found to be enemy combatants based on their association with identified organizations which themselves are not proscribed by the Department of Homeland Security from entering the United States. In analyzing the charges against the detainees, the Combatant Status Review Board identified 72 organizations that are used to evidence links between the detainees and al Qaeda or the Taliban.

These 72 organizations were compared to the list of Foreign Terrorist Organizations in the Terrorist Organization Reference Guide of the U.S. Department of Homeland Security, U.S. Customs and Border Protection and the Office of Border Patrol. This Reference Guide was published in January of 2004 which was the same year in which the charges were filed against the detainees.[28] According to the Reference Guide, the purpose of the list is "to provide the Field with a 'Who's Who' in terrorism."[29] Those 74 foreign terrorist organizations are classified in two groups: 36 "designated foreign terrorist organizations," as designated by the Secretary of State, and 38 "other terrorist groups," compiled from other sources.

Comparing the Combatant Status Review Board's list of 72 organizations that evidence the detainee's link to al Qaeda

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[28] Terrorist Organization Reference Guide. Retrieved February 6, 2006 from http://www.mipt.org/pdf/TerroristOrganizationReferenceGuide.pdf

[29] It continues: "The main players and organizations are identified so the CBP [Customs and Border Protection] Officer and BP [Border Protection] Agent can associate what terror groups are from what countries, in order to better screen and identify potential terrorists." Unlike the many other compilations of terrorist organizations published by the Government since 9/11, including the list of the Office of Foreign Asset Control (OFAC) used to monitor or block international funds transfers to suspected and known terrorist organizations and their supporters, the Terrorist Organization Reference Guide identifies the 74 "main players and organizations" in terrorism.

and/or the Taliban, only 22% of those organizations are included in the Terrorist Organization Reference Guide. Further, the Reference Guide describes each organization, quantifies its strength, locations or areas of operation, and sources of external aid. Based on these descriptions of the organizations, only 11% of all organizations listed by the Combatant Status Review Board as proof of links to al Qaeda or the Taliban are identified as having any links to Qaeda or the Taliban in the Terrorist Organization Reference Guide.

Only 8% of the organizations identified by the Combatant Status Review Board even target U.S. interests abroad.

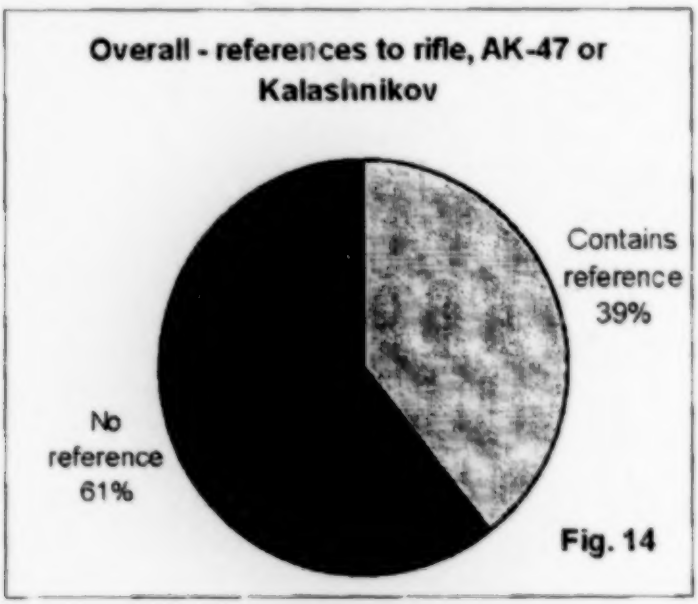

Fig. 14

The evidence against 39% of the detainees rests in part upon the possession of a Kalashnikov rifle.

Possession of a rifle in Afghanistan does s not distinguish a peaceful civilian from any terrorist. The Kalashnikov culture permeates both Afghanistan and Pakistan.[30]

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[30] Afghanistan is also the world's center for unaccounted weapons; thus, there is no exact count on the number of weapons in circulation. Arms experts have estimated that here are at least 10 million small arms in

Our economy has been suffering and continues to suffer because of the situation in Afghanistan. Rampant terrorism as well as the culture of drugs and guns—that we call the "Kalashnikov Culture"—tearing apart our social and political fabric—was also a direct legacy of the protracted conflict in Afghanistan.[31]

This is recognized not merely by the Pakistani Foreign minister but by American college students touring Afghanistan. "There is a big Kalashnikov-rifle culture in Afghanistan: . . . I was somewhat bemused when I walked into a restaurant this afternoon to find Kalashnikovs hanging in the place of coats on the rack near the entrance, ..."[32]

The Government treats the presence at a "guest house" as e evidence of being an enemy combatant. The evidence against 27% of the detainees included their residences while traveling through Afghanistan and Pakistan.

Stopping at such facilities is common for all people traveling in the area. In the region, the term guest house refers simply to a form of travel accommodation.[33] Numerous travel and

---

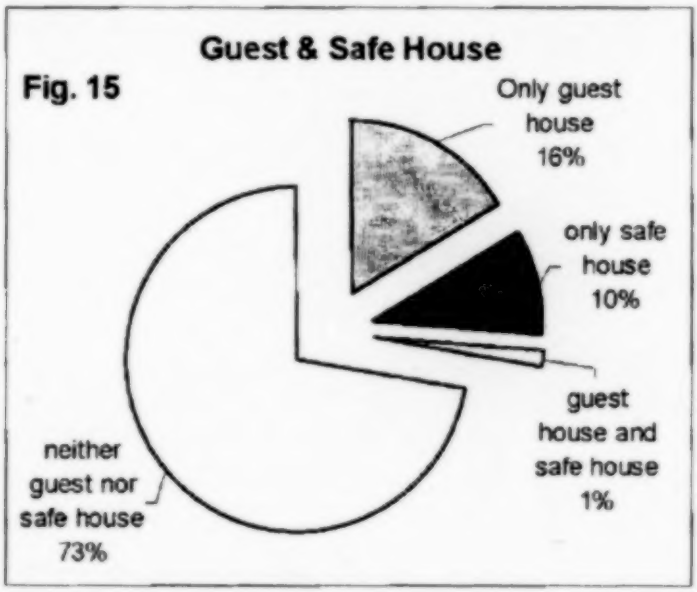
the country. The arms flow has included Soviet weapons funneled into the country during the 1979 invasion, arms from Pakistan supplied to the Taliban, and arms from Tajikistan that equipped the Northern Alliance. NEA's Statements on Afghanistan and the Taliban. Retrieved February 6, 2006 from http://neahin.org/programs/schoolsafety/september11 /materials/nmncapos.htm.

[31] Pakistan Mission to the United Nations, New York. Retrieved February 6, 2006 from http://www.un.int/pakistan/12011220.html.

[32] Hall, B. (2002 Nov.-Dec.) Letters from Afghanistan. *Duke Magazine*. Retrieved February 6, 2006, from www.dukemagazine.duke.edu/dukemag/issues/111202/afghan1.html.

[33] A June 7, 2005 article in Business Week referenced an Afghani woman named Mahboba who hopes to open a chain of women's guest houses, gaining assistance from participation in a program sponsored by the Business Council for Peace. In an article published September 25, 2005, New York Times travel reporter, Paul Tough, described the guest

tourism agencies, such as Worldview Tours, South Travels, and Adventure Travel include overnight stays at local guest houses and rest houses on their tour package itineraries and lists of accommodations, which are marketed to western tourists.[34] Guesthouses and rest houses typically offer budget rates and breakfast American travel agents advise American tourists to expect to stay in guest houses in either country.



In a handful of cases the detaince's possession of a Casio watch or the wearing olive drab clothing is cited as evidence that the detainee is an enemy combatant. No basis is given to

---

houses that he and his girlfriend stayed in while he explored the budding tourism industry in Afghanistan. Perman, Staci. Aiding Afghanistan with Style. (2005, June 7). *Business Week Online.* Retrieved January 11, 2006 from http://www.businessweek.com/smallbiz/content/jun2005/sb2005067_5111_sb013.htm. Tough, Paul. The Reawakening. (2005, September 25). *New York Times.*

[34] *See, Services Along the Silk Road: Accommodations.* Retrieved January 10, 2006, from http://worldviewtours.com/service/accomodation.htm; *Adventure Travel Trek and Tour Operators.* Retrieved January 10, 2006 from http://www.adventure-touroperator.com/main.html; *Adventure Holiday in Pakistan: Budget Hotels and Guesthouses.* Retrieved January 10, 2006, from http://www.southtravels.com/asia/pakistan/index.html

explain why such evidence makes the detainee an enemy combatant.

IV. CONTINUED DETENTION OF NON-COMBATANTS

The most well recognized group of individuals who were held to be enemy combatants and for whom summaries of evidence are available are the Uighers[35] These individuals are now recognized to be Chinese Muslims who fled persecution in China to neighboring countries. The detainees then fled to Pakistan when Afghanistan came under attack by the United States after September 11, 2001. The Uighers were arrested in Pakistan and turned over to the United States.

At least two dozen Uighurs found in Afghanistan and Pakistan has been detained in Guantanamo Bay, Cuba. The Government originally determined that these men were enemy combatants, just as the Government so determined for all of the other detainees. The Government has now decided that many of the Uighur detainees in Guantanamo Bay are not enemy combatants and should no longer be detained. They have not yet been released.

The Government has publicly conceded that many of the Uighers were wrongly found to be enemy combatants. The

---

[35] Uighurs, a Turkic ethnic minority of 8 to 12 million people primarily located in the northwestern region of China and in some parts of Kyrgyzstan and Kazakhstan, face political and religious oppression at the hands of the Chinese Government. The Congressional Human Rights Caucus of the United States House of Representatives has received several briefings on these issues, including the information that the People's Republic of China "continues to brutally suppress any peaceful political, religious, and cultural activities of Uighurs, and enforce a birth control policy that compels minority Uighur women to undergo forced abortions and sterilizations." (United States Commission on International Religious Freedom, World Uighur Network) In response to oppression by the Chinese Government, many Uighurs flee to surrounding countries such as Afghanistan and Pakistan. Wright, Robin. Chinese Detainees are Men Without a Country. (2005, August 24) Washington Post, p. A01.

question is how many more of the detainees were wrongly found to be enemy combatants. The evidence that satisfied the Government that the Uighers were enemy combatants parallel's the evidence against the other detainees—but the evidence against the Uighers is actually sometimes stronger.

The Uigher evidence parallels the evidence against the other detainees in that they were:

1. Muslims,
2. in Afghanistan,
3. associated with unidentified individuals and/or groups
4. possessed Kalishnikov rifles
5. stayed in guest houses
6. captured in Pakistan
7. by bounty hunters.

If such evidence is deemed insufficient to detain these persons as enemy combatants, the data analyzed by this Report would suggest that many other detainees should likewise not be classified as enemy combatants.

CONCLUSION

The detainees have been afforded no meaningful opportunity to test the Government's evidence against them. They remain incarcerated.

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App. 234

APPENDIX A

Image from http://www.psywar.org/apddetailsdb.php?detail=2002NC02

"Dear countrymen: The al Qaeda terrorists are our enemy. They are the enemy of your independence and freedom. Come on. Let us find their most secret hiding places. Search them out and inform the intelligence service of the province and get the big prize." (taken from AP article, http://afgha.com/?af=article&sid=12975

"The reward, about $4,285, would be paid to any citizen who aided in the capture of Taliban or al-Qaida fighters."

Text on the back of the imitation banknote is "Dear countrymen: The al-Qaida terrorists are our enemy. They are the enemy of your independence and freedom. Come on. Let us find their most secret hiding places. Search them out and inform the intelligence service of the province and get the big prize."

http://www.psywarrior.com/Herbafghan02.html

تا ۵ ملیون دالر جائزه در مقابل ارائه معلومات
موثق در باره محل بود و باش و یا دستگیری
رهبران طالبان و القاعده پرداخته میشود.

تر ۵ ملیون دالر جائزه دهغه موثق معلومات دپاره
چه د طالبان او القاعده مشرانو د نیولو او یا
استوګنې ځای وښی ورکول کیږی.

Image from http://www.psywar.org/apddetailsdb.php?detail=2002AFD029P

AFD29p—leaflet code. This leaflet shows an unnamed Taliban leader (http://www.psywarrior.com/Herbafghan02.html)

REWARD FOR INFORMATION LEADING TO THE WHEREABOUTS OR CAPTURE OF TALIBAN AND AL QAEDA LEADERSHIP.

Translation: http://www.psywarrior.com/afghanleaf15.html

App. 236

Afghanistan Leaflets

یه هغه اندازه یانګه وګټی چه د ټاسی خوب کی هم نه وی راغلی. د طالبانو

ضد قوا سره مرسته وکړی چه قاتلان او داره ماران د افغانستان څخه وشړی.

TF11-RP09-1

FRONT

"Get wealth and power beyond your dreams. Help the Anti-Taliban Forces rid Afghanistan of murderers and terrorists"

BACK

TEXT ONLY

"You can receive millions of dollars for helping the Anti-Taliban Force catch Al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people."

From http://www.psywarrior.com/afghanleaf40.html

APPENDIX B

Afghanistan Support Committee
al Birr Foundation
Al Haramain
Al Ighatha
Al Irata
Al Nashiri
Al Wa'ad
Al Wafa
Al-Gama'a al-islamiyya
Algerian Armed Islamic Group
Algerian resistance group
al-Haramayn
Al-Igatha Al-Islamiya, Int'ntl Islamic Relief Org
Al-Islah Reform Party in Yemen
Al-Itiihad al Islami (AIAI)
Ariana Airlines
Armed Islamic Group of Algeria
Bahrain Defense Organization
Chechen rebels
Dawa wa Irshad
East Turkish Islamic Movement
Egyptian Islamic Jihad (EIJ)
Extremist organization linked to Al Qaeda
Fiyadan Islam
Hamas (Islamic Resistance Front)

Harakat-e-Mulavi
HIG
Hizballah
International Islamic Relief Organization (IIRO)
Iraqi National Congress (INC)
Islamic Group Nahzat-Islami
Islamic Movement of Tajikistan
Islamic Movement of Uzbekistan
Islamic Salvation Front
Itihad Islami
JABRI, Wai Al
Jaish-e-mohammad
Jama'at al Tablighi
Jamaat ud Dawa il al Quran al Sunnat (JDQ)
Jamat al Taligh
Jamiat Al Islamiya
Jemaah Ilamiah Mquatilah
Jihadist
Karim Explosive Cell
Kuwaiti Joint Relief Committee
Lajanat Dawa Islamiya (LDI)
Lash ar-e-tayyiba
Lashkar-e-Tayyiba(LT)
LIFG
Maktab al Khidman
Mujahadin

Mujahedin Brigade in Bosnia
Mulahadin
Muslims in Sink'Iang Province of China
Nahzat-Islami
Pacha Khan
Revival of Islamic Heritage Society
Salafist group for call and combat
Sami Essid Network
Samoud
Sanabal Charitable Committee
Sharqawi Abdu Ali al-Hajj
small mudafah in Kandahar
Takfir Seven
Takvir Ve Hijra (TVH)
Talibari
Tarik Nafaz Shariati Muhammedi Molakan Danija
Tunisian Combat Group
Tunisian terrorists
Turkish radical religious groups
Uighers
World Assembly of Muslim Youth
yemeni mujahid

APPENDIX C

"Captured by Whom" Notes

"other" includes "Bosnian Authorities", "Foreign Government", "Gambia", "Iranian Authorities", "Local Pashtun tribe", "natural elders of Andokhoy City" and "United Islamic Front for the Salvation of Afghanis"

"Pakistani Authorities" includes "Pakistani Greentown"

"Where Captured" Notes

"Afghanistan" includes "Mazar-e Sharif" and "Tora Bora"

"other" includes "Bosnia", "fleeing from Shkin firebase", "Gambia", "home of al Qaeda financier", "home of suspected HIG commander", "Iran", "Kashmir", "Libyan guesthouse", "Samoud's compound", "UK, Gambia" and "while being treated for leg wound"

"Affiliation" Notes

al Qaeda includes "al Qaeda or its network"

al Qaeda & Taliban includes "al Qaeda member taliban associate", "al Qaeda/Taliban", "member of al Qaeda & associated with Taliban", "member of Taliban and/or associated w/ al Qaeda", "Taliban and/or al Qaeda", "Taliban Fighter and al Qaeda Member" and "taliban member al Qaeda associate"

"other" includes "HIG" and "Uigher"

Unidentified includes "al Qaeda affiliated group", "enemy combatant", "forces allied with al Qaeda and Taliban", "forces engaged in hostilities against US", "organization associated w/ and supported al Qaeda", "terrorist", "terrorist organization", "terrorist organization tied to al Qaeda", "terrorist organization supported by al Qaeda" and "various NGOs with al Qaeda & Taliban connections"

"Nexus" Notes

"associated with" includes "affiliated", "material support", "supported" and "supporter"

"fighter" for includes "supported and fought for"

"member" includes "member and participated in hostile acts", "member of or associated with", "member or ally", "operative", "part of or supported" and "worked for"

FILED
MAR 21 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 06-1195 and 06-1196

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v.

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KHALED A.F. AL ODAH, NEXT FRIEND OF
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PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, removes federal court jurisdiction over habeas petitions filed by aliens detained as enemy combatants at Guantanamo Bay, Cuba.

2. Whether aliens detained as enemy combatants at Guantanamo Bay have rights under the Suspension Clause of Article I, Section 9, of the Constitution.

3. Whether, if aliens detained at Guantanamo Bay have such rights, the MCA violates the Suspension Clause.

4. Whether petitioners may challenge the adequacy of the judicial review available under the MCA and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, before they have sought to invoke, much less exhaust, such review.

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UNITED STATES OF AMERICA, ET AL.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 476 F.3d 981.[1] The opinions of the district courts are reported at 355 F. Supp. 2d 311 (Pet. App.

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix filed in No. 06-1195.

51a-79a) and 355 F. Supp. 2d 443 (06-1196 Pet. App. 61-127).

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2007. The petitions for a writ of certiorari were filed on March 5, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are aliens detained by the Department of Defense at the Naval Base at Guantanamo Bay, Cuba. Their detention is based on individualized determinations by military Combatant Status Review Tribunals (CSRTs) that they are enemy combatants in the ongoing armed conflict against the al Qaeda terrorist organization and its supporters. Under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, those determinations are subject to review in the United States Court of Appeals for the District of Columbia Circuit. Challenges to the scope of review provided by the DTA may also be presented to the D.C. Circuit. Petitioners, unlike other detainees at Guantanamo Bay, have not availed themselves of the review provided by the DTA. The court of appeals held that the district court lacked jurisdiction under the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, to consider their habeas challenges filed outside of the exclusive review procedure established by the DTA.

1. In *Rasul* v. *Bush*, 542 U.S. 466 (2004), this Court held that district courts had jurisdiction under 28 U.S.C. 2241 to consider habeas petitions filed by detainees at Guantanamo Bay. The D.C. Circuit had relied on *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), for the proposi-

tion that habeas jurisdiction does not extend to aliens held outside the sovereign territory of the United States. See *Al Odah* v. *United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003), rev'd *sub nom. Rasul* v. *Bush*, 542 U.S. 466 (2004). This Court reversed. The Court reasoned that, on the question of "statutory jurisdiction" under 28 U.S.C. 2241, *Eisentrager* had implicitly rested on the narrow construction of the habeas statute adopted in *Ahrens* v. *Clark*, 335 U.S. 188 (1948), which did not survive the Court's decision in *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973). See *Rasul*, 542 U.S. at 477-479. Accordingly, this Court had no occasion to revisit *Eisentrager*'s constitutional holding and instead concluded, as a statutory matter, that Section 2241 "confer[red] * * * jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base." *Id.* at 484. The Court emphasized that it had decided "only whether the federal courts have jurisdiction," and it expressly declined to address "the merits of petitioners' claims." *Id.* at 485.

2. After the remand in *Rasul*, numerous Guantanamo Bay detainees filed habeas petitions. Their actions include 13 cases, involving more than 60 detainees, which were coordinated in the district court for limited procedural purposes, but assigned to two different district judges. Respondents moved to dismiss the claims of each detainee. One district court, acting on eleven of the cases, granted the motions in part and denied them in part, concluding that Due Process Clause of the Fifth Amendment applies extraterritorially to aliens held at Guantanamo Bay, and that the CSRT procedures are constitutionally deficient. 06-1196 Pet. App. 61a-128a. Another district court, acting on two cases,

granted the motions to dismiss in full, holding that the petitioners' detention was authorized by the congressional Authorization for Use of Military Force (AUMF), Pub. L. 107-40, 115 Stat. 224, and that the Constitution does not protect aliens outside sovereign United States territory, including at Guantanamo Bay. Pet. App. 51a-79a. Both decisions were appealed.

3. Recognizing that litigation over habeas filings by other detainees was consuming enormous resources and disrupting the day-to-day operation of the Guantanamo Bay Naval Base, Congress enacted the DTA. Section 1005(e)(1) of that Act amended the federal habeas corpus statute to provide that "no court, justice, or judge shall have jurisdiction" to consider habeas petitions filed by aliens detained at Guantanamo Bay. DTA § 1005(e)(1), 119 Stat. 2742.

Section 1005(e)(2) of the Act provides that the Court of Appeals for the District of Columbia Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." DTA § 1005(e)(2)(A), 119 Stat. 2742. The DTA specifies that the court of appeals may determine whether a final CSRT decision "was consistent with the standards and procedures specified by the Secretary of Defense," and "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(C), 119 Stat. 2742. Section 1005(e)(3) creates a parallel exclusive-review mechanism for Guantanamo Bay detainees seeking to challenge final criminal convictions issued by military commissions. DTA § 1005(e)(3)(A), 119 Stat. 2743.

4. While these appeals were pending, this Court decided *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006). In *Hamdan*, the Court held that Section 1005(e)(1), the jurisdiction-removing provision of the DTA, does not apply to habeas claims filed before the DTA was enacted. See *id.* at 2762-2769. In reaching that conclusion, the Court observed that the statute made the exclusive-review provisions in Sections 1005(e)(2) and 1005(e)(3) of the DTA "expressly * * * applicable to pending cases." *Id.* at 2764 (citing DTA § 1005(h)(2), 119 Stat. 2743). The Court noted the absence of such language regarding Section 1005(e)(1), and therefore drew a "negative inference" as to Congress' intent to apply Section 1005(e)(1) to pending cases. *Id.* at 2766.

5. In the wake of this Court's decision in *Hamdan*, Congress enacted the MCA. Section 7(a) of the MCA amends 28 U.S.C. 2241 to provide that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." Section 7(a) also eliminates federal court jurisdiction, except as provided by Sections 1005(e)(2) and (3) of the DTA, over "any other action against the Untied States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of such an alien. MCA § 7(a), 120 Stat. 2636. The MCA further provides that these amendments "shall take effect on the date of the enactment of this Act," and that they "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act, which relate to any aspect of the detention, transfer, treatment, trial, or conditions of

detention of an alien detained by the United States since September 11, 2001." MCA § 7(b), 120 Stat. 2636.

6. On February 20, 2007, the court of appeals dismissed these cases for lack of jurisdiction.

a. The court held that the MCA applies to petitioners' pending habeas cases—each of which "relates to an 'aspect' of detention and * * * deals with the detention of an 'alien' after September 11, 2001," Pet. App. 6a—and thus eliminates federal court jurisdiction over their petitions, *id.* at 6a-9a. The court rejected petitioners' argument that Section 7(b)'s effective-date provision applies only to non-habeas detention-related cases specified in Section 7(a) (28 U.S.C. 2241(e)(2)). The court explained that Section 7(b) specifies the effective date of Section 7(a), which eliminates federal jurisdiction over *both* habeas and all other detention-related claims in "all cases, without exception." *Id.* at 9a.

The court of appeals further held that the MCA is consistent with the Suspension Clause, for two independent reasons. First, as aliens outside the sovereign territory of the United States, petitioners have no constitutional rights under that clause. Pet. App. 14a (citing, *e.g.*, *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950)). Second, even if petitioners had constitutional rights under the Suspension Clause, the clause would not protect a right to the writ in these circumstances. As the court explained, "the Suspension Clause protects the writ 'as it existed in 1789,'" *id.* at 10a, but "the history of the writ in England prior to the founding" shows that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." *Id.* at 12a-13a.

The court further explained that this Court's decision in *Eisentrager* "ends any doubt about the scope of com-

mon law habeas." Pet. App. 13a. In *Eisentrager*, this Court stated that it was aware of "no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Ibid.* (quoting *Eisentrager*, 339 U.S. at 768).

The court of appeals held that petitioners' reliance on this Court's decision in *Rasul* was misplaced. Pet. App. 13a. The court explained that *Rasul* interpreted only the statutory right to habeas, so it "could not possibly have affected the constitutional holding of *Eisentrager*," *id.* at 15a n.10, in which the Court explicitly held that aliens detained outside the sovereign territory of the United States do not have a constitutionally protected right to the writ, see 339 U.S. at 781.

Having concluded that the MCA eliminates jurisdiction in petitioners' cases, the court vacated the district courts' decisions and dismissed the cases for want of jurisdiction. Pet. App. 19a-20a.

b. Judge Rogers dissented. She agreed that Congress intended the MCA to withdraw federal jurisdiction over the detainees' claims, but she found the statute to be inconsistent with the Suspension Clause, because "Congress has neither provided an adequate alternative remedy * * * nor invoked the exception to the Clause by making the required findings to suspend the writ." Pet. App. 21a-22a.

ARGUMENT

The scope of judicial review afforded to aliens detained at Guantanamo Bay who have been determined to

be enemy combatants is important, but the issues raised by the petitions do not warrant this Court's review at this time. In the DTA, Congress has provided a means by which petitioners can obtain judicial review of the validity of their detention. Petitioners contend that this review mechanism is deficient in various respects, but their claims are not ripe because petitioners have not even attempted to pursue review under the DTA. An effort to seek DTA review would not only allow petitioners to challenge the scope of review available under the DTA but also give concrete guidance as to the extent of that review. There is no need for this Court to assess the adequacy of DTA review before it has taken place, and certainly none that warrants the extraordinary expedition requested by petitioners.

Furthermore, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The court's holding that the MCA eliminates jurisdiction over petitioners' habeas actions is compelled by the plain language of the statute. Relying on the settled precedent of this Court, the court of appeals also correctly held that the MCA does not violate the Suspension Clause. As aliens outside the sovereign territory of the United States, petitioners have no rights under the Suspension Clause, and, in any event, the habeas rights protected by that provision would not extend to aliens detained at Guantanamo Bay as enemy combatants.

Congress has afforded petitioners—all aliens detained at Guantanamo Bay as confirmed enemy combatants in the ongoing armed conflict against the al Qaida terrorist organization and its supporters—an unprecedented degree of access to our courts in wartime. No other captured enemy combatants in the history of this

country, or any other, have enjoyed such privileges. The court of appeals has correctly concluded that petitioners must exercise their statutory right of judicial review through the procedures established by Congress. Petitioners have failed to demonstrate a sufficiently compelling basis for this Court to review the court of appeals' decision before petitioners have even attempted to invoke the procedures that Congress has afforded. And, in any event, any review in this Court of the questions presented should await a case in which a detainee has actually invoked his right of judicial review under the DTA, and in which this Court may consider the judicial review available under the DTA on a developed and concrete record, rather than in the abstract.

1. The court of appeals correctly held that the MCA removes federal jurisdiction over petitioners' pending habeas petitions. Section 7 of the MCA unequivocally eliminates federal court jurisdiction over petitioners' claims, except as provided by Section 1005(e)(2) and (3) of the DTA. Section 7(a) of the MCA amends 28 U.S.C. 2241 to provide that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien" detained by the United States as an enemy combatant. In addition, Section 7(a) eliminates federal jurisdiction over "any other action * * * relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of such an alien. MCA § 7(a), 120 Stat. 2636. The statute further provides that both of these amendments "shall take effect on the date of the enactment of this Act," and that they "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act, which relate to any aspect of the detention, transfer, treatment, trial, or conditions of

detention of an alien detained by the United States since September 11, 2001." MCA § 7(b), 120 Stat. 2636.

As the court of appeals explained, "[t]he detainees' lawsuits fall within the subject matter covered by the amended [Section] 2241(e); each case relates to an 'aspect' of detention and each deals with the detention of an 'alien' after September 11, 2001. The MCA brings all such 'cases, without exception' within the new law." Pet. App. 6a. The court of appeals' conclusion that the MCA applies to these cases is unassailable and provides no basis for further review. Indeed, though Judge Rogers dissented on other issues, she agreed with the majority that "Congress intended to withdraw federal jurisdiction" through the MCA. *Id.* at 21a.

Petitioners contend (Pet. 13; 06-1196 Pet. 25-26) that Section 7(b)'s effective-date provision does not apply to the elimination of jurisdiction over habeas cases in Section 7(a) (28 U.S.C. 2241(e)(1)), and that jurisdiction over their pending habeas cases is therefore preserved. That claim is contrary to both the statutory language and the underlying legislative intent. The scope of Section 7(b) is unambiguous—it applies to the amendment "made by subsection (a)," MCA § 7(b), 120 Stat. 2636, which expressly includes the elimination of jurisdiction over habeas claims brought by aliens detained as enemy combatants. MCA § 7(a), 120 Stat. 2635. Thus, there is no basis for reading Section 7(b), which applies to "all cases, without exception * * * which relate to any aspect of the detention, transfer treatment, trial, or conditions of detention," to exclude the habeas cases addressed in Section 7(a). As the court of appeals explained, "[h]abeas cases are simply a subset of cases dealing with detention." Pet. App. 7a-8a; see *Preiser* v. *Rodriguez*, 411 U.S. 475, 484 (1973) ("the essence of ha-

beas corpus is an attack by a person in custody on the legality of that custody").

The court of appeals properly rejected petitioners' argument that the MCA does not satisfy the requirement that a statute contain a "clear statement" in order to "repeal habeas jurisdiction," *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001). Section 7(a) expressly refers to the elimination of "habeas" jurisdiction. It also amends the habeas statute, 28 U.S.C. 2241. And the effective-date provision of Section 7(b), stating that the amendment "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act," makes clear that the repeal of habeas jurisdiction applies to pending cases. Indeed, Congress "could not [have been] clearer." Pet. App. 7a. "It is almost as if the proponents of these words were slamming their fists on the table shouting 'When we say "all," we mean all—**without exception!**'" *Ibid.* This is more than sufficient to satisfy *St. Cyr*, which, as the court of appeals explained, "demands clarity, not redundancy." *Id.* at 8a.

The context in which the MCA was enacted underscores that Section 7 was intended to remove district-court jurisdiction over these cases and to do so clearly. In the DTA, Congress had attempted to accomplish that result and to place exclusive jurisdiction in the D.C. Circuit. See DTA § 1005(e)(1) and (2), (h)(1), 119 Stat. 2742, 2743. This Court, however, held that the DTA failed to make sufficiently clear that the elimination of district-court jurisdiction applied to pending cases. See *Hamdan*, 126 S. Ct. at 2769. Congress reacted swiftly to *Hamdan* by extending the elimination of habeas jurisdiction to "all cases, without exception, pending" on the date of the MCA's enactment. MCA § 7(b), 120 Stat. 2636. Indeed, as the court of appeals explained,

"[e]veryone who has followed the interaction between Congress and the Supreme Court knows full well" that the MCA was passed in response to *Hamdan*. Pet. App. 6a; see *id.* at 6a n.2 (discussing legislative history).[2]

2. As explained below, aliens held outside the sovereign territory of the United States do not enjoy the protections of the Suspension Clause. In any event, even in contexts to which the Suspension Clause is fully applicable, this Court has held that Congress may withdraw habeas jurisdiction if it provides an adequate alternative remedy. See *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977); *St. Cyr*, 533 U.S. at 314 n.38. Here, the DTA and the MCA satisfy that requirement by giving petitioners the right to obtain judicial review of the military's determination that they are properly classified as enemy combatants. At the very least, the availability of judicial review through the DTA underscores that consideration of petitioners' claims would be premature because they have not yet exhausted their remedies under the DTA. Pursuing that avenue would afford this Court the oppor-

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[2] Petitioners suggest (Pet. 13 n.10; 06-1196 Pet. 25-26) that Section 3(a) of the MCA compels a negative inference that Section 7(b) does not repeal jurisdiction over pending habeas cases. That argument lacks merit. Section 3(a)(1) enacts 10 U.S.C. 950j, which removes federal jurisdiction to review final military-commission decisions, except as otherwise provided in the statute. As the court of appeals explained, "Section 7(b), read in conjunction with [S]ection 7(a), is no less explicit than § 950j." Pet. App. 9a. Indeed, Congress used very similar language in Sections 3 and 7. Both sections refer explicitly to the habeas statute. And Section 7, referring to "all cases, without exception," is even broader than Section 3, referring to "any claim or cause of action." In contrast to the statutory provisions addressed in *Hamdan*, therefore, there is no basis for drawing a "negative inference" from Section 3 that Congress did not intend Section 7 to repeal habeas jurisdiction.

tunity to assess the adequacy of the DTA's alternative in a concrete context, rather than in the abstract. It also would show proper regard to Congress's considered judgment that that alternative is appropriate for alien military detainees in the current conflict.

a. Section 1005(e)(2)(C) of the DTA specifies the D.C. Circuit's "[s]cope of review" of the CSRT's enemy-combatant determination. The court must consider "whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence)." DTA § 1005(e)(2)(C)(i), 119 Stat. 2742. The court also must consider, "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." *Id.* § 1005(e)(2)(C)(ii), 119 Stat. 2742. Thus, the statute allows for ample judicial review both of the procedures used by the CSRTs and of the evidentiary sufficiency of their determinations.

All but one of the petitioners (who has been charged with a military-commission offense) are being detained for non-punitive reasons during the ongoing conflict. See *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 518-524 (2004) (plurality opinion). The level of review afforded under the DTA, however, gives petitioners greater rights of judicial review than traditionally provided to those held for punishment pursuant to the judgment of a military tribunal. This Court has held that the habeas review afforded in that context does not examine the guilt or

innocence of the defendant, nor does it examine the sufficiency of the evidence. Rather, it is limited to the question whether the military tribunal had jurisdiction. See *In re Yamashita*, 327 U.S. 1, 8 (1946); *Ex parte Quirin*, 317 U.S. 1, 25 (1942); see also *Eisentrager*, 339 U.S. at 786; *id.* at 797 (Black, J. dissenting) (extent of review "is of most limited scope"); cf. *Hamdi*, 542 U.S. at 535 (plurality opinion) (recognizing that "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting").

Under *Yamashita*, there was review only of the threshold jurisdictional question whether the offense and offender were triable by military commission. There was no review of other legal questions, compliance with the military's own procedures, or evidentiary sufficiency—all of which the DTA and MCA permit. See DTA § 1005(e)(2)(C)(i), 119 Stat. 2742. Thus, the review provided by Congress in the DTA far surpasses the type of review available under *Yamashita*—a level of review deemed adequate for an alien enemy convicted by a military commission and sentenced to death—and it affords an adequate and effective substitute remedy for any applicable habeas right. See *Pressley*, 430 U.S. at 381.

The review provided under the DTA is not only greater than that afforded under *Yamashita*, it also is fully consistent with traditional habeas practice even outside the particularly deferential military context. This Court has explained that under traditional habeas review, "pure questions of law" are generally reviewable, but, "other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive." *St. Cyr*, 533 U.S. at 305-306 (footnote

omitted); cf. *Herrera* v. *Collins*, 506 U.S. 390, 400 (1993) ("[H]abeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."); 28 U.S.C. 2254(e). DTA review fully satisfies even that standard for conventional habeas petitions (putting aside the extraordinary nature of the petitions here). Thus, even if precedent developed in the non-military context were to be applied, petitioners' Suspension Clause arguments would fail because Congress has provided an adequate alternative remedy.

b. The settled rule is that federal courts will decline to consider a habeas petition in circumstances where other judicial or administrative remedies have not been exhausted. See *Rose* v. *Lundy*, 455 U.S. 509, 515-516 (1982). This requirement is most commonly applied in cases where the available remedies are in state-court proceedings, see 28 U.S.C. 2254(b)(1), but it also applies to federal proceedings, see, *e.g.*, *United States* v. *Hayman*, 342 U.S. 205, 223 (1952), including those conducted by military tribunals, see *Clinton* v. *Goldsmith*, 526 U.S. 529, 537 n.11 (1999); *Noyd* v. *Bond*, 395 U.S. 683, 693-699 (1969); cf. *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975). The comity considerations that underlie the exhaustion requirement are especially pressing here, given that petitioners seek to challenge the concurrent judgment of Congress and the President regarding the conduct of an ongoing war. See *Hamdi*, 542 U.S. at 531 (plurality opinion); *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in the judgment) ("[T]here is a realm of political authority over military affairs where the judicial power may not enter.").

To be sure, in *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006), this Court declined to require exhaustion of the military-commission process before considering a chal-

lenge to the system of military commissions unilaterally established by the President. The Court emphasized that, while courts ordinarily "should respect the balance that Congress struck," *id.* at 2770, the military commissions were not established by Congress and did not provide for "independent review," *id.* at 2771. The contrast between this case and *Hamdan*, however, is striking. Congress enacted the statute at issue here in direct response to *Hamdan*. Moreover, the DTA and the MCA expressly recognize and affirm the CSRT process. See DTA § 1005, 119 Stat. 2740; MCA § 3(a)(1), 120 Stat. 2603 (to be codified at 10 U.S.C. 948d(c)). Under the DTA and the MCA, petitioners will enjoy "independent review" of the CSRT determinations in the D.C. Circuit. This Court should now "respect the balance that Congress struck" and allow that review process to run its course under the traditional rule that a habeas petitioner must first exhaust his remedies before challenging the scope of review.[3]

c. Exhaustion is also appropriate because it could resolve many of petitioners' specific objections to the DTA process, and at a minimum it would allow this Court to consider those objections in a more concrete setting. Petitioners complain (Pet. 18-21) about various aspects of the CSRT procedural rules. These objections lack merit, because the CSRTs provide detainees with

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[3] That is particularly true given that the *Al Odah* petitioners represented to the Court in *Rasul* that they sought only a military tribunal process to determine the validity of their detention, and "have never sought to have Article III courts make *any* individualized determinations of petitioners' alleged status as enemies or to second-guess military determinations as to which aliens pose a threat to the United States." Al Odah Reply Br. at 13, *Rasul*, *supra* (No. 03-334); see Tr. of Oral Arg. 9-10, 15, 18-19, *Rasul*, *supra* (No. 03-334).

procedural protections exceeding even those that this Court in *Hamdi* held would be sufficient for American citizens held in the United States. See 542 U.S. at 533 (plurality opinion). More to the point, petitioners' objections can be asserted in the D.C. Circuit under the DTA. That court can determine the nature of petitioners' rights, if any, under "laws of the United States" and the U.S. Constitution, and can decide whether the CSRT process violated any applicable rights. See DTA § 1005(e)(2), 119 Stat. 2742. Likewise, any claim that the CSRT misapplied the applicable standards and procedures is subject to review in the D.C. Circuit under the DTA. See DTA § 1005(e)(2)(C), 119 Stat. 2742. Petitioners therefore will have adequate opportunity to raise such grievances in their petitions for review in that court.

Petitioners assert that the review afforded under the DTA is insufficient because it does not authorize fact-finding by the court of appeals, and it prohibits them from submitting new exculpatory material. In fact, the DTA contains a provision requiring that such new evidence be considered by the Department of Defense. DTA § 1005(a)(3), 119 Stat. 2741 (directing the Secretary to "provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee"). In accordance with that requirement, the Defense Department will administratively review new evidence that a petitioner submits to determine whether it warrants reconsideration of the CSRT's enemy combatant determination.[4] Thus, con-

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[4] In addition to the CSRT review process, the Department of Defense also conducts an annual administrative examination of whether it is appropriate to release or repatriate an enemy combatant. The 328 administrative reviews conducted in 2006 resulted in determinations

trary to petitioners' assertion, there is an administrative mechanism for these detainees to submit new evidence that may bear on their detention.

In any event, limiting the D.C. Circuit's DTA review to the CSRT record does not make the DTA a constitutionally inadequate substitute for habeas review. As noted above, in the context of the decisions of military tribunals, this Court has repeatedly held that habeas does not provide for factual review, and certainly does not provide an opportunity for counsel to build a new evidentiary record. *Yamashita*, 327 U.S. at 8, 17; *Quirin*, 317 U.S. at 25. Even outside the military context, there is no right to factual re-examination of a judgment. See, *e.g.*, *Felker* v. *Turpin*, 518 U.S. 651, 663-664 (1996) (restrictions on successive petitions do not violate Suspension Clause). Likewise, for the confirmed alien enemy combatants here, there is no constitutional right to successive CSRT decisions.

Moreover, it is not yet established how, in practice, DTA review will be conducted. Those detainees who have pursued their DTA remedies have argued strenuously for an exhaustive scope of review, including wide-ranging discovery and fact-finding by the court of appeals—a level of review far exceeding that traditionally available in habeas. See, *e.g.*, Emer. Mot. for Order Setting Procedures at 9-10, *Parhat* v. *Gates*, No. 06-1397 (D.C. Cir. filed Dec. 22, 2006) (petitioners "are entitled

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that 55 detainees (roughly 17 percent) should no longer be detained at Guantanamo Bay. See Department of Defense, *Annual Administrative Review Boards for Enemy Combatants Held at Guantanamo Attributable to Senior Defense Officials* (Mar. 6, 2007) <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902>. Since 2002, approximately 390 detainees have been transferred or released. See *ibid.*

to a hearing and limited discovery" of "all evidence relevant to petitioners' enemy combatant determination"); Mot. to Compel at 19, *Bismullah* v. *Gates*, No. 06-1197 (D.C. Cir. filed Aug. 7, 2006) (arguing that the "DTA must be construed to permit Bismullah to adduce new evidence in support of his claim that he is not and never has been an 'enemy combatant'"). The government has opposed those arguments, but the D.C. Circuit has not yet resolved them.[5] Conventional principles against avoiding important constitutional questions before it is necessary to decide them counsel strongly against jumping to determine, at this early juncture, the adequacy of DTA review before the D.C. Circuit has even had an opportunity to determine what that review entails in a concrete setting and issued a decision adverse to an enemy combatant.[6]

3. The court of appeals correctly held that petitioners do not enjoy rights under the Suspension Clause.

a. As the court of appeals recognized, this Court's precedent—including the constitutional holding of *Eisentrager*—"holds that the Constitution does not confer rights on aliens without property or presence within

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[5] The D.C. Circuit has ordered expedited briefing and argument in *Parhat* and *Bismullah* to consider the nature of review under the DTA and issues relating to the entry of a proposed protective order addressing, among other things, counsel access to classified information. Oral argument will be held on May 15.

[6] Petitioners further contend (Pet. 20) that the DTA does not expressly authorize the court of appeals to order a detainee's release. In fact, all of the detainees who were determined by CSRTs not to be enemy combatants have been released from United States custody. See Notice of Transfer at 3, *Kiyemba* v. *Bush*, No. 05-5487 (D.C. Cir. filed Nov. 21, 2006). And, in any event, petitioners may direct to the D.C. Circuit any arguments about the appropriate relief under the DTA in the case (if any) in which such a detainee is not released.

the United States." Pet. App. 14a. As to any alleged rights under the Suspension Clause in particular, this Court's decision in *Eisentrager* is "controlling." *Ibid.*

In *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), this Court held that aliens detained as enemies outside the United States are not "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*." *Id.* at 777. The Court concluded that, because the petitioner in that case had no constitutional rights, the denial of habeas review did not violate either the Suspension Clause or the Fifth Amendment. *Id.* at 777-779, 784-785. In rejecting the assertion of a constitutional habeas right, the Court emphatically stated that such an entitlement "would hamper the war effort." *Id.* at 779. The Court explained that "[i]t would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Ibid.*

This Court has repeatedly reaffirmed *Eisentrager*'s holding that aliens outside the United States have no rights under the Constitution. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) ("Not only are history and case law against [the alien], but as pointed out in [*Eisentrager*], the result of accepting his claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries."); *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) (citing *Eisentrager* and *Verdugo-Urquidez* for the proposition that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders").

Likewise, the courts of appeals have consistently applied these precedents in various contexts. See, *e.g.*, *People's Mojahedin Org. of Iran* v. *Department of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause *or otherwise*") (emphasis added), cert. denied, 529 U.S. 1104 (2000). With respect to Guantanamo Bay specifically, the Eleventh Circuit has held that aliens there "have no First Amendment or Fifth Amendment rights." *Cuban Am. Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1428, cert. denied, 515 U.S. 1142 and 516 U.S. 913 (1995); see also *id.* at 1425 ("We disagree that 'control and jurisdiction' is equivalent to sovereignty.").[7]

Petitioners contend (Pet. 17; 06-1196 Pet. 14-15) that *Eisentrager* is no longer good law in the wake of this Court's decision in *Rasul*. Petitioners misread *Rasul*. *Rasul* held that the "statutory predicate" for the Court's holding in *Eisentrager* had been overruled, and it therefore rejected the D.C. Circuit's broad holding, based on *Eisentrager*, that habeas jurisdiction was entirely unavailable to aliens at Guantanamo Bay. See *Rasul*, 542 U.S. at 475, 479. It did not, however, cast any doubt on *Eisentrager*'s holding—or the holdings of subsequent cases relying on *Eisentrager*—that aliens held abroad do not have a *constitutionally* guaranteed right to habeas corpus. See *id.* at 478. *Rasul* addressed only the extent to which the habeas *statute* applies

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[7] Petitioners argue (Pet. 17-18) that it does not matter whether they enjoy constitutional rights, because the Suspension Clause is "a limitation on congressional power." But so too is the Fifth Amendment. In any event, however the Suspension Clause is described, *Eisentrager* establishes that it does not apply to aliens held outside sovereign United States territory. Cf. Pet. App. 17a-19a.

extraterritorially, and it expressly reserved all constitutional questions. See *id.* at 485. Nothing in *Rasul* suggests that the Court implicitly overruled *Eisentrager* or the many other precedents governing that question.

Petitioners' reliance on a concurrence in *Rasul* (Pet. 17; 06-1196 Pet. 20) is likewise misplaced. Justice Kennedy stated that the detainees at Guantanamo Bay are distinguishable from the petitioner in *Eisentrager* in two ways, from which he would have concluded that there was jurisdiction under the federal habeas statute. *Rasul*, 542 U.S. at 487-488 (Kennedy, J., concurring in the judgment). First, he stated, "Guantanamo Bay is in every practical respect a United States territory." *Id.* at 487. Second, "the detainees at Guantanamo Bay are being held indefinitely, and without benefit of *any legal proceeding to determine their status.*" *Id.* at 487-488 (emphasis added). The latter observation cannot extend to this case. Since this Court's decision in *Rasul*, all of petitioners have had CSRTs, which have issued individualized decisions determining that each is properly being detained as an enemy combatant. Further, Congress has not only recognized the CSRT process but provided for review of those CSRT determinations in the D.C. Circuit. Thus, there is an established statutory mechanism for the detainees to challenge their status determination.

The other "critical" fact Justice Kennedy cited—that, in construing the habeas statute, Guantanamo Bay should be treated as sovereign territory of the United States—was rejected by the majority in *Rasul*, which held that the United States exercises control, but "not 'ultimate sovereignty,'" over the leased area. See 542 U.S. at 475. And although the Court concluded that such control was sufficient to establish *statutory* habeas

jurisdiction even as to aliens, it focused on the distinctive language of the habeas statute, see *id.* at 481, as well as the "'extraordinary territorial ambit' of the writ at common law," *id.* at 482 n.12 (citation omitted). Indeed, the very fact that the Court was addressing the territorial reach of the writ underscores that Guantanamo Bay—a part of the sovereign territory of Cuba—lies *outside* the sovereign territory of the United States.

In any event, the status of Guantanamo Bay for purposes of the habeas statute is no longer a relevant consideration. The DTA makes clear that detainees at Guantanamo Bay have an avenue to challenge their detention in the court of appeals and that that new statutory remedy is exclusive. Accordingly, the question now before the Court is the constitutionality of this new statute. As to that question, *Eisentrager* controls: petitioners, as aliens outside the United States, are not "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas*." 339 U.S. at 777.

Petitioners nevertheless contend that, even though they are aliens held on Cuban sovereign territory, they should be treated as being within the United States since the United States has control over the Naval Base at Guantanamo Bay. What was critical to the constitutional holding in *Eisentrager*, however, was sovereignty, not control. In *Eisentrager*, the petitioners were aliens imprisoned at a United States military base in Germany, which was controlled by the United States Army. See 339 U.S. at 766. Despite that control, this Court stressed that the aliens "at no relevant time were within any territory over which the United States is *sovereign*," *id.* at 778 (emphasis added), and, on that basis, it held that application of the Fifth Amendment would be

impermissibly "extraterritorial" (*id.* at 784). The United States is not sovereign over Guantanamo Bay; it operates a naval base there under written agreements with Cuba that expressly recognize Cuban sovereignty.[8]

Even if Guantanamo Bay were somehow treated as sovereign United States territory (contrary to *Rasul*), petitioners still would not have any constitutional rights. In *Verdugo-Urquidez*, this Court held that aliens "receive constitutional protections when they have come within the territory of the United States *and* developed *substantial* connections with this country." 494 U.S. at 271 (emphases added); see *People's Mojahedin*, 182 F.3d at 22. The Court further held that "lawful but involuntary" presence in the United States "is not of the sort to indicate any substantial connection with our country" for constitutional purposes. *Verdugo-Urquidez*, 494 U.S. at 271. Applying that rule, this Court denied Fourth Amendment protection to an alien who was being detained *in the United States* against his will, but who had "no previous significant *voluntary* connection with the United States." *Ibid.* (emphasis added). Similarly, here, petitioners' presence at Guantanamo Bay is, as the

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[8] See Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 (Lease); Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, T.S. No. 426 (Supp. Lease); Treaty on Relations with Cuba, May 29, 1934, U.S.-Cuba, 48 Stat. 1682. Under those agreements, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba" over the leased area, and "Cuba consents" to United States control over that area, but only "during the period" of the lease. Lease art. III. The lease permits the United States to "do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose." Lease art. II. The United States may not, for example, allow civilian settlement at Guantanamo Bay, or establish "commercial" or "industrial" enterprises there. Supp. Lease art. III.

petitions underscore, involuntary, and the detainees lack significant voluntary connections with this country.[9]

b. Even if alien enemy combatants detained outside the United States do possess some measure of constitutional rights, the court of appeals correctly held that the protections of the Suspension Clause do not extend "to aliens held at an overseas military base leased from a foreign government." Pet. App. 14a.

As the court of appeals explained, the Suspension Clause protects the common law writ of habeas corpus, "as it existed in 1789." Pet. App. 10a (quoting *St. Cyr*, 533 U.S. at 301). The court further noted that petitioners were unable to identify any cases "showing that the English common law writ of habeas corpus extended to aliens beyond the Crown's dominions." Pet. App. 11a. And the court, in undertaking its own review, found the contrary: "[e]very territory * * * cited as a jurisdiction to which the writ extended * * * was a sovereign territory of the Crown," but when "the Crown detained prisoners outside the Crown's dominions, it was understood that they were outside the jurisdiction of the writ." *Id.* at 12a. As the court stated, "[t]he short of the matter is that given the history of the writ in England prior to the founding, habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." *Id.* at 12a-13a.

The court's conclusion is correct. Numerous contemporary treatises support its understanding of the scope

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[9] Even if Guantanamo Bay were treated as sovereign United States territory, and even if petitioners had a substantial connection to the United States, petitioners would face an additional barrier to their assertion of constitutional rights: their failure to effect an "entry" into the United States. See *Zadvydas*, 533 U.S. at 693; *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 215 (1953).

of the writ at common law. See Pet. App. 11a (citing, *inter alia*, 3 William Blackstone, *Commentaries* *131; 2 Robert Chambers, *A Course of Lectures on the English Law: Delivered at Oxford, 1767-1773*, at 7-8 (Thomas M. Curley ed., 1986)). Moreover, no cases to the contrary have been identified. The cases upon which petitioners rely are inapposite, as the court of appeals explained, Pet. App. 10a-11a, because they all involved petitions by aliens held *within* sovereign territory.[10] Nor do the cases cited by the dissent (*id.* at 33a-36a) cast any doubt on the court of appeals' holding.[11]

In any event, as the court of appeals further explained, this Court's decision in *Eisentrager* "ends any doubt about the scope of common law habeas." Pet. App. 13a. In *Eisentrager*, this Court observed that no court has ever issued a writ on behalf of an alien enemy that was not within the court's jurisdiction at any time

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[10] See *Lockington's Case*, Brightly 269 (Pa. 1813) (denying habeas petition of enemy alien found in Philadelphia); *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779) (declining to review detention of sailors held within English sovereign territory because they were "alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus"); *Rex* v. *Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (denying habeas to Swedish citizen held in Liverpool because there was ample evidence that he was a prisoner of war).

[11] See *Rex* v. *Cowle*, 97 Eng. Rep. 587, 599 (K.B. 1759) (holding King's Bench had power to issue writ to Berwick, an English borough, after determining that Berwick was part of sovereign English territory); *Rex* v. *Mitter*, 1 Indian Dec. 1008 (Calcutta S.C. 1781) (local court in India, specifically authorized by the British Parliament pursuant to the East India Company Regulation Act of 1773, held that it lacked power to issue writ); *Rex* v. *Hastings*, 1 Indian Dec. 1005 (Calcutta S.C. 1775) (same).

during his captivity. See 339 U.S. at 768. Petitioners provide no reason for revisiting that conclusion here.

Petitioners contend (Pet. 15-16; 06-1196 Pet. 18) that the court of appeals' reliance on *Eisentrager* ignored this Court's more recent decision in *Rasul*. That is incorrect. *Rasul* was limited to a construction of the federal habeas statute; it studiously avoided addressing the constitutional right to habeas. See pp. 21-22, *supra*.

Insofar as the Court discussed common-law habeas rights in *Rasul*, it did not conclude that habeas jurisdiction would have extended to aliens outside the sovereign territory of England. Instead, it stated that, "[a]t common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control." 542 U.S. at 481-482 (footnotes omitted). The cited cases involving "persons" outside the "sovereign territory of the realm" all involved *British subjects*. See *id.* at 481-482 nn.12-13. In stating that "[a]pplication of the habeas statute to *persons* detained at the base is consistent with the historical reach of the writ," *id.* at 481 (emphasis added), the Court thus rested not on the historic availability of habeas to aliens abroad, but on its historic availability to *citizens* abroad in controlled territories, combined with the fact that the habeas "statute draws no distinction between Americans and aliens." See *id.* at 481-82. The DTA, of course, draws just such a distinction, and so aliens outside the realm to whom the writ was historically *unavailable* have no basis to piggyback on the availability of the writ to citizens outside the realm. For that reason, *Rasul* in

no way undermines *Eisentrager*'s holding as to the scope of the writ protected by the Suspension Clause.[12]

4. Finally, petitioners raise various objections to the merits of their detention. Those arguments have not been considered by the court of appeals, so they do not provide a basis for review here. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984). They should instead be presented to the D.C. Circuit in the context of DTA review of petitioners' CSRT determinations. If petitioners are dissatisfied with the outcome of the proceedings in the D.C. Circuit, they may seek further review in this Court at that time.

In any event, petitioners' objections lack merit. Petitioners contend (Pet. 25) that the definition of "enemy combatant" as applied to them is inconsistent with the AUMF and Executive authority. That is incorrect. The AUMF authorizes the President to take action against all "organizations" that "planned, authorized, committed, or aided" the September 11 attacks. 115 Stat. 224. Al Qaida is undeniably such an organization, and the CSRTs determined that petitioners were "part of or supporting * * * al Qaida forces or associated forces that are engaged in hostilities against the United States." Pet. App. 81a. Petitioners' claim that *Hamdi* limits the Executive's authority under the AUMF is without basis. In *Hamdi*, the plurality looked to the text of the AUMF and traditional laws of war in upholding

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[12] Petitioners assert that the Suspension Clause may extend beyond the writ "as it existed in 1789." Pet. 14 (citing *St. Cyr*, 533 U.S. at 301). Whatever the merits of "[a]n evolving interpretation of the Suspension Clause"; Pet. 15 n.12, that issue is not presented in this case. Petitioners cannot show any historical practice, either before or after 1789, of extending habeas corpus to alien enemies detained outside of sovereign territory.

the President's authority to detain individuals who were "part of or supporting forces hostile to the United States" and who had themselves "engaged in an armed conflict against the United States." 542 U.S. at 516-521; see also *id.* at 586-588 (Thomas, J., dissenting). Nothing in *Hamdi* even remotely suggests, however, that the AUMF encompasses *only* those individuals.

The suggestion (Pet. 28), that petitioners are being improperly detained because they are akin to "little old lad[ies] in Switzerland" who unwittingly lend financial support to al Qaida activities, is absurd. After individualized hearings, petitioners were each found to be enemy combatants based on their substantial connections with, or provision of support to, al Qaida or associated forces—a terrorist network that has already inflicted the deadliest foreign attack ever on American soil and has repeatedly vowed to strike America and its allies again. The records of those CSRT proceedings contain ample evidence supporting those findings.[13]

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[13] While classified information reinforces many of the CSRT determinations and cannot be addressed in a public filing, the unclassified summaries and other unclassified material in the record provide a much different perspective on these enemy combatants than suggested by the petitions. The lead habeas petitioners in the various cases for which petitions have been filed who remain in detention are indicative: Al Odah went to Afghanistan shortly before September 11, used an AK-47 at a training camp, and carried a weapon through the Tora Bora mountains during the US campaign in the region. Unclassified CSRT Decision Report (Al Odah), encl. 1, at 1. (The CSRT Decision Reports were included in the factual returns to the habeas petitions and are part of the district court record.) Boumediene traveled to conflict hotspots throughout the 1990s and provided assistance on several occasions to a known al Qaida operative. Unclassified CSRT Decision Report (Boumediene), encl. 1, at 1; *id.* exh. R1. David Hicks trained with al Qaida, collected intelligence on the U.S. Embassy in Afghanistan, and fought on the front lines against the United States in Afghanistan.

Petitioners are free to challenge those enemy-combatant determinations. And under the DTA, the D.C. Circuit can review the record evidence to ensure that the CSRTs properly adhered to the applicable standards and procedures and that their determinations are supported by a preponderance of the evidence. See DTA § 1005(e)(2)(C), 119 Stat. 2742. At a minimum, any consideration by this Court of the questions presented by this case should await the outcome of such proceedings.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2007

Unclassified CSRT Decision Report (Hicks), encl. 1, at 1. Falen Gherebi was an al Qaida operative in Kabul who fled Afghanistan in November 2001; his name was also on a list of individuals who trained at an al Qaida camp. Unclassified CSRT Decision Report (Gherebi), encl. 1, at 1; *id.* exh. R1. Zohair Al-Shorabi went to Afghanistan for weapons training and fought on the front lines. CSRT Decision Report, encl. 1, at 1. Jamil El-Banna met with and aided an al Qaida operative, Abu Qatada, while he was in hiding from British police. *Al Odah* C.A. Supp. J.A. 1806. Ali Abdullah Almurbati voluntarily traveled from Bahrain to Afghanistan in November 2001 to get training and "fight the Jihad." Unclassified CSRT Decision Report (Almurbati), encl. 1, at 1.

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06-1195

No. 06-1196

FILED
MAR 2 2 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The government argues that the issues raised in this Petition for Certiorari are not "ripe" because petitioners "have not yet exhausted their remedies under the DTA." Brief for the Respondents in Opposition ("Gov. Opp.") at 12. But the government's response demonstrates, in fact, that the key issues raised are ripe for determination by this Court, and that they should be decided now.

A habeas petitioner has no obligation to exhaust a remedy that is not adequate to vindicate the asserted right. *See, e.g., Wilwording v. Swenson*, 404 U.S. 249, 250 (1971).[1] As Judge Rogers made clear in her dissent below, the review provisions of the DTA, at least as they are interpreted by the D.C. Circuit, are plainly not adequate to vindicate petitioners' asserted habeas rights.

Section 1005(e)(2)(C)(i) of the DTA allows the D.C. Circuit to review a CSRT decision to determine whether it "was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs]" – in other words, whether the CSRTs followed their own procedures in reaching their determinations. Under that section, the court would be precluded from going behind the CSRTs to determine whether the definitions they used were legally sufficient and whether the procedures they followed were fair, adequate, and legitimate. That, however, is a fundamental requirement of habeas. As Justice Holmes famously wrote:

> [H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been pre-

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> served, opens the inquiry whether they have been more than an empty shell.[2]

Any review process – such as the one set forth in Section 1005(e)(2)(C)(i) of the DTA – that limits the court to determining whether the jailor has followed its own rules, and precludes an inquiry into whether the rules themselves are adequate and more than an empty shell, cannot be an adequate or effective substitute for habeas.[3]

The DTA does provide a method for determining whether the standards and procedures followed by the CSRTs were adequate. Section 1005(e)(2)(C)(ii) (emphasis added) allows the D.C. Circuit to consider, "*to the extent the Constitution and laws of the United States are applicable*, whether the use of such standards and procedures to make

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[3] Citing a number of cases reviewing convictions after trial by military tribunals, the government argues that "in the context of the decisions of military tribunals, this Court has repeatedly held that habeas does not provide for factual review . . . ." Gov. Opp. at 18. That may be so where the underlying process being reviewed allows for adequate factual development. Habeas, however, always enables the court to determine whether or not the underlying process being reviewed is fair, adequate, and legitimate and allows for adequate factual development. Any process that does not cannot be an adequate substitute for habeas, and habeas cannot be replaced and the courts restricted in their review of the legality of the detention by a process that is so inadequate. As Judges Green and Rogers concluded, and as pointed out in the Petition for Certiorari, the CSRTs were completely inadequate to test the legality of the detention. Pet. at 7-8, 12 n.24.

the determination is consistent with the Constitution and laws of the United States." The government, of course, has argued strenuously that the Constitution and laws of the United States are not applicable to these detainees because they are aliens held at Guantanamo. Gov. Opp. 19-25. It says, however, that review by this Court is premature because "the D.C. Circuit . . . can determine the nature of petitioners' rights, if any, under the 'laws of the United States' and the U.S. Constitution, and can decide whether the CSRT process violated any applicable rights." Gov. Opp. at 17. But the D.C. Circuit has already decided that issue. Based on *Johnson v. Eisentrager*, the D.C. Circuit held that petitioners have no constitutional rights and therefore are not entitled to constitutional review of the adequacy of the CSRT procedures. App. 15-17, 52-53.

The issue is therefore ripe for decision by this Court. It must be decided by this Court in order to determine the scope of review available under the DTA, as well as whether the government is correct in asserting that these petitioners have no constitutional protections whatsoever, including protections under the Suspension Clause of the Constitution. Those issues have been decided, albeit wrongly, by the D.C. Circuit. There are no remedies left for the petitioners to exhaust. These issues should be decided by this Court now so that these petitioners, imprisoned without a fair hearing for more than five years, are not forced to endure months and years more deprived of justice because of judicial delay.

CONCLUSION

The Court should grant the petition for a writ of *certiorari* to the Court of Appeals.

Respectfully submitted,

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MARCH 22, 2007

No. 06-1196

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The DTA does provide a method for determining whether the standards and procedures followed by the CSRTs were adequate. Section 1005(e)(2)(C)(ii) (emphasis added) allows the D.C. Circuit to consider, "*to the extent the Constitution and laws of the United States are applicable*, whether the use of such standards and procedures to make

[2] *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). Justice Holmes' dissenting opinion was later made the law of the land in *Moore v. Dempsey*, 261 U.S. 86 (1923). *See Fay v. Noia*, 372 U.S. 391, 411 n.22 (1963). His words frequently have been quoted with approval. *See, e.g., Harris v. Nelson*, 394 U.S. 286, 291 n.2 (1969); *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 807 (D.C. Cir. 1988) (en banc).

[3] Citing a number of cases reviewing convictions after trial by military tribunals, the government argues that "in the context of the decisions of military tribunals, this Court has repeatedly held that habeas does not provide for factual review . . . ." Gov. Opp. at 18. That may be so where the underlying process being reviewed allows for adequate factual development. Habeas, however, always enables the court to determine whether or not the underlying process being reviewed is fair, adequate, and legitimate and allows for adequate factual development. Any process that does not cannot be an adequate substitute for habeas, and habeas cannot be replaced and the courts restricted in their review of the legality of the detention by a process that is so inadequate. As Judges Green and Rogers concluded, and as pointed out in the Petition for Certiorari, the CSRTs were completely inadequate to test the legality of the detention. Pet. at 7-8, 12 n.24.

the determination is consistent with the Constitution and laws of the United States." The government, of course, has argued strenuously that the Constitution and laws of the United States are not applicable to these detainees because they are aliens held at Guantanamo. Gov. Opp. 19-25. It says, however, that review by this Court is premature because "the D.C. Circuit . . . can determine the nature of petitioners' rights, if any, under the 'laws of the United States' and the U.S. Constitution, and can decide whether the CSRT process violated any applicable rights." Gov. Opp. at 17. But the D.C. Circuit has already decided that issue. Based on *Johnson v. Eisentrager*, the D.C. Circuit held that petitioners have no constitutional rights and therefore are not entitled to constitutional review of the adequacy of the CSRT procedures. App. 15-17, 52-53.

The issue is therefore ripe for decision by this Court. It must be decided by this Court in order to determine the scope of review available under the DTA, as well as whether the government is correct in asserting that these petitioners have no constitutional protections whatsoever, including protections under the Suspension Clause of the Constitution. Those issues have been decided, albeit wrongly, by the D.C. Circuit. There are no remedies left for the petitioners to exhaust. These issues should be decided by this Court now so that these petitioners, imprisoned without a fair hearing for more than five years, are not forced to endure months and years more deprived of justice because of judicial delay.

CONCLUSION

The Court should grant the petition for a writ of *certiorari* to the Court of Appeals.

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MARCH 22, 2007

No. 06-1196

In the Supreme Court of the United States

KHALED A. F. AL ODAH, ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR REHEARING

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Contrary to the government's claim (Opp. 1-2), events since the Court denied certiorari demonstrate that the Court should reconsider that decision and grant review.[1] Specifically, the government's subsequent filings confirm that the review provided under the Detainee Treatment Act of 2005 ("DTA") can *never* be an adequate substitute for habeas and that there is no reason to delay determining the important question of whether the Military Commissions Act (MCA) deprives the Guantanamo detainees of constitutionally-protected rights.

1. After the Court denied certiorari, the government finally conceded that DTA review – exhaustion of which the government says is "a principal reason" to deny certiorari here (Opp. 4) – is more limited than, and not the equivalent of, habeas review. In *Bismullah*,[2] a pending DTA case, the government filed a brief urging the court of appeals not to extend to counsel for the detainees the same access to Guantanamo that the district court granted to them under habeas. The government stated:

> [T]he district court habeas regime should not be recreated in this Court because it is not appropriate to this Court's limited review under the DTA. . . . [T]he review here is administrative in nature and is on the record of the CSRT [Combatant Status Review Tribunal]. Accordingly, factual development at Guantanamo will not be necessary in pursuing this action – the broad access to Guantanamo by private counsel under the Habeas Protective Order is therefore not necessary.[3]

Thus, the government now admits that, under the DTA, the detainees will *not* be able to develop, and the court of

[1] "Opp." refers to the Brief for the Respondents in Opposition to the Petitions for Rehearing in No. 06-1195 and this case.

[2] *Bismullah v. Gates*, No. 06-1197 (D.C. Cir.).

[3] *Id.*, Resp. Br. Address Pending Prelim. Mots. 32 (Apr. 9, 2007).

appeals will *not* be able to consider, plainly exculpatory evidence and other relevant facts outside the "record" of the CSRT that may determine the validity of their detention. The development and judicial consideration of such evidence and relevant facts, of course, is the *sine qua non* of habeas review.

2. The government also has conceded in its opposition to the petitions for rehearing that DTA review does not contemplate the judicial remedy of release from imprisonment, a remedy that is the hallmark of habeas. Instead, if the court of appeals concludes that the CSRT committed legal error and the detainee is not properly detained as an "enemy combatant," the government maintains that "a remand would be the appropriate remedy" (Opp. 7). The government speculates that such a remand "could" lead the CSRT to enter a finding that the detainee is not an "enemy combatant," and it says that, eventually, all detainees determined to be no longer enemy combatants have been released by the Defense Department (*Id.* 7-8).[4] However, the government does not suggest that, under the DTA, the court of appeals may order a release, even if it finds that there is *no* factual or legal basis for the detention.

Indeed, under the government's reading of the DTA, the Defense Department could hold a detainee forever, even where the court of appeals repeatedly invalidates a CSRT determination that a detainee is an "enemy combatant." Moreover, the government can avoid review by this Court through an endless loop of remands for further CSRT determinations followed by further DTA reviews, *ad infinitum*.

[4] In fact, detainees determined by CSRTs not to be properly detained as enemy combatants remained imprisoned at Guantanamo for months after the conclusion of the CSRT process before they were released by the Defense Department. *See* http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10204.

This is the inverse of the habeas process, where release is a matter of legal right and not executive grace.

3. In light of the government's concessions, if the detainees do have a right to habeas corpus protected by the Suspension Clause, as they maintain, then the review provided by the DTA can never be an adequate substitute for habeas and the revocation of their right to habeas by the MCA would appear to be unconstitutional. *See Sanders v. United States*, 373 U.S. 1, 14 (1963). The Court should grant certiorari to resolve this important question.

There is no reason to delay determination of whether the detainees have fundamental constitutional rights. The government, in its opposition, insists that, under the DTA, the court of appeals is authorized to consider petitioners' constitutional claims (Opp. 6). *See* DTA § 1005(e)(2)(C), 119 Stat. 2742. However, the court of appeals reiterated below (*Boumediene v. Bush*, 476 F.3d 981, 991-92 (D.C. Cir. 2007)), as it previously held in *Al Odah v. United States*, 321 F.3d 1134, 1140-41 (D.C. Cir. 2004), that, under its interpretation of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), petitioners have no rights under the Constitution. Unless and until this Court reviews and reverses that erroneous holding, it is the unshakeable law of the circuit. *See Boumediene*, 476 F.3d at 1011 (Rogers, J., dissenting) ("Although in *Rasul* the Court cast doubt on the continuing vitality of *Eisentrager*, 542 U.S. at 475-79, absent an explicit statement by the Court that it intended to overrule *Eisentrager*'s constitutional holding, that holding is binding on this court").

Petitioners were accorded the right to the Great Writ three years ago in *Rasul v. Bush*, 542 U.S. 466 (2004). Now, in the *sixth year* of petitioners' unlawful detention under inhumane conditions of confinement, it would be nothing short of tragic to force petitioners to wait another year or more to first pursue a pointless remedy and receive another decision from the court of appeals that they have no constitutional

rights before they can raise this critical issue in this Court. *See* 127 S. Ct. 1478 (statement of Stevens & Kennedy, JJ., respecting denial of certiorari) (habeas corpus "does not require the exhaustion of inadequate remedies"); *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971). That issue is ripe for decision now.

4. Finally, it is now clear that, not only is the remedy provided by the DTA inadequate, but also the underlying CSRT process was an irremediable sham. A courageous military officer, Lieutenant Colonel Stephen Abraham, United States Army Reserve, has come forward with a declaration responding to assertions about the adequacy of the CSRT process made on behalf of the government by Rear Admiral (Retired) James M. McGarrah in the *Bismullah* case. Based on his personal experience, first as a factual investigator and then as a member of a CSRT tribunal, Lieutenant Colonel Abraham avers that, in every phase, the CSRT process was infected with command influence and an illusion. *See* annexed Declaration of Stephen Abraham.

No review under the DTA can cure such a sham process. No remand by a court for such a process can be an adequate substitute for independent review by a habeas court. Therefore, no exhaustion of the DTA remedy should be required before certiorari is granted in this case.

CONCLUSION

The Court should grant the Petition for Rehearing from Denial of *Certiorari*.

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JUNE 22, 2007

Appendix

DECLARATION OF STEPHEN ABRAHAM
Lieutenant Colonel, United States Army Reserve

I, Stephen Abraham, hereby declare as follows:

1. I am a lieutenant colonel in the United States Army Reserve, having been commissioned in 1981 as an officer in Intelligence Corps. I have served as an intelligence officer from 1982 to the present during periods of both reserve and active duty, including mobilization in 1990 ("Operation Desert Storm") and twice again following 9-11. In my civilian occupation, I am an attorney with the law firm Fink & Abraham LLP in Newport Beach, California.

2. This declaration responds to certain statements in the Declaration of Rear Admiral (Retired) James M. McGarrah ("McGarrah Dec."), filed in *Bismullah v. Gates*, No. 06-1197 (D.C. Cir.). This declaration is limited to unclassified matters specifically related to the procedures employed by Office for the Administrative Review of the Detention of Enemy Combatants ("OARDEC") and the Combatant Status Review Tribunals ("CSRTs") rather than to any specific information gathered or used in a particular case, except as noted herein. The contents of this declaration are based solely on my personal observations and experiences as a member of OARDEC. Nothing in this declaration is intended to reflect or represent the official opinions of the Department of Defense or the Department of the Army.

3. From September 11, 2004 to March 9, 2005, I was on active duty and assigned to OARDEC. Rear Admiral McGarrah served as the Director of OARDEC during the entirety of my assignment.

4. While assigned to OARDEC, in addition to other duties, I worked as an agency liaison, responsible for coordinating with government agencies, including certain Department of Defense ("DoD") and non-DoD organizations, to gather or

validate information relating to detainees for use in CSRTs. I also served as a member of a CSRT, and had the opportunity to observe and participate in the operation of the CSRT process.

5. As stated in the McGarrah Dec., the information comprising the Government Information and the Government Evidence was not compiled personally by the CSRT Recorder, but by other individuals in OARDEC. The vast majority of the personnel assigned to OARDEC were reserve officers from the different branches of service (Army, Navy, Air Force, Marines) of varying grades and levels of general military experience. Few had any experience or training in the legal or intelligence fields.

6. The Recorders of the tribunals were typically relatively junior officers with little training or experience in matters relating to the collection, processing, analyzing, and/or dissemination of intelligence material. In no instances known to me did any of the Recorders have any significant personal experience in the field of military intelligence. Similarly, I was unaware of any Recorder having any significant or relevant experience dealing with the agencies providing information to be used as a part of the CSRT process.

7. The Recorders exercised little control over the process of accumulating information to be presented to the CSRT board members. Rather, the information was typically aggregated by individuals identified as case writers who, in most instances, had the same limited degree of knowledge and experience relating to the intelligence community and intelligence products. The case writers, and not the Recorders, were primarily responsible for accumulating documents, including assembling documents to be used in the drafting of an unclassified summary of the factual basis for the detainee's designation as an enemy combatant.

8. The information used to prepare the files to be used by the Recorders frequently consisted of finished intelligence

products of a generalized nature - often outdated, often "generic," rarely specifically relating to the individual subjects of the CSRTs or to the circumstances related to those individuals' status.

9. Beyond "generic" information, the case writer would frequently rely upon information contained within the Joint Detainee Information Management System ("JDIMS"). The subset of that system available to the case writers was limited in terms of the scope of information, typically excluding information that was characterized as highly sensitive law enforcement information, highly classified information, or information not voluntarily released by the originating agency. In that regard, JDIMS did not constitute a complete repository, although this limitation was frequently not understood by individuals with access to or who relied upon the system as a source of information. Other databases available to the case writer were similarly deficient. The case writers and Recorders did not have access to numerous information sources generally available within the intelligence community.

10. As one of only a few intelligence-trained and suitably cleared officers, I served as a liaison while assigned to OARDEC, acting as a go-between for OARDEC and various intelligence organizations. In that capacity, I was tasked to review and/or obtain information relating to individual subjects of the CSRTs. More specifically, I was asked to confirm and represent in a statement to be relied upon by the CSRT board members that the organizations did not possess "exculpatory information" relating to the subject of the CSRT.

11. During my trips to the participating organizations, I was allowed only limited access to information, typically prescreened and filtered. I was not permitted to see any information other than that specifically prepared in advance of my visit. I was not permitted to request that further searches

be performed. I was given no assurances that the information provided for my examination represented a complete compilation of information or that any summary of information constituted an accurate distillation of the body of available information relating to the subject.

12. I was specifically told on a number of occasions that the information provided to me was all that I would be shown, but I was never told that the information that was provided constituted all available information. On those occasions when I asked that a representative of the organization provide a written statement that there was no exculpatory evidence, the requests were summarily denied.

13. At one point, following a review of information, I asked the Office of General Counsel of the intelligence organization that I was visiting for a statement that no exculpatory information had been withheld. I explained that I was tasked to review all available materials and to reach a conclusion regarding the non-existence of exculpatory information, and that I could not do so without knowing that I had seen all information.

14. The request was denied, coupled with a refusal even to acknowledge whether there existed additional information that I was not permitted to review. In short, based upon the selective review that I was permitted, I was left to "infer" from the absence of exculpatory information in the materials I was allowed to review that no such information existed in materials I was not allowed to review.

15. Following that exchange, I communicated to Rear Admiral McGarrah and the OARDEC Deputy Director the fundamental limitations imposed upon my review of the organization's files and my inability to state conclusively that no exculpatory information existed relating to the CSRT subjects. It was not possible for me to certify or validate the non-existence of exculpatory evidence as related to any individual undergoing the CSRT process.

16. The content of intelligence products, including databases, made available to case writers, Recorders, or liaison officers, was often left entirely to the discretion of the organizations providing the information. What information was not included in the bodies of intelligence products was typically unknown to the case writers and Recorders, as was the basis for limiting the information. In other words, the person preparing materials for use by the CSRT board members did not know whether they had examined all available information or even why they possessed some pieces of information but not others.

17. Although OARDEC personnel often received large amounts of information, they often had no context for determining whether the information was relevant or probative and no basis for determining what additional information would be necessary to establish a basis for determining the reasonableness of any matter to be offered to the CSRT board members. Often, information that was gathered was discarded by the case writer or the Recorder because it was considered to be ambiguous, confusing, or poorly written. Such a determination was frequently the result of the case writer or Recorder's lack of training or experience with the types of information provided. In my observation, the case writer or Recorder, without proper experience or a basis for giving context to information, often rejected some information arbitrarily while accepting other information without any articulable rationale.

18. The case writer's summaries were reviewed for quality assurance, a process that principally focused on format and grammar. The quality assurance review would not ordinarily check the accuracy of the information underlying the case writer's unclassified summary for the reason that the quality assurance reviewer typically had little more experience than the case writer and, again, no relevant or meaningful intelligence or legal experience, and therefore had no

skills by which to critically assess the substantive portions of the summaries.

19. Following the quality assurance process, the unclassified summary and the information assembled by the case writer in support of the summary would then be forwarded to the Recorder. It was very rare that a Recorder or a personal representative would seek additional information beyond that information provided by the case writer.

20. It was not apparent to me how assignments to CSRT panels were made, nor was I personally involved in that process. Nevertheless, I discerned the determinations of who would be assigned to any particular position, whether as a member of a CSRT or to some other position, to be largely the product of ad hoc decisions by a relatively small group of individuals. All CSRT panel members were assigned to OARDEC and reported ultimately to Rear Admiral McGarrah. It was well known by the officers in OARDEC that any time a CSRT panel determined that a detainee was not properly classified as an enemy combatant, the panel members would have to explain their finding to the OARDEC Deputy Director. There would be intensive scrutiny of the finding by Rear Admiral McGarrah who would, in turn, have to explain the finding to his superiors, including the Under Secretary of the Navy.

21. On one occasion, I was assigned to a CSRT panel with two other officers, an Air Force colonel and an Air Force major, the latter understood by me to be a judge advocate. We reviewed evidence presented to us regarding the recommended status of a detainee. All of us found the information presented to lack substance.

22. What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence. Statements allegedly made by percipient witnesses lacked detail. Reports presented generalized statements in indirect and passive forms without stating the

source of the information or providing a basis for establishing the reliability or the credibility of the source. Statements of interrogators presented to the panel offered inferences from which we were expected to draw conclusions favoring a finding of "enemy combatant" but that, upon even limited questioning from the panel, yielded the response from the Recorder, "We'll have to get back to you." The personal representative did not participate in any meaningful way.

23. On the basis of the paucity and weakness of the information provided both during and after the CSRT hearing, we determined that there was no factual basis for concluding that the individual should be classified as an enemy combatant. Rear Admiral McGarrah and the Deputy Director immediately questioned the validity of our findings. They directed us to write out the specific questions that we had raised concerning the evidence to allow the Recorder an opportunity to provide further responses. We were then ordered to reopen the hearing to allow the Recorder to present further argument as to why the detainee should be classified as an enemy combatant. Ultimately, in the absence of any substantive response to the questions and no basis for concluding that additional information would be forthcoming, we did not change our determination that the detainee was not properly classified as an enemy combatant. OARDEC's response to the outcome was consistent with the few other instances in which a finding of "Not an Enemy Combatant" (NEC) had been reached by CSRT boards. In each of the meetings that I attended with OARDEC leadership following a finding of NEC, the focus of inquiry on the part of the leadership was "what went wrong."

24. I was not assigned to another CSRT panel.

I hereby declare under the penalties of perjury based on my personal knowledge that the foregoing is true and accurate.

Stephen Abraham

Dated: June 15, 2007

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06-1195

06-1196

No. 06-___

Supreme Court, U.S.
FILED
MAR 5 - 2007
OFFICE OF THE CLERK

In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF FORMER FEDERAL JUDGES, DIPLOMATS, MILITARY OFFICERS, GOVERNMENT OFFICIALS, BAR LEADERS, POWs AND KAREN KOREMATSU-HAIGH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*[1]

Three years ago these *amici* urged the Court to grant review in *Rasul* v. *Bush*, 542 U.S. 466 (2004). The *amici* in *Rasul* came from a wide variety of backgrounds: retired judges, military officers, diplomats, government officials, former POWs, bar leaders and, in the case of Fred Korematsu, an American who had searing personal experience with Executive detention. The *Rasul amici* all urged the Court to take the case because of a profound concern that the Government's detention of individuals at Guantanamo without charge and without access to habeas review presented fundamental issues concerning the rule of law, separation of powers, our country's standing in the world community, and the effect of the Government's detention policy on the safety of American service men and women serving abroad.

This Court did take the case, and almost three years ago held in no uncertain terms that the Guantanamo Detainees were entitled to habeas corpus review to challenge the lawfulness of their detention. But since that decision in June 2004, the Court's mandate has been frustrated and not a single detainee has had a habeas hearing in federal court. Accordingly, the *amici* come before this Court once again to urge the Court to grant review and to decide this case expeditiously because of the extraordinary importance of the issues presented.

Amici and their former positions are as follows: Assistant Secretary of State Diego C. Asencio, Brigadier General David M. Brahms, Ambassador A. Peter Burleigh, Rear Admiral and Judge Advocate General of the Navy

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

Donald J. Guter, State Department Legal Adviser Conrad K. Harper, Assistant Secretary of State Allen Holmes, Rear Admiral and Judge Advocate General of the Navy John D. Hutson, POW Leslie H. Jackson, Circuit Judge Nathaniel R. Jones, Karen Korematsu-Haigh, Assistant Secretary of State Samuel W. Lewis, Chief Judge Abner J. Mikva, USAID Assistant General Counsel Arthur Mudge, Ambassador Richard H. Nolte, Circuit Judge William A. Norris, Ambassador Herbert S. Okun, Under Secretary of State Thomas R. Pickering, Assistant Secretary of State Anthony Quainton, Professor Deborah L. Rhode, Under Secretary of State William D. Rogers, Circuit Judge H. Lee Sarokin, ABA President Jerome J. Shestack, Ambassador Monteagle Stearns, Ambassador Richard N. Viets, Assistant Secretary of State Alexander F. Watson. Please see the Appendix for further information about each of the *amici*.

INTRODUCTION AND SUMMARY OF ARGUMENT[2]

It has been more than five years since the first group of Guantanamo Detainees arrived at Guantanamo Bay, and more than five years since the first of the habeas corpus petitions was filed challenging the military detentions of hundreds of men scooped up around the world and held without charge or trial in the military prison at Guantanamo. The case arising out of that first habeas petition, *Rasul* v. *Bush*, 542 U.S. 466 (2004), reached this Court almost three years ago, when the Court ruled that "federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing." *Id.* at 485. Nearly three years have passed since this Court remanded the *Rasul* cases "for the District Court to consider in the first instance the merits of petitioners' claims." *Ibid.*

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[2] This brief is intended to support the companion petition in *Boumediene* v. *Bush* (No. 06-____) in addition to the above-captioned case.

In all those years—a longer period of time than the length of active American involvement in World War I, World War II, or the Korean War—not a single Guantanamo Detainee has had the legality of his detention adjudicated, on the merits, in a court of law. The court below now has held that, despite *Rasul* and the constitutional guarantee of habeas corpus, no Detainees are entitled to independent judicial review of the lawfulness of their military imprisonment.

Amici urge this Court to grant certiorari to the Detainees and to hear and decide this case as expeditiously as possible. The core promise of the writ of habeas corpus is a promise of prompt adjudication of the lawfulness of detention. Riding circuit during the Civil War, Chief Justice Taney examined the history of the Great Writ. "From the earliest history of the common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of habeas corpus, to bring his case before the king's bench." *Ex Parte Merryman*, 17 F. Cas. 144, 150 (1861). Describing England's "great habeas corpus act" of 1679, Chief Justice Taney wrote: "The great and inestimable value of the habeas corpus act [of 1679] is that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties ***promptly***." *Id.* at 150 (emphasis added).

That promise of promptness at the heart of the common law writ of habeas, effectively codified by the Constitution's Suspension Clause, has been denied to the Guantanamo Detainees, despite this Court's clear holding in *Rasul* almost three years ago. As the Detainees demonstrate in their petitions, the core reasoning and holding of *Rasul*—that federal district courts have jurisdiction to hear applications for habeas corpus by Guantanamo Detainees—was undisturbed by the purported revocations of statutory habeas jurisdiction by the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (DTA), and the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (MCA). The Constitution entitles the

Guantanamo Detainees to a prompt and meaningful judicial process to challenge the legal and factual grounds for their detentions.

Amici appreciate the exigencies of the moment. However, the Constitution's Suspension Clause outlines the very limited conditions of national peril in which Congress may suspend the privilege of the writ. The majority opinion of the court below never even addressed whether the DTA or the MCA satisfies the strict limits of the Suspension Clause.

This Court has a long tradition of safeguarding the role of courts in monitoring the validity of Executive detention, even in the most precarious moments of our Nation's history. See *Rasul*, 542 U.S. at 474 (providing examples of when this Court has "recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace," and citing examples from detentions arising out of the Civil War and World War II). Because the common law privilege of the writ of habeas corpus extends to the Guantanamo Detainees and was not validly suspended, federal courts have jurisdiction to reach the merits of the Detainees' claims and the obligation to do so "promptly."

Nevertheless, a divided court of appeals barred the district court from exercising the historic power to test the lawfulness of Executive detention—detention that already has continued without prospect of relief for five years. This is truly a case where justice delayed is justice denied. The Guantanamo Detainees are currently deprived of their liberty in the most fundamental sense. At best, the great majority are held in a maximum security facility, with almost no human contact and at least twenty-two hours per day alone in small, concrete cells.[3] Numerous organizations, including the Federal Bureau of Investigation, have documented

[3] This account derives from the Declaration of Sabin Willett, filed in *Parhat v. Gates*, No. 06-1397 (D.C. Circuit).

instances of abusive treatment. See, *e.g.*, FBI, *GTMO Counterterrorism Division Special Inquiry* (Sept. 9, 2004), *available at* http://foia.fbi.gov/guantanamo/detainees.pdf. *Amici* point to such treatment to underscore the urgency of this Court's adjudication in this matter. As it is, these Detainees must tolerate such conditions without being charged with any crime and without knowing whether their detentions will end at some point in the future, or last for the balance of their lives.

After five long years in harsh military confinement, the time is long past due to begin to inquire into the validity of individual detentions at Guantanamo Bay. The Constitution simply does not allow the Executive or the Legislature to put that inquiry beyond the reach of the courts without complying with the rigors of the Suspension Clause—a test that neither the President nor the Congress suggests could be met here.

ARGUMENT

I. This Court Has A Long Tradition Of Reviewing Executive Detention Pursuant To The Writ Of Habeas Corpus, Even In Times Of National Crisis.

More than five years after the confinement of the Guantanamo Detainees commenced, and almost three years after this Court held that the constitutionally guaranteed common law writ of habeas corpus reaches these Detainees, it is time for the courts to move forward and determine whether the detention of individual detainees at Guantanamo is lawful.

"At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001). This Court has already decided that the Guantanamo Detainees are entitled to access to the writ, so that independent courts can review the legality of the Executive

detentions here. It is long past time that those reviews begin. Only by granting the petitions and expediting consideration of these cases can the Court honor the promise of the writ and protect the integrity of its own decision in *Rasul*.

The "war on terrorism" does not license either the President or Congress to nullify habeas corpus. Justice Story emphasized the importance of making the writ available even in times of crisis, save only situations of actual rebellion or invasion. The writ is a "very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in bad times to the worst purposes." JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 208-09 (1833). Throughout our history, this Court and individual Justices have been steadfast in asserting the judicial power under the Constitution, including the power to issue writs of habeas corpus, to ensure that the Executive Branch's assertions of "national security" do not serve as a license for unchecked abuse of liberty. While the Court often has deferred to the judgment of the political branches, the Constitution entrusts to the courts the ultimate protection of individual liberty—especially in times of national anxiety and stress.

The Framers, formulating the Constitution in the shadow of the Revolutionary War, understood that this Nation would face grave threats, and that those threats would put great pressure on the privilege of habeas corpus. They addressed this pressure by precisely limiting the circumstances when the writ may be suspended. The Framers placed the authority to suspend the writ with the Legislature, but confined the circumstances under which that suspension could validly occur: only "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9.

> "[The framers] knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight

> could not tell; and that unlimited power, where lodged at such a time, was especially hazardous to freemen." *Ex parte Milligan*, 71 U.S. 2, 125 (1866).

The writ of habeas corpus stands as our legal system's oldest and most basic protection against the tyranny of unjustified detention. The fact that the Constitution sets extraordinarily high barriers to suspending that protection, even temporarily, underscores the need for vigilance when the requirements of suspension are unmet.

This Court and its Justices have not shirked the responsibility to test the validity of claims by the President or Congress or both that national dangers justify drastic measures violating personal liberty. Shortly after the end of the Civil War, the gravest threat to its existence this Nation has ever faced, this Court warned of the dangers of allowing the pressures of the present to undermine the birthright of this Nation's past. In *Milligan* this Court declared:

> "The Constitution of the United States is a law for rulers and people, *equally in war* and in peace, and covers with the shield of its *protection all classes of men, at all times, and under all circumstances*. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority." *Milligan*, 71 U.S. at 120-21 (emphasis added).

Repeatedly, throughout its history, this Court has made clear that the privilege of the writ remains fully valid even

during times of crisis. As noted in *Rasul*, this Court has a very long tradition of entertaining the writ in a wide variety of Executive detention cases "in wartime as well as in times of peace." *Rasul*, 542 U.S. at 474.

> "The Court has, for example, entertained the habeas petitions of an American citizen who plotted an attack on military installations during the Civil War, *Ex parte Milligan*, 4 Wall. 2 (1866), and of admitted enemy aliens convicted of war crimes during a declared war and held in the United States, *Ex parte Quirin*, 317 U.S. 1 (1942), and its insular possessions, *In re Yamashita*, 327 U.S. 1 (1946)." 542 U.S. at 474-75.

This Court's clear adherence to the continued operation of the writ of habeas corpus even in the context of the Civil War and World War II vindicates the role of federal courts as the ultimate judges of the lawfulness of Executive detention.

Even during our last declared war, World War II, when the Nation was truly at peril and the entire country was on a war footing, this Court asserted the power and responsibility to review the lawfulness of military detentions that the Executive Branch considered necessary. See *Korematsu* v. *United States*, 323 U.S. 214 (1944). The Court ultimately upheld an Executive Order providing for military confinement of persons of Japanese ancestry—over dissents by Justice Jackson and others that history has regarded as more faithful to the Constitution. But it was *the Court* that decided whether the detentions were legally permissible.

In *Ex parte Endo*, 323 U.S. 283 (1944), decided the same day as *Korematsu*, the Court granted a writ of habeas corpus in a case arising from the same World War II military policy of exclusion and detention. The Court reviewed the basis proffered for the Executive detention and found it insufficient, because the petitioner was not a spy or saboteur: "When the power to detain is derived from the power to

protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized." *Id.* at 302.

Once again this Court is called upon to protect the constitutional balance and to assert the continuing vitality of the privilege of the writ of habeas corpus, even in the face of the expedient preference of the political branches to ignore this historic guarantee of human liberty.

II. Federal Courts Have Jurisdiction To Adjudicate Petitions For Writs Of Habeas Corpus By Guantanamo Detainees.

Not only should certiorari be granted, but to protect the function of the writ as assuring "prompt" review, the case should be expedited. The Constitution, codifying the common law function of the writ, requires no less.

A. This Court has already decided that the common law writ of habeas corpus covers the Guantanamo Detainees.

Article I, § 9, cl. 2 of the Constitution declares: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." By articulating the narrow circumstances under which Congress may *suspend* the privilege of the writ of habeas corpus, the Suspension Clause functions as a constitutional codification of the *availability* of the writ—unless validly suspended.

The writ mentioned in the Suspension Clause "is that great and celebrated writ, used in all cases of illegal confinement, known by the name of the writ of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, * * * to do, submit to, and receive, whatsoever the judge or court, awarding such writ, shall consider in that behalf." JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 206 (1833).

This Court has stated that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (quoting *Felker* v. *Turpin*, 518 U.S. 651, 663-64 (1996)). The writ requires the Executive to come into court to justify the legality of the detention of the person whom the Executive has imprisoned and who invokes the privilege of the writ, making the court the ultimate judge of the lawfulness of the detention.

There is no need to answer the question anew whether the common law scope of the writ of habeas corpus reaches the Guantanamo Detainees. This Court has already resolved the inquiry:

> "Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control. As Lord Mansfield wrote in 1759, even if a territory was 'no part of the realm,' there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.' *King* v. *Cowle*, 2 Burr. 834, 854-855, 97 Eng. Rep. 587, 598-599 (K.B.). Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.' *Ex parte Mwenya*, [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M. R.)." *Rasul*, 542 U.S. at 481-82 (internal footnotes omitted).

This Court, therefore, already has concluded that extending the writ of habeas to the Guantanamo Detainees is

consistent with the common law reach of the writ. The historical basis for this conclusion is amply laid out in the footnotes in the passage quoted above, *id.* at 481-82 nn. 11-14, and in the relevant passage of Judge Rogers's dissent below, *Boumediene* v. *Bush*, __ F.3d __, 2007 WL 506581, at *14 to *16 (D.C. Cir. Feb. 20, 2007) (Rogers J., dissenting).

By engaging in an analysis of the common law meaning of the writ of habeas corpus in order to determine the application of the habeas statute, this Court in *Rasul* presupposed that the habeas statute was coextensive as a matter of scope (though not necessarily procedure) with the constitutional scope of the writ protected by the Suspension Clause. The Court explicitly grounded its interpretation of the Guantanamo Detainees' statutory right in "the historical reach of the writ of habeas corpus" at common law. *Rasul*, 542 U.S. at 481. *Rasul* also makes clear that it is the common law scope of the writ that the Constitution presupposes, codifies and protects.

Therefore, repeal of the habeas *statute* does not and cannot undermine the historic, constitutionally protected scope of the writ which the Court held available to the Guantanamo Detainees. The privilege of the writ can be stripped from these men only in compliance with the Constitution's requirements, not at the whim of the Executive or Legislature.

B. The DTA and MCA do not validly bar access to the constitutionally guaranteed common law writ of habeas corpus.

Rasul establishes that the common law writ of habeas corpus as it existed in 1789—the bare minimum scope of the writ guaranteed by the Constitution—applies to the Guantanamo Detainees. In enacting the DTA and MCA and purporting to repeal the statutory basis for habeas jurisdiction over the claims of Guantanamo Detainees, Congress did not

provide an adequate alternative procedure for challenging their detention. Therefore, these statutes necessarily "suspend" the writ and are unconstitutional unless they satisfy the Suspension Clause.

By explicitly circumscribing any governmental intrusion on the reach of the writ as it was understood at common law, the Suspension Clause creates constitutional protection for habeas corpus. See JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 33 (1873) ("The privilege of this writ is also made an express constitutional right at all times, except in cases of invasion or rebellion, by the Constitution of the United States."). The Constitution presupposes that this structural right belongs to all persons who would have enjoyed the privilege at common law. By its express terms as part of Article I, § 9, the Clause functions as a limitation on Congressional power, prescribing the limited conditions under which Congress can contract the scope of the writ.[4]

The parties below briefed, and Judge Rogers addressed extensively, the infirmity of the DTA and MCA when they are viewed, as they must, as operating to suspend the constitutionally assured privilege of the writ. Judge Rogers demonstrated that the alternative procedures followed by the combatant status review tribunals (CSRTs) do not provide a constitutionally adequate alternative procedure to a writ of habeas corpus for challenging Executive detention. These so-called "tribunals" are not the kind of court that the writ assumes—a court independent of the Executive, as the common law courts were independent of the King. These "tribunals" are part of the military establishment in the Executive Branch, and it is the very purpose of the writ to subject Executive detention to *independent* judicial review.

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[4] Dissenting below, Judge Rogers demonstrated how the Suspension Clause functions as a limitation on congressional power. See *Boumediene*, 2007 WL 506581, at *10 to *12 (Rogers, J., dissenting).

The CSRTs' other infirmities include, *inter alia*, that the detainee (1) "bears the burden of coming forward with evidence explaining why he should not be detained," (2) "need not be informed of the basis for his detention," (3) "need not be allowed to introduce rebuttal evidence," (4) "must proceed without the benefit of his own counsel," and (5) can have his detention justified by "evidence resulting from torture." *Boumediene*, 2007 WL 506581, at *18 to *19 (Rogers, J., dissenting).

The DTA and MCA also do not comply with the Suspension Clause because, unlike previous, valid suspensions of the writ, the statutes make no reference to "rebellion" or "invasion," were not passed during a period of rebellion or invasion, and are not limited to the duration of any "necessity." Furthermore, it is dispositive that "there is no indication that Congress even sought to avail itself of the exception in the Suspension Clause." *Id.* at *20.

Under the opinion of the court below, there can be no federal court review whatsoever of the basis for indefinite, uncharged detention of the Guantanamo Detainees beyond the narrow review provided by the DTA. Limited review in the D.C. Circuit of an adverse determination by a CSRT does not adequately replace the searching inquiry guaranteed by habeas corpus, when a person is being detained without charge and before any conviction by *any* process. The DTA allows judicial review of the record of the CSRT only to "assess whether the CSRT has complied with its own standards." *Boumediene*, 2007 WL 506581, at *19 (Rogers, J., dissenting); DTA § 1005(e)(2), 119 Stat. at 2742. Under this new regime, the Guantanamo Detainees cannot obtain what habeas assures, an independent judicial determination whether lawful grounds exist to continue to imprison them.

C. The court of appeals majority opinion is inconsistent with *Rasul* and not mandated by *Eisentrager*.

Amici have discussed above how a straightforward application of *Rasul* is inconsistent with the court of appeals decision in this case. The majority below contended that "[e]ven if *Rasul* somehow calls *Eisentrager*'s constitutional holding into question, as detainees suppose, we would be bound to follow *Eisentrager*." *Boumediene*, 2007 WL 506581, at *7 n.10. That seeming deference to *Eisentrager* erects a false conflict that the Court in *Rasul* disclaimed.

First, *Johnson* v. *Eisentrager*, 399 U.S. 763 (1950), did not address the constitutional right to a writ of habeas corpus by petitioners in the position of the Guantanamo Detainees, who, unlike the petitioners in *Eisentrager*, are located in a place where the United States has the right to "exercise complete jurisdiction and control." *Rasul*, 542 U.S. at 471 (quoting 1903 Lease for Guantanamo base). In this context, the majority below was simply wrong in asserting that "[a]ny distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in *Eisentrager* were held, is immaterial to the application of the Suspension Clause." *Boumediene*, 2007 WL 506581, at *7. In *Rasul* this Court expressly concluded that the Guantanamo Detainees "differ from the *Eisentrager* detainees" in part because "they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." 542 U.S. at 476. Justice Kennedy's concurrence laid out in detail how "Guantanamo Bay is in every practical respect a United States territory." *Id.* at 487 (Kennedy, J., concurring in the judgment).

Second, the court below never came to terms with the numerous other relevant ways the *Rasul* Court determined that the Guantanamo Bay detainees were "differently situated from the *Eisentrager* detainees." *Rasul*, 542 U.S. at 476. The court of appeals ignored Justice Kennedy's detailed analysis of how "follow[ing] the framework of *Eisentrager*"

leads to the conclusion that the detainees are entitled to the privilege of the writ of habeas corpus. *Rasul*, 542 U.S. at 485-88. Neither this Court nor Justice Kennedy in his concurrence ever suggested that amending the habeas statute could, consistent with the Constitution, properly suspend the Guantanamo Detainees' right to petition for a writ of habeas corpus.

Furthermore, there is no historical support for the position that the common law writ of habeas corpus as it existed in 1789 would *not* have extended to persons in the position of the Guantanamo Detainees. As Judge Rogers pointed out, the panel majority could "point to no case where an English court has refused to exercise habeas jurisdiction because the alleged enemy being held, while under the control of the Crown, was not within the Crown's dominions. * * * The question is whether by the process of inference from similar, if not identical, situations the reach of the writ at common law would have extended to the detainees' petitions." *Boumediene*, 2007 WL 506581, at *14.

In *Rasul* the Court expressly ruled that habeas jurisdiction over the claims of Guantanamo Detainees "is consistent with the historical reach of the writ of habeas corpus." 542 U.S. at 481. Respect for this Court's analysis should have led the court below to follow the Court's precedent and, indeed, its mandate in these related cases.

D. The writ of habeas corpus carries the promise of prompt, substantive review, which the decision below frustrates.

Blackstone, writing almost a quarter of a millennium ago, described the writ of habeas corpus as the most basic test of the validity of imprisonment:

> "To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering it's

> protection impossible: but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an *habeas corpus* may examine it's validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner." WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 133 (1st ed. 1765-69).

Blackstone's description of the functioning of the writ at common law not only expresses the conception of the writ as the law's most basic protection against the tyranny of an unjustified detention. He also describes the force the writ had at common law to compel the Executive, in seeking to justify detentions, to account to the independent law courts. As Judge Rogers put it in her dissent in this case: "Throughout history, courts reviewing the Executive detention of prisoners have engaged in searching factual review of the Executive's claims." *Boumediene*, 2007 WL 506581, at *22. This is what Blackstone meant when he described the "absolute necessity of expressing upon every commitment the reason for which it is made," so that a court "may examine its validity" upon a writ of habeas corpus.

Justice Joseph Story also spoke of the writ's substantive assurance of basic review of the sufficiency of the claimed grounds for detention. In his COMMENTARIES, he declared that the writ of habeas corpus is

> "justly esteemed the great bulwark of personal liberty; since it is the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement; and *if no sufficient ground of detention appears, the party is entitled to his immediate*

> *discharge*. This writ is most beneficially construed; and is applied in every case of illegal restraint, whatever it may be; for *every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever the manner, in which the restraint is effected*." JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 206 (1833) (emphasis added).

The Suspension Clause, by impliedly codifying the availability of the common law writ, also codified the common law remedy. And that remedy is, at the very least, thorough scrutiny of the Executive's claimed, factual grounds for detention, accompanied by the right to be set free if the court finds no legitimate grounds for detaining the person. Without guaranteeing such a remedy, the writ carries none of its common law force and is effectively suspended in violation of the Suspension Clause.

The precise scope of habeas review may depend upon the nature of the procedures that led to the detention under review, but habeas review always scrutinizes the factual basis underlying the Executive's assertion that the detainee is subject to military detention in the first place. The Court has been willing to limit its review of military detentions after *conviction* of a crime by a military tribunal, so long as that military tribunal has valid jurisdiction over the person. That is, *the reviewing court* first must be satisfied that the person's status made him *subject to military detention*.

In each of the three pivotal cases cited by the Court in *Rasul* as examples of habeas review in wartime—*Milligan*, *Quirin*, and *Yamashita*—the petitioners had been tried and convicted by a military tribunal.[5] In each of those cases, the

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[5] The convictions that were being reviewed were the result of a formal trial process very different from the essentially *ex parte* process the CSRTs provide to the Guantanamo Detainees. See

Court determined that the threshold question in testing the validity of military detention was whether, in fact, the person's individual status made him subject to military authority at all. See *Milligan*, 71 U.S. at 108 (explaining that Milligan insisted, correctly, that as a non-combatant civilian "said military commission had no jurisdiction to try him"); *Quirin*, 317 U.S. at 19 (describing as "stipulated" and "undisputed" the petitioners' status as German soldiers conducting illegal wartime activities); *Yamashita*, 327 U.S. at 5 (accepting petitioner's role as Commanding General of the Imperial Japanese Army in the Philippine Islands as established by "the petitions and supporting papers"). See also *Reid* v. *Covert*, 354 U.S. 1 (1957) (Constitution ordinarily precludes military tribunals from asserting jurisdiction to detain and try civilians).

In this case, the Guantanamo Detainees present the threshold question whether there is a factual basis for their detentions. The validity of any detention turns on underlying facts about the individual Detainee's status as an actual combatant in a quasi-military campaign against the United States. Those facts are sharply disputed. There is substantial reason to believe that the CSRT process is not a reliable way to resolve those factual disputes fairly. In any event, it is the office of the Great Writ to subject the operative facts on which detention turns to searching inquiry by an independent court.

To test whether there is valid cause for confinement, a court entertaining a petition for a writ of habeas corpus must look beyond the CSRT process to inquire into the factual basis itself. See *Boumediene*, 2007 WL 506581, at *23 (Rogers, J., dissenting) ("There is good reason to treat

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Boumediene, 2007 WL 506581, at *23 (Rogers, J., dissenting) ("The robustness of the review [the Guantanamo Detainees] have received to date differs by orders of magnitude from that of the military tribunal cases.").

differently a petition by an uncharged detainee—who could be held indefinitely without even the prospect of a trial or meaningful process—from that of a convicted war criminal.").

The type of review assured by the writ of habeas corpus can be found in *Ex parte Bollman*, 8 U.S. 75 (1807), an early habeas opinion authored by Chief Justice Marshall. In *Bollman*, this Court reviewed the detention of two persons accused of levying war against the United States but not yet charged. The situation was analogous to that of the Guantanamo Detainees. The Court proceeded "to do that which the court below ought to have done." *Id.* at 114. In proceedings stretching over five days and with the prisoners present in court, it "fully examined and attentively considered" on an item-by-item basis "the testimony on which they were committed," held it insufficient and ordered their discharge. *Id.* at 125, 128-36. See *Boumediene*, 2007 WL 506581, at *22 to *23 (Rogers, J., dissenting) for a discussion of other cases reviewing Executive detentions and conducting "searching factual review of the Executive's claims" pursuant to an application for a writ of habeas corpus, even in wartime.

Justice Kennedy, in his *Rasul* concurrence, crisply explained how indefinite detention without trial implicates the privilege of a writ of habeas corpus in a more compelling way than detention resulting from conviction by a court or even a properly constituted military tribunal:

> "Indefinite detention without trial or other proceeding presents altogether different considerations [than being tried and convicted by a military commission]. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus." *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring in the judgment).

Despite this Court's explicit holding in *Rasul* that the common law reach of habeas corpus extends to the Guantanamo Detainees, and its explicit statement in *St. Cyr* that the common law reach is the "absolute minimum" scope of the writ, the court of appeals has nevertheless disallowed what Justice Story described as "the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement." As Justice Kennedy explained in his *Rasul* concurrence, "[T]here are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated." 542 U.S. at 487 (Kennedy, J., concurring in the judgment).

The Guantanamo Detainees have been seeking this judicial scrutiny for five years. At every turn, the Executive (now with congressional cooperation) has sought to frustrate their resort to the Great Writ. By tolerating this evasion, the court of appeals abandoned the historic duty of the judiciary as enshrined in the Constitution. Only prompt action by this Court can restore the integrity of the Great Writ and protect its own mandate in *Rasul*.

The Guantanamo Detainees do not ask for anything more than this Court acknowledged was their due almost three long years ago. All they ask is to be able to have an independent court inquire whether they are rightfully detained. After more than five years in harsh military confinement, with no end in sight and no knowledge whether an end even exists, it is time for the courts to begin that inquiry and determine the merits of their claims.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for expedited briefing and argument.

Respectfully submitted.

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APPENDIX

APPENDIX
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A. Peter Burleigh served as Ambassador and Coordinator for Counter-Terrorism from 1991 to 1992, Ambassador to Sri Lanka and the Maldives from 1995 to 1997, and Ambassador and Deputy Permanent Representative to the United Nations from 1997 to 1999.

Rear Admiral Donald J. Guter was a line officer in the United States Navy from 1970 through 1974. After a break for law school, he returned to the Navy in 1977 and remained in the Navy until 2002, when he retired from the military. He served as the Navy's Judge Advocate General from June 2000 through June 2002. Rear Admiral Guter was in the Pentagon when it was attacked by terrorists on September 11, 2001. He is currently the Dean of Duquesne Law School in Pittsburgh, Pennsylvania.

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Hon. Nathaniel R. Jones served as a judge on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002. Prior to taking the bench, he served as General Counsel for the National Association for the Advancement of Colored People from 1969 to 1972, and as Co-Chair, U.S. Department of Defense Civil-Military Task Force on Military Justice in 1972.

Karen Korematsu-Haigh is the daughter of Fred Korematsu, the petitioner in *Korematsu* v. *United States*, 323 U.S. 214 (1944), who died in 2005. Ms. Korematsu-Haigh continues to work to preserve her father's legacy, and is Co-founder of The Fred Korematsu Civil Rights Education Center, established in 1989 in association with the Asian Law Caucus, San Francisco.

Samuel W. Lewis served as Assistant Secretary of State for International Organization Affairs from 1975 to 1977, Ambassador to Israel from 1977 to 1985, and Director of the State Department Policy Planning Staff from 1993 to 1994.

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Anthony Quainton served as Ambassador to Central African Republic from 1976 to 1978, Ambassador to Nicaragua from 1982 to 1984, Ambassador to Kuwait from 1984 to 1987, Ambassador to Peru from 1989 to 1992, and Assistant Secretary of State for Diplomatic Security from 1992 to 1995.

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(1) (3)

Nos. 06-1195 and 06-1196

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

KHALED A. F. AL ODAH, *et al.*,
Petitioners,

v.

UNITED STATES, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF UNITED STATES SENATOR ARLEN SPECTER IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is the Ranking Member of the Senate Committee on the Judiciary. During the 109th Congress, when the Military Commissions Act of 2006 and the Detainee Treatment Act of 2005 moved through the Senate, *amicus* was Chairman of the Committee and held several hearings to consider whether it is constitutionally permissible for Congress to deny the right of habeas corpus to detainees held at the United States Naval Station at Guantanamo Bay. Therefore, *amicus*, being intimately familiar with the statutory provisions implicated in these cases, urges this Court to grant review and to resolve the constitutional questions presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States began sending alien detainees to Guantanamo over five years ago, having previously found them to be enemy combatants when they were initially captured. During that time, some 390 detainees have been released, and others have been added. In total, the base remains home to 385 detainees, of whom eighty have been designated for release. By all accounts, there are some very dangerous individuals residing within the walls of Guantanamo. Toward the end of 2006, for example, the government transferred fourteen "high value" detainees to the base, including the alleged (and now, apparently, confessed) 9/11 mastermind, Khalid Sheikh Muhammad.[2] Moreover, reports indicate some twenty former detainees may have returned to the

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[1] This brief is filed with the consent of the parties. The parties' letters of consent will be filed together with this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no other person, other than *amicus* and its counsel, made a monetary contribution to its preparations or submission.

[2] *See* Dep't of Defense, Transcript of CSRT Hearing for ISN 10024 (Mar. 10, 2007); J. White, *Alleged Architect Of 9/11 Confesses To Many Attacks*, WASH. POST, Mar. 15, 2007, at A1.

battlefield to face U.S. forces. Given the lengthy debates and disagreements among Members of Congress as to the handling of these detainees, and the perception that the United States Court of Appeals for the District of Columbia Circuit failed to follow this Court's direction in *Rasul v. Bush*, 542 U.S. 466 (2004), this Court should review these cases this term.

The question presented here is not whether some of the individuals should continue to be detained. They should. The question is whether the U.S. Constitution ensures that the writ of habeas corpus is available for detainees to contest the legality of their detention by the executive.

The writ of habeas corpus is an age-old remedy for unlawful detention at the hands of the executive. The Founders imported this common law right from England; afforded it constitutional protection in the Suspension Clause, U.S. CONST. art. I., § 9, cl. 2; and authorized the federal courts to issue the writ, *see* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

Three years ago, in *Rasul*, this Court explained that the common law writ extends to both citizens and aliens within United States territory. 542 U.S. at 481. In turn, the Court reasoned that because the United States exercises exclusive jurisdiction and control over Guantanamo, "[a]pplication of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus." *Id.*; *see* 28 U.S.C. § 2241 (2000). Shortly thereafter, the Department of Defense (DoD) instituted Combatant Status Review Tribunals (CSRTs) to ascertain whether each detainee should still be considered an enemy combatant and remain detained at the Guantanamo facility. *See* Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004) ("CSRT Order"); Memorandum of the Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures (July 29, 2004) ("CSRT Rules").

The following year, with the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (DTA), Congress purported to preclude habeas petitions from Guantanamo detainees while providing for a limited review of CSRT determinations in the D.C. Circuit. *Id.* § 1005(e). In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the Supreme Court held that this so-called jurisdiction-stripping provision did not apply to pending cases and therefore found it unnecessary to address its constitutional implications. In response, Congress passed the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (MCA), to preclude detainee habeas petitions in all cases (pending and future).

In the present cases, the court of appeals relied on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in holding that the Guantanamo detainees have no constitutional right to seek habeas relief because Guantanamo is not within the sovereign territory of the United States. *Boumediene v. Bush*, 476 F.3d 981, 990-92 (D.C. Cir. 2007). This decision flies directly in the teeth of this Court's reasoned conclusion in *Rasul* as to Guantanamo's unique territorial status, which places it within the "historical reach of the writ" as it existed at common law prior to and during the founding era.

The procedures for reviewing enemy combatant status provided pursuant to the DTA and MCA depart dramatically from the core features of habeas relief and are, thus, a wholly inadequate substitute. In particular, they fail to provide an independent forum, an imperative remedy, and a fair opportunity to contest enemy combatant status.

Congress has struggled with the important constitutional questions presented in these cases. The arguments have been aired and re-aired. The time is ripe for this Court to address the constitutional infirmity of the MCA's attempt to curtail the right of habeas corpus. Habeas must be restored to ensure that the rule of law prevails at Guantanamo. This Court should grant review and resolve the matter this term.

ARGUMENT

I. The MCA Precludes Habeas Relief in Pending Cases

As a preliminary matter, this Court should decline Petitioners' invitation to exempt pending cases from the ambit of the MCA. *See Boumediene* Pet. 12-14; *Al Odah* Pet. 25-26. The Petitioners' argument is little more than a red herring aimed at avoiding this Court's review of the pressing constitutional issues. The language of the statute is straightforward: it precludes pending and future actions, both habeas and non-habeas (except for CSRT appeals in the D.C. Circuit), that relate to "any aspect of the detention, transfer, treatment, trial, or conditions of confinement." *See* MCA § 7 (codified at 28 U.S.C § 2241(e)).

Section 7(a) of the MCA removes (1) "jurisdiction to hear or consider an application for a writ of habeas corpus" and (2) "jurisdiction to hear or consider any *other* action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement." (Emphasis added). In turn, section 7(b) states that "subsection (a) . . . shall apply to *all cases, without exception,* pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention." (Emphasis added). Although this list mirrors the list found in the second clause of section 7(a), it does not mean that section 7(b) exempts habeas cases. To the contrary, section 7(b) explicitly references the entirety of 7(a) and conspicuously omits the word "other"—a qualifier used in section 7(a) to address non-habeas actions. In short, there is no significance to section 7(b)'s use of one clause to refer to what section 7(a) refers to in two clauses. *Cf.* MCA § 3(a) (adding 10 U.S.C. § 950j).

Moreover, as Congress debated and passed the MCA, both the Members who supported and the Members who opposed

these provisions recognized the effect on pending habeas cases. *See, e.g.*, 152 CONG. REC. S10357 (Sept. 28, 2006) (Sen. Leahy) ("This new bill strips habeas jurisdiction retroactively, even for pending cases."); *id.* at S10404 (Sen. Sessions) ("I don't see how there could be any confusion as to the effect of this act on the pending Guantanamo litigation.").[3] Similarly, the court below unanimously agreed that the statute impacts pending habeas cases. *Boumediene*, 476 F.3d at 986-88; *id.* at 999 (Rogers, J., dissenting).

Any attempt to avoid this interpretation runs headlong into the plain text and the clear understanding of the legislators. *See Swain v. Pressley*, 430 U.S. 372, 378 n.11 (1977). As a consequence, this Court should move past the statutory argument and determine whether the MCA's jurisdiction-stripping provisions are constitutional.

II. The Great Writ Extends to Guantanamo Detainees

The Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST., art. I, § 9, cl. 2. At a minimum, this constitutional protection extends to the writ as it existed at common law in 1789. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). Although it has expanded since that time, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *Id.*

In *Rasul*, this Court held that the federal habeas statute was available to aliens being detained at Guantanamo. *See* 542 U.S. at 485; 28 U.S.C. § 2241 (2000). In reaching this conclusion, the Court reasoned that extending habeas to such

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[3] *Accord* 152 CONG. REC. S11197 (Dec. 5, 2006) (Sen. Specter); *id.* at S10364-65 (Sept. 28, 2006) (Sens. Smith and Levin); *id.* at S10269-70 (Sept. 27, 2006) (Sen. Kyl); *id.* at H7544-45 (Rep. Sensenbrenner).

individuals was "consistent with the historical reach of the writ of habeas corpus," given that Guantanamo was "territory over which the United States exercises exclusive jurisdiction and control." *Rasul*, 542 U.S. at 476, 481-82. At common law, the Court declared, "even if a territory was 'no part of the realm,' there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.'" *Id.* at 482 (quoting *King v. Cowle*, 97 Eng. Rep. 587, 598-99 (K.B. 1759)).

The court of appeals held that "[t]he text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba—not the United States—has sovereignty over Guantanamo Bay." *Boumediene*, 476 F.3d at 992. However, this conclusion is irrelevant given that, under *Rasul*, the "historical reach of the writ" turns not on *de jure* sovereignty, but rather on *de facto* exclusive jurisdiction and control.

It bears emphasizing that Guantanamo, for the reasons mentioned in *Rasul*, is uniquely situated. 542 U.S. at 471, 480-81. Under the 1903 lease agreement ("*Lease*"), although Cuba retains "ultimate sovereignty," the United States "shall exercise complete jurisdiction and control over and within said areas."[4] Also, pursuant to a subsequent treaty, the arrangement is to last indefinitely and it cannot be unilaterally terminated by Cuba.[5] As Justice Kennedy explained, "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . . From a practical perspective, the indefinite lease . . . has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." *Rasul*,

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[4] Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418.

[5] *See* Treaty Between the United States and Cuba Defining Their Relations, May 29, 1934, U.S.-Cuba, art. III, T.S. No. 866.

542 U.S. at 487 (concurring opinion) (quoting *Eisentrager*, 339 U.S. at 777-78).

Additional facts illustrate this exclusive control. First, under the lease agreement, "[t]he United States exercises exclusive criminal jurisdiction over all persons, citizens and aliens alike, who commit criminal offenses at the Base[.]" *Gherebi v. Bush*, 352 F.3d 1278, 1289 (9th Cir. 2003), *vacated on other grounds*, 542 U.S. 952 (2004).[6] Second, the United States has the power of eminent domain at Guantanamo. *See Lease*, art. III. Third, when Fidel Castro severed water and supplies to the base in 1964, the base promptly "became and remains entirely self-sufficient, with its own water plant, schools, transportation, entertainment facilities, and fast-food establishments." *Gherebi*, 352 F.3d at 1295. Fourth, although Cuba has declared its belief that the United States has not adhered to restrictions in the original agreement, Cuba nonetheless has recognized that it is powerless to do anything about it.[7] Fifth, the base remains in place despite the decidedly rocky relations between the United States and Cuba.

The contrast between Guantanamo and other American military bases, past and present, further highlights the point.

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[6] *See* Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, art. IV, T.S. No. 426; *United States v. Lee*, 906 F.2d 117, 117 & n. 1 (4th Cir. 1990) (Jamaican national charged with sexual abuse occurring at Guantanamo); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975) (U.S. civilian employee at Guantanamo Bay under contract with the Navy was prosecuted for drug offenses and tried in Virginia).

[7] *Compare Lease*, Art. II (permitting the United States "generally to do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose"), *with* Statement by the Government of Cuba to the National and International Public Opinion (Jan. 11, 2002) ("Cuba could do absolutely nothing to prevent [other activities]."), *available at* http://ciponline.org/cuba/cubaproject/cubanstatement.htm (last visited Mar. 15, 2007).

For example, Diego Garcia, located in the Indian Ocean, is operated under an agreement with Great Britain that, unlike the Guantanamo lease, is terminable by either party.[8] Similarly, the United States has operated various military facilities under agreements that run only for a specific period of time,[9] articulate very narrow purposes,[10] or provide for joint control.[11] Indeed, Landsberg, the post-WWII prison in Germany that housed the petitioners in *Eisentrager*, was operated "under three flags" (United States, Great Britian, and France). *Gherebi*, 352 F.3d at 1287 n.10. In still other instances of American control abroad, the host country has pressured the United States to leave or make changes.[12] Such is not the case at Guantanamo, where the United States "is

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[8] *See* Availability of Certain Indian Ocean Islands for Defense Purposes, Dec. 30, 1966, U.S.-U.K., para. 11, 18 U.S.T. 28 (terminating two years after "either Government shall have given notice of termination to the other"); *see also, e.g.*, Establishment of Long Range Aid to Navigation Station in the Bahama Islands, June 24, 1960, U.S.-U.K., art. XXVI, 11 U.S.T. 1587; Mutual Defense Treaty, October 1, 1953, U.S.-S. Korea, art. VI, 5 U.S.T. 2368.

[9] *See, e.g.*, Treaty Regarding United States Defence Areas and Facilities in Antigua, Jan. 1, 1978, U.S.-Ant. & Barb., art. XXIV, 29 U.S.T. 4183 ("This Agreement shall come into force on January 1, 1978, and shall remain in force through December 31, 1988.").

[10] *See, e.g.*, K. L. Storrs & C. Veillette, CRS Report, *Andean Counterdrug Initiative (ACI) and Related Funding Programs: FY2005*, at 18 (May. 10, 2005) (describing agreement for use of location "solely for the detection of drug trafficking flights in the region").

[11] *See, e.g.*, Defense of Greenland, June 8, 1951, U.S.-Den., art. II, 2 U.S.T. 1485.

[12] *See, e.g.*, D. Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST., Nov. 2, 2005, at A1 (reporting that, in 2003, the Thai government insisted CIA shut down "black" site where it was holding and interrogating suspected terrorists); M. Wald, *U.S. Curbs Low-Flight Training in Italy Near '98 Ski-Lift Deaths*, N.Y. TIMES, Mar. 11, 1999, at A7 (describing Italian response to accident involving U.S. pilots based out of Aviano).

accountable to no one." G. L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1230 (1996); *see also Gherebi*, 352 F.3d at 1300 ("[T]he United States' territorial relationship with the Base is without parallel today[.]").

Consequently, the lower court's reliance on *Eisentrager* is misplaced. *See Boumediene*, 476 F.3d at 990-92. In *Eisentrager*, this Court turned back the habeas claims of enemy aliens who were captured, tried, convicted, and detained on non-U.S. territory. Once Guantanamo is understood to be a U.S. territory for these purposes, as *Rasul* holds it must, then *Eisentrager* no longer controls. Nor can the court below draw support from the DTA provision stating that "'United States,' when used in a geographic sense . . . does not include the United States Naval Station, Guantanamo Bay, Cuba." DTA § 1005(g). Whether or not "the determination of sovereignty over an area is for the legislative and executive departments," *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948), *see Boumediene*, 476 F.3d at 992, the inquiry, per *Rasul*, into the common law scope of the writ turns not on formal sovereignty but rather on the functional level of control. Here, it is plain that the U.S. exercises such control over Guantanamo.

In short, contrary to the court of appeals decision, *Rasul*'s analytical path leads inexorably to the conclusion that the Constitution prevents Congress from eliminating the writ for the Guantanamo detainees—absent the prerequisites for suspension (rebellion or invasion), which no one asserts here. With Guantanamo under the plenary control of the United States and isolated from the heat of battle, the "ordinary constitutional processes" can, and must, move forward. *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting); *see also Rasul*, 542 U.S. at 487 (Kennedy, J., concurring) (observing that Guantanamo is "far removed from any hostilities").

III. The Framework For Challenging Detention Is an Insufficient Substitute for the Great Writ

Although the MCA deprives the Guantanamo detainees of habeas corpus, the Suspension Clause will not be offended if there remains a substitute collateral remedy that is "neither inadequate nor ineffective to test the legality of a person's detention." *Swain*, 430 U.S. at 381; *see also St. Cyr*, 533 U.S. at 314 n.38; *Sanders v. United States*, 373 U.S. 1, 14 (1963). However, no adequate substitute appears here.

This Court has upheld statutory alternatives that shifted the challenge to a different court, but did not otherwise materially alter the nature of the habeas remedy. *See Swain*, 430 U.S. at 383-84 (upholding provision shifting habeas challenges to local D.C. courts, notwithstanding the lack of tenure and salary protections); *United States v. Hayman*, 342 U.S. 205 (1952) (upholding 28 U.S.C. § 2255, which provides for actions to be brought by federal convicts in the sentencing district rather than the district of detention). These substitutes avoided constitutional difficulties largely by virtue of an escape clause allowing habeas relief any time the alternative proves "inadequate or ineffective." *Swain*, 430 U.S. at 381; *Hayman*, 342 U.S. at 223.[13] No such escape clause exists here. Rather, the procedures established under the DTA remain the sole mechanism by which detention may be challenged.

Moreover, far from a mere change in venue, the procedures available to the Guantanamo detainees for contesting deten-

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[13] Restrictions on filing successive petitions have also been approved because such constraints fall "well within the compass of [the] evolutionary process" of the writ. *Felker v. Turpin*, 518 U.S. 651, 664 (1996). Lower courts have upheld other modest limitations, such as a one-year statute of limitation—albeit often acknowledging equitable tolling as a means to avoid constitutional impropriety. *See, e.g., Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005); *Delaney v. Matesanz*, 264 F.3d 7, 12 (1st Cir. 2001); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998).

tion represent a dramatic departure from the essence of habeas relief and, accordingly, are ill-suited as an alternative. The limited status review mechanisms include CSRTs (to assess the detainees' status upon arrival) and Administrative Review Boards (ARBs) (to reassess the status annually). Congress has not spelled out the precise frame-work for the CSRTs and ARBs—except that they must "pro-vide for periodic review of any new evidence" and must, "to the extent practicable, assess" the probative value of any statements resulting from coercion, DTA § 1005(a)(3), (b)—and has, instead, entrusted the DoD to fill in the gaps, *see id.* § 1005(a)(1)(A). While a limited appeal of CSRT decisions is available to the D.C. Circuit, *see id.* § 1005(e)(2); MCA § 10, the courts are otherwise barred from hearing actions (including habeas petitions) relating to the "detention, transfer, treatment, trial, or conditions of confinement" of alien detainees alleged to be enemy combatants, *see* MCA § 7.

Whatever the precise metes and bounds of the inviolable core of habeas, the framework established by the MCA and DTA provides an insufficient substitute for habeas because it lacks three fundamental features: a hearing before an impartial adjudicator, an imperative remedy, and a fair opportunity to rebut the charges.

A. The Framework Lacks an Independent Tribunal

The MCA and DTA fail to provide an independent forum in which to contest executive detention in the first instance. Instead, detainees must face a non-neutral tribunal—a CSRT staffed with executive branch officials. *See* CSRT Rules, encl.1 § (C). Labeling the CSRT members as "*neutral* commissioned officers," *id.* (emphasis added), is of little comfort to the detainee, whose plea for release depends on the very executive branch that is detaining him. Indeed, that turns traditional habeas corpus on its head, putting the king in the role of both jailer and judge. *See Lonchar v. Thomas*, 517

U.S. 314, 322 (1996) (describing the writ's "most basic purpose" as "avoiding serious abuses of power by a government, say a king's imprisonment of an individual without referring the matter to a court"); *Boumediene*, 476 F.3d at 1005 (Rogers, J., dissenting) ("[T]hese proceedings occur before a board of military judges subject to command influence."); *cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality) (citizen entitled to "neutral decisionmaker" in challenging enemy combatant status in habeas action).

The CSRTs and ARBs are in no sense independent and, accordingly, are not a passable substitute to the great writ. Indeed, in practice, the CSRT procedures have allowed the government, upon receiving an unfavorable CSRT decision, to convene multiple tribunals until the detainee is found to be an enemy combatant. *See Boumediene*, 476 F.3d at 1006-07 (Rogers, J., dissenting).

Moreover, such a fundamental flaw cannot be remedied on review, especially given the limited scope of authority afforded the D.C. Circuit in conducting its review. *Cf. Hamdan*, 126 S. Ct. at 2807 (Kennedy, J., concurring) (expressing concern for DTA's limited review of military commissions and noting that "provisions for review of legal issues after trial cannot correct for structural defects . . . that can cast doubt on the factfinding process and the presiding judge's exercise of discretion during trial"). This deficiency alone warrants this Court's prompt intervention.

B. The Framework Lacks an Imperative Remedy

The MCA and DTA also do not provide the power to order the release of individuals whose indefinite detentions are contrary to law. At its core, the writ's function is "to afford a *swift and imperative* remedy in all cases of illegal restraint upon personal liberty." *Price v. Johnston*, 334 U.S. 266, 283 (1948) (emphasis added), *overruled on other grounds*, *McCleskey v. Zant*, 499 U.S. 467 (1991). As imported from

England, "the use of habeas corpus to *secure release* from unlawful physical confinement . . . was thus an integral part of our common-law heritage." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). This is reflected, for example, in the federal statute providing post-conviction relief for federal convicts (as a substitute to habeas under § 2241): if the sentence is illegal, the court is authorized to "discharge the prisoner" after "vacat[ing] and set[ting] the judgment aside." 28 U.S.C. § 2255. While the writ may, over time, have expanded, a claim for "immediate release . . . lies at 'the core of habeas corpus.'" *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005).

1. A CSRT has no power to order a detainee released, even if it determines that the detainee is not an enemy combatant. As implemented, if the CSRT "determines that the detainee shall no longer be classified as an enemy combatant," its decision (after approved by the Director) is forwarded "in order to *permit* the Secretary of State to coordinate the transfer of the detainee with representatives of the detainee's country of nationality for release *or other disposition* consistent with applicable laws," CSRT Rules, encl.1 § (I)(9) (emphasis added), and "consistent with domestic and international obligations and the foreign policy of the United States," CSRT Order § (i). Also, the "implementing directive is subject to revision at any time." CSRT Rules at 2. The lack of a remedy is apparent from this permissive language.

2. In similar fashion, an ARB offers little remedial hope. An ARB, which convenes annually to reassess detainee status, is directed to "conduct its own proceeding and make an independent recommendation notwithstanding any prior determinations" and, thereafter, "make a recommendation" to the Designated Civilian Officer (DCO) to release, transfer, or continue to detain. Memorandum for Secretaries of the Military Departments, Revised Implementation of Administrative Review Procedures, encl.3 § 1(b) (July 14, 2006). The

DCO "decides whether to release, transfer with conditions, or continue to detain the enemy combatant" and coordinates with various cabinet departments "to implement any enemy combatant release or transfer according to established Deputy Secretary of Defense policy." *Id.*, encl.4 § 5(c)-(d).

The non-mandatory language of the rules establishing both the CSRTs and ARBs, in the absence of statutory constraints, provides ample wiggle room for continued detention at the discretion of the executive officials—who are under no obligation to reach an agreement with the host countries at all, let alone in an expeditious fashion. By claiming it has not received adequate assurances from the home countries to address security risks posed by the individuals to be released, the executive branch can refrain indefinitely from actually releasing the detainees.[14] In short, neither the CSRTs nor the ARBs have the authority to require the executive to release any detainees, even ones designated for release or found no longer to be enemy combatants.

3. Nor is the D.C. Circuit given authority to order release. Even if that court, in exercising its limited review, concludes that the CSRT's procedures were improper—that is, the court determines either that the CSRT did not comply with the Defense Secretary's "standards and procedures" or that the "standards and procedures" are inconsistent with the Constitution and laws of the United States—the court is only given authority "to determine the validity of any final decision of a [CSRT]." DTA § 1005(e)(2)(A), (C). Voiding the CSRT's decision would thus apparently leave the detainee in his *ex ante* position—*i.e.*, detained.

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[14] *See* Dep't of Defense, Transcript of Press Conference (Mar. 6, 2007) (discussing 80 detainees still in custody despite being "designated for release or transfer"), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902 (last visited Mar. 12, 2007).

In sum, lacking an imperative remedy, these procedures cannot be an adequate substitute for the great writ. As has been the case over the last five years, such "indefinite detention of an alien" represents a "serious constitutional problem," *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), impacting "friends and foes alike." *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring).

C. The Framework Fails to Afford a Fair Opportunity to Rebut the Accusations

In light of the *Rasul* Court's characterization of Guantanamo as being under plenary U.S. control—which perhaps makes it akin to the "unincorporated territories" in the *Insular Cases*—the detainees are entitled to at least a bare minimum of due process in contesting enemy combatant status.[15] However, the framework established by the MCA and DTA falls short and, accordingly, is an inadequate substitute for habeas corpus.

In *Hamdi v. Rumsfeld*, a plurality of this Court determined that, upon seeking habeas relief, a citizen captured in a foreign country and detained within the United States as an enemy combatant must be given notice of the factual basis underlying his classification, a fair opportunity to rebut the

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[15] *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922) (constitution affords "certain fundamental personal rights" to inhabitants of territories not yet "incorporated" by Congress); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1342-43 (2d Cir. 1992) ("fundamental constitutional rights" are guaranteed to Guantanamo inhabitants), *vacated as moot*, 509 U.S. 918 (1993); *Gov't of the Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974) (treating Canal Zone as unincorporated U.S. territory); 35 Op. Att'y Gen. 536, 540 (1929) (Canal Zone grant "appear[s] to be no less comprehensive a grant that the lease from Cuba"); Neuman, *supra*, at 1200 (comparing Guantanamo to Canal Zone); *but see Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995); *cf. Vermilya-Brown*, 335 U.S. at 405 (Jackson, J., dissenting) (arguing Guantanamo is not a "possession").

government's assertions before a neutral decisionmaker, and the assistance of counsel. 542 U.S. at 533, 539. As the plurality explained, the Due Process Clause "informs the procedural contours" of the writ of habeas corpus. 542 U.S. at 525; *see also* D. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 75 n.67 (2006) ("[T]he habeas remedy (or an adequate alternative) and the right of a detainee not to be deprived of liberty without due process are intertwined.").

While this does not necessarily indicate that the same level of constitutional protection must attach to detainees held at Guantanamo,[16] at least some minimal fundamental due process protections must apply to the detainees in light of the indefinite nature of the detention on territory over which the United States exercises complete jurisdiction and control. *See Rasul*, 542 U.S. at 487 (Kennedy, J., concurring) (Guantanamo is under the "implied protection" of the United States); *Zadvydas*, 533 U.S. at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."); *Verdugo-Urquidez*, 494 U.S. 259, 271-72 (1990) (reserving the question whether a "lawful but involuntary" presence, if prolonged, would constitute "substantial connections with this country" such that constitutional protections attach).

These are not "some undefined, limitless class of noncitizens who are beyond our territory." *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring). These are 385 individuals who "face continued detention, perhaps for life," and, even though aliens are "subject to limitations and conditions not applicable to citizens," they are nonetheless entitled to a "fair hearing under lawful and proper procedures." *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting);

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[16] *Cf. Dorr v. United States*, 195 U.S. 138 (1904) (no Sixth Amendment right to jury trial in Philippines, which was then an insular possession).

see also Hamdi, 542 U.S. at 530 ("[A]n unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present [an immediate] threat [to the national security of the United States during ongoing international conflict].").

The framework prescribed by statute and implemented in the CSRTs does not guarantee a detainee sufficient opportunity to contest his status as an enemy combatant. First, the detainee "shall not be represented by legal counsel," and will only have access to a "Personal Representative"—who is a commissioned officer appointed by the Director, and with whom "no confidential relationship exists." CSRT Rules, encl.1 § (F)(5); *id.*, encl.3 §§ (A)(1), (C)(1). Access to legal counsel has long been held to be an essential aspect of challenging one's detention. Second, the evidentiary standards raise serious concerns due to the potential use of information obtained under abusive interrogation techniques; the limitation on discovery of classified information; the admission of hearsay evidence; the tribunal's discretion to screen out evidence found to be not "reasonably available"; the government's low burden of proof; and the rebuttable presumption in favor of the government's evidence. *See* DTA § 1005(b)(1), (e)(2)(C)(i); CSRT Rules, encl.1 §§ (B), (E)(2)-(3), (F)(6), (F)(8), (G)(2), (G)(7), (G)(9)-(11), (H)(7). While some of these elements might be individually justifiable depending on the circumstances, *see Hamdi*, 542 U.S. at 533-34 (giving qualified approval of hearsay evidence and rebuttable presumptions) (plurality), in the aggregate, this framework denies a detainee a "fair opportunity to rebut the Government's factual assertions" and "present his own factual case to rebut the Government's return," *id.* at 533, 538; *see also Boumediene*, 476 F.3d at 1004-06 (Rogers, J., dissenting).

One particular anecdote, recounted in an opinion rendered by the United States District Court for the District of Colum-

bia below, brings the matter into focus. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). An individual was being detained on allegations that he was "associated with a known Al Qaida operative." *Id.* at 469. However, he was not told his purported associate's name (the tribunal did not even know it) and was unable to view the evidence against him (if there even was any). Unable to defend himself, he simply denied the charges and stated: "I was hoping you had evidence that you can give me. . . . [I]f a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about that." *Id.* The resulting laugher by those in the tribunal room demonstrates the absurdity of the situation. As the district court judge noted, it would have been humorous, had it not been so serious and "had the detainee's criticism of the process not been so piercingly accurate." *Id.* at 470. This is hardly an adequate substitute for habeas corpus.

Congress is, of course, capable of amending the statute not just to *recognize* the CSRTs and ARBs, *see* DTA § 1005(a)(1)(A), but to further prescribe a framework commensurate with traditional habeas review. By making clear that certain constitutional minimums apply, this Court will preserve Congress's role in mapping out the way forward while simultaneously allowing the detainees the opportunity to be heard and to advance the merits of their individual cases.

IV. This Court's Guidance is Necessary as a Bulwark of Liberty

Within Congress, there has been extensive debate over the last few years regarding the Guantanamo detainees' access to habeas corpus. Some Members have argued that the provisions in the MCA (and, before that, the DTA) stripping the courts of habeas jurisdiction, MCA § 7; DTA § 1005(e), pass

constitutional muster.[17] Others have taken the contrary position.[18] Moreover, some lawmakers have explicitly sought to amend or delete the offending MCA habeas provisions.[19] In the last Congress, the Senate Judiciary Committee held three hearings, chaired by *amicus*, examining the detainees' situation and considering testimony from a wide array of legal authorities.[20]

While this exchange of ideas is surely healthy and appropriate, the conversation has begun to generate diminishing returns. Meanwhile, the detainees wait, and uncertainty surrounds a fundamental constitutional principle. If the Court declines to resolve these important issues in this term, the detainees could face more than another full year in legal limbo. Although Congress will continue to discharge its

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[17] *See, e.g.*, 152 CONG. REC. S10359 (Sept. 28, 2006) (Sen. Sessions); *id.* at S10265-67 (Sept. 27, 2006) (Sens. Graham and Warner); *id.* S10267-72 (Sen. Kyl); *id.* at S10272-73 (Sen. Cornyn).

[18] *See, e.g.*, 153 CONG. REC. S2962-63 (Mar. 9, 2007) (Sen. Leahy); *id.* at S2749-51 (Mar. 7, 2007) (Sen. Specter); 152 CONG. REC. S10366 (Sept. 28, 2006) (Sen. Dodd); *id.* at S10264-65 (Sept. 27, 2006) (Sen. Specter); *id.* at S10243 (Sen. Levin); *id.* at S10361 (Sen. Feingold); *id.* at S10400 (Sen. Kennedy); *id.* at S10409 (Sen. Biden); *id.* at H7548, H7550, H7559 (Reps. Conyers, Lofgren, Nadler, and Jackson-Lee); 151 CONG. REC. S14309 (Nov. 10, 2005) (Sen. Bingaman); *id.* at H11866 (Dec. 15, 2005) (Rep. Kucinich).

[19] *See, e.g.*, Habeas Corpus Restoration Act of 2007, S. 185, 110th Cong.; Habeas Corpus Restoration Act of 2006, S. 4081, 109th Cong.; Effective Terrorists Prosecution Act of 2006, S. 4060, 109th Cong.; S.A. 5087, 109th Cong. (2006).

[20] *See Examining Proposals to Limit Guantanamo Detainees' Access to Habeas Corpus Review: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (Sept. 25, 2006); *Hamden v. Rumsfeld: Establishing a Constitutional Process: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (July 11, 2006); *Detainees: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (June 15, 2005).

duties, at the end of the day, it falls to this Court to say, emphatically, what the law is.

In an address at Buffalo Law School in 1951, Justice Jackson warned that "suspension of privilege of the writ of habeas corpus is in effect a suspension of every other liberty." Robert Jackson, *Wartime Security and Liberty Under Law*, 1 BUFFALO L. REV. 103, 109 (1951). To avoid an incongruous legal "black hole" at Guantanamo, the Court should review one or both of these cases, strike down the MCA's illegal suspension of the great writ, and pave the way for Congress to address this challenging situation consistent with the constitutional reach of the writ.

CONCLUSION

This Court should grant the petitions for a writ of *certiorari* and move expeditiously to decide the cases this term.

Respectfully submitted,

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March 2007

Supreme Court, U.S.
FILED
APR 27 2007
OFFICE OF THE CLERK

(6)

No. 06--1196

In the Supreme Court of the United States

KHALED A. F. AL ODAH, ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING FROM DENIAL OF CERTIORARI

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Petitioners, foreign nationals held in the custody of the United States at Guantanamo Bay Naval Station, Cuba, petition under Rule 44.2 for rehearing of the Court's Order of April 2, 2007, denying their petition for a writ of certiorari. The grounds for this petition are those set forth in the petition for rehearing filed today by petitioners in *Boumediene v. Bush*, No. 06-1195, and petitioners incorporate by reference and rely upon those grounds in this petition. A certification of counsel that this petition is presented in good faith and not for delay, and that the grounds for this petition are intervening circumstances of a substantial and controlling effect and other substantial grounds not previously presented, is annexed.

CONCLUSION

The Court should grant this Petition for Rehearing from Denial of Certiorari.

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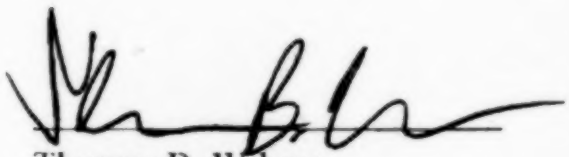
APRIL 27, 2007

CERTIFICATION OF COUNSEL (RULE 44)

I certify that the Petition for Rehearing from Denial of Certiorari is presented in good faith and not for delay and is restricted to the grounds specified in Supreme Court Rule 44.2.

Dated: April 27, 2007



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Counsel for Petitioner

Nos. 06-1195 and 06-1196

In the Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

KHALED A.F. AL ODAH, NEXT FRIEND OF
FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE PETITIONS FOR REHEARING

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In the Supreme Court of the United States

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BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE PETITIONS FOR REHEARING

Petitioners ask this Court to reconsider its order, issued just over two months ago, denying review of the D.C. Circuit's decision in *Boumediene* v. *Bush*, 476 F.3d 981, cert. denied, 127 S. Ct. 1478 (2007). As petitioners themselves recognize (Pet. 2), that is "an exceptional request."[1] What is more, petitioners implicitly concede that they cannot show any "intervening circumstances" or new "substantial grounds" since the Court's denial of certiorari that would warrant reconsideration under Supreme Court Rule 44.2. Instead, their request

[1] Unless otherwise noted, all references to "Pet." are to the rehearing petition filed in No. 06-1195.

is based solely on speculation that they "will *soon* be within [the] categories" of cases covered by Rule 44.2. Pet. 2 (emphasis added). Such speculation provides no basis for rehearing.

Indeed, if anything, events since the Court denied certiorari confirm that petitioners will receive an opportunity to press their claims in the D.C. Circuit. Petitioners are currently pursuing their statutory rights in the D.C. Circuit under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Title X, 119 Stat. 2739, which is precisely what was expected. See, *e.g.*, *Boumediene*, 127 S. Ct. at 1478 (statement of Stevens and Kennedy, JJ., respecting the denial of certiorari). And since this Court denied certiorari, the D.C. Circuit has acted with dispatch and heard oral argument in key cases that are expected to establish the framework for processing claims under the DTA. See *Bismullah* v. *Gates*, No. 06-1197, and *Parhat* v. *Gates*, No. 06-1397 (argued May 15, 2007). Petitioners will have ample opportunity to raise any claims challenging their detention under the DTA and, if necessary, may seek review in this Court of the D.C. Circuit's final judgment.

Nor is there any basis for this Court to grant petitioners' alternative request to defer consideration of this petition and simply shelve these cases on the Court's docket. This Court's rules explicitly discourage the filing of rehearing petitions for purposes of "delay." Sup. Ct. R. 44.2. And deferring consideration of the petition would only interfere with the litigation now underway in the D.C. Circuit on the scope of the review afforded by the DTA by creating confusion as to how the lower courts are to proceed. If, following the exhaustion of their DTA remedies, the detainees do not secure the relief they seek, they may promptly petition this Court for review—as they did in the days following *Boumediene*.

1. The grant of a petition for rehearing from a denial of certiorari is an extraordinary remedy, warranted only where

there have been "intervening circumstances of a substantial or controlling effect" or "other substantial grounds not previously presented." Sup. Ct. R. 44.2. As petitioners acknowledge (Pet. 2), neither basis for rehearing is currently present here.

As explained in respondents' opposition to the petitions for a writ of certiorari, the judgment of the court of appeals is correct and does not warrant this Court's review. See Br. in Opp. 7-30. On April 2, 2007, this Court denied certiorari. See *Boumediene*, 127 S. Ct. at 1478. Two Justices noted that the denial of certiorari was consistent with the "traditional rules governing [the Court's] decision of constitutional questions" and the Court's practice of "requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus." *Ibid.* (statement of Stevens and Kennedy, JJ., respecting the denial of certiorari) (citations omitted). On April 30, 2007, this Court denied another petition seeking review of the same D.C. Circuit decision. See *Hamdan* v. *Gates*, 127 S. Ct. 2133.

As petitioners recognize, no "intervening circumstances" or other "substantial grounds" supporting their request have arisen in the last two months. See Pet. 2 (arguing that events "in the coming months" may make rehearing appropriate). That should be fatal to the petition, as this Court's rules recognize that rehearing is "limited" to those two factors. See Sup. Ct. R. 44.2.

Nothing material has changed since the Court denied the certiorari petition. No new or conflicting decision has been issued by any court of appeals. See *Sanitary Refrigerator Co.* v. *Winters*, 280 U.S. 30, 34 n.1 (1929). Nor is there any new or controlling precedent from this Court, see *Friend* v. *United States*, 517 U.S. 1152 (1996), or even any new pending case that raises the same issue, see *United States* v. *Ohio Power Co.*, 353 U.S. 98, 98-99 (1957). Indeed, as explained below, the events that have transpired in the D.C. Circuit since this

Court denied certiorari—such as the court's expedited consideration of *Bismullah* and *Parhat*—only underscore that the D.C. Circuit is already moving promptly to give effect to the review established by the DTA. Once this Court issues a ruling, there is a substantial public interest in the finality of that ruling, and that interest can be overcome only by the most compelling changed circumstances. No such circumstances are present here.

2. Petitioners suggest (Pet. 2) that "the pursuit of DTA remedies in the coming months by petitioners and other detainees constitutes an 'intervening circumstance[] of a substantial or controlling effect' and will also give rise to 'other substantial grounds not previously presented.'" That argument lacks merit.

Some of the petitioners, as well as more than 90 other detainees, have now filed petitions for review in the D.C. Circuit, thus initiating proceedings under the DTA to review the final determinations of their Combatant Status Review Tribunals (CSRTs). But that fact does not remotely qualify as an "intervening circumstance[]" or "other substantial ground[]" warranting rehearing of the Court's denial of certiorari. On the contrary, when this Court denied certiorari, it anticipated that petitioners and the other Guantanamo detainees would file such petitions in the D.C. Circuit under the DTA. See *Boumediene*, 127 S. Ct. at 1478 (statement of Stevens and Kennedy, JJ., respecting the denial of certiorari) (stating that any review should await exhaustion of remedies under the DTA). Indeed, the government emphasized that prospect as a principal reason to deny review. See Br. in Opp. 12-19.

Petitioners' "pursuit of DTA remedies" is not by any stretch a circumstance that would favor either granting certiorari or reconsidering the previous denial of certiorari. It is the logical (and desirable) consequence of this Court's decision to deny certiorari.

3. Petitioners' speculation that review under the DTA in the D.C. Circuit will be ineffective or deficient is likewise not a ground for this Court to grant rehearing. Petitioners voiced precisely the same concerns in their certiorari petitions. See 06-1195 Pet. for Cert. 18-21; 06-1196 Pet. for Cert. 19-24.[2] Petitioners are unable to identify concrete examples demonstrating that any of those fears has materialized in their DTA cases. And there is certainly no basis to presume that the D.C. Circuit will not faithfully discharge its Article III duties in processing their claims.

a. In *Bismullah* and *Parhat*, the D.C. Circuit is currently considering—on an expedited basis—key threshold issues that will govern pending and future DTA proceedings. Those issues concern counsel access to classified materials and to the detainees, and the availability of discovery. The D.C. Circuit has already received full briefing and held oral argument in *Bismullah* and *Parhat* on May 15, 2007. The D.C. Circuit is fully aware of the importance of these cases and the need for prompt guidance on these threshold issues.

In anticipation of a decision in *Bismullah* and *Parhat*, the D.C. Circuit has scheduled briefing and oral argument on the merits of the first DTA petition filed, with petitioner's opening brief due on July 16, 2007, and argument set for September 17, 2007. See Order, *Paracha* v. *Bush*, No. 05-5194 (D.C. Cir. Apr. 9, 2007). It has instructed the parties to "take into account" its coming disposition of *Bismullah* and *Parhat*.

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[2] Petitioners' arguments regarding the supposed inadequacy of DTA review largely repeat the arguments raised in their certiorari petitions. Compare, *e.g.*, Pet. 4 (arguing that DTA procedures will "prevent Petitioners from obtaining * * * the ultimate remedy of release"), with 06-1195 Pet. for Cert. 20 ("A further deficiency in section 1005(e)(2) is that it does not expressly authorize the court of appeals to discharge a prisoner."), and Pet. 3 ("The government asserts that the DTA prohibits access by detainees to relevant government documents outside the CSRT record."), with 06-1195 Pet. for Cert. 18-19 ("[T]he DTA, as interpreted by the government, artificially constrains the 'record' forming the basis of petitioners' detention.").

Ibid. The court is expected to issue briefing schedules in the near future for the other pending DTA cases.

Moreover, rehearing is not necessary in order to preserve this Court's ability to review the adequacy of DTA remedies. In the event that petitioners receive adverse decisions in their DTA cases, they may then seek review of those decisions in this Court. Petitioners "expect the government to contend that this Court does not have jurisdiction to review a decision by the court of appeals in a DTA case." Pet. 7. That expectation is ill-founded. The D.C. Circuit's decision, like any other court of appeals decision, will be reviewable in this Court under 28 U.S.C. 1254(1).

b. Petitioners suggest (Pet. 4) that pursuit of DTA remedies is futile because there is no decision the D.C. Circuit can reach in *Bismullah* and *Parhat* that would result in adequate proceedings to review their detention. But litigants do not have the option of bypassing proceedings in the lower courts simply because they believe they will not get what they want. In any event, pursuit of DTA remedies is by no means futile.

Even if the D.C. Circuit adopts the DTA procedures advocated by the government—which, of course, is uncertain—review under the DTA would still permit petitioners to meaningfully challenge their detention. The DTA specifies that the court of appeals may review a final CSRT decision to determine whether it "was consistent with the standards and procedures specified by the Secretary of Defense," and "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(C), 119 Stat. 2742. That includes review of whether the CSRT's status determination is "supported by a preponderance of the evidence." DTA § 1005(e)(2)(C)(i), 119 Stat. 2742. Thus, petitioners may raise challenges to their enemy combatant status or procedural objections to the CSRT in the context of their

DTA proceedings before the D.C. Circuit, and ultimately in this Court, if necessary.[3]

Petitioners contend (Pet. 1, 4) that the D.C. Circuit is likely to establish procedures that will prevent petitioners from communicating with counsel, call for the destruction of classified material, and preclude any relief other than remand for a new CSRT, where appropriate. But that is pure speculation and, in any event, as explained fully in the government's briefs to the D.C. Circuit in *Bismullah* and *Parhat* (at 28-32, 41-50), the DTA procedures urged by the government would provide private attorneys the right to visit their clients at the secure military base, use a legal mail system, and access relevant records, including classified national security information. Those steps go well beyond any constitutional or statutory minimum, and they will enhance the ability of both the court of appeals and this Court to review the CSRT determinations.[4]

Moreover, contrary to petitioners' argument (Pet. 4), the government's proposed procedures in no way prevent petitioners from being released. If the D.C. Circuit determines that the CSRT committed legal error, a remand would be the appropriate remedy. Such a remand could lead the CSRT to enter a finding that the detainee is not an enemy combatant.

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[3] The DTA procedures also permit detainees to present new evidence to the Defense Department relating to their enemy combatant status. See DTA § 1005(a)(1) and (3), 119 Stat. 2740-2741.

[4] In addition, by letter to the D.C. Circuit on June 8, 2007, the government explained that the provision in its proposed protective order regarding destruction of documents containing classified information after the termination of the cases will not endanger any future record review of petitioners' detention. The government explained that it will maintain records of material filed in court and served on counsel for the government, and that the protective order provision does not apply to Department of Defense records, including records generated during the CSRT process. The government further explained that it would not seek destruction of materials in concluded district court cases covered by the habeas protective order where a DTA petition has been brought in the court of appeals.

Similarly, if the Department of Defense determines that new evidence presented by the detainee warrants a new CSRT, the new CSRT could issue a final decision that the individual is not an enemy combatant. To date, all individuals who have been found to be no longer enemy combatants have been released by the Department of Defense. See Br. in Opp. 19 n.6.

4. Petitioners alternatively ask (Pet. 5) the Court to defer consideration of their motion until they have exhausted their remedies under the DTA. This Court's rules explicitly discourage the filing of rehearing petitions for "delay," Sup. Ct. R. 44.2, and there is no reason to delay giving effect to the Court's denial of certiorari in these cases.

This Court itself has occasionally delayed consideration of rehearing petitions, but only where there has been an obvious justification, such as the pendency in this Court of another case raising the same issues. See, *e.g.*, *Florida* v. *Rodriguez*, 461 U.S. 940 (1983); *United States* v. *Ohio Power Co.*, 353 U.S. 98 (1957). No comparable situation is presented here. Likewise, as petitioners point out (Pet. 6 & n.2), courts of appeals have occasionally deferred consideration of rehearing petitions when a case involving the same issues is pending in *this Court*. But there is no reason for this Court to defer consideration of a petition for rehearing pending a decision from an *inferior* court.

Petitioners contend (Pet. 5) that deferring consideration of their rehearing petitions is necessary because *Boumediene* is the "optimal vehicle" for this Court's review of the underlying issues. But petitioners' alleged injury would flow not from *Boumediene*, but from a future court of appeals decision regarding the standards and procedures applicable to pending and future DTA cases, which *Boumediene* did not address. *Boumediene* therefore cannot be the "optimal" vehicle for this Court's review of the issues concerning DTA cases. In addition, *Boumediene* did not consider the application of the DTA to a claim filed under the DTA. This Court's review of the

questions presented would benefit from concrete facts illuminating the review afforded by the DTA.

Petitioners further argue (Pet. 8-9) that deferring consideration is appropriate because, if they are correct both that they have constitutional habeas rights and that DTA procedures are an inadequate substitute for a habeas remedy, their ability to seek prompt habeas relief would be frustrated if they had to start over after the DTA review process concludes. But in reviewing a DTA case, this Court can address whether petitioners have any applicable constitutional rights. This Court's ruling in regard to such rights, if favorable to the detainee, may provide a basis for petitioners to file habeas cases at that time, and those cases could be expedited if appropriate under the law applicable at that juncture.

In addition, petitioners argue (Pet. 9-10) that deferral of their petitions is necessary to preserve their ability to communicate with counsel and to protect habeas materials from destruction. As explained above, however, the counsel-access issue is currently pending before the D.C. Circuit, and even if the D.C. Circuit accepts the government's proposed procedures for DTA cases, petitioners' concerns are unfounded. The amended proposed protective order permits counsel to visit the detainees, with no limit on the number of visits. It also provides counsel access to a legal mail system that maintains attorney-client confidentiality.

Finally, if this Court chooses to defer consideration of the petitions, it will create confusion in the D.C. Circuit and district courts as to how they are to proceed with the numerous actions filed by detainees and in all likelihood will invite more unusual filings in this Court, effectively putting this Court in the role of special master over the detainee litigation while the cases are considered by the D.C. Circuit. Many of the habeas corpus cases brought by the detainees are still pending in district court, despite the clear language of *Boumediene* that district courts lack jurisdiction over those actions.

Moreover, the D.C. Circuit has yet to issue the mandate in *Boumediene*. As a result, both the habeas cases and the DTA cases are pending simultaneously, and each set of cases may be governed by separate orders or other requirements, resulting in potentially conflicting obligations. If this Court defers consideration of the petitions, this double-track litigation will likely continue, with a third track likely in the form of new filings in this Court, causing increased burdens on the parties and the courts, in direct contravention of Congress's intent in enacting the DTA and the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

Conversely, denying rehearing will help to eliminate this confusion and put the focus on the processing of DTA claims in the D.C. Circuit, after which detainees may seek review in this Court on a fully developed record as to the review afforded by the DTA. In all events, all parties to the litigation would benefit from a prompt disposition of the rehearing request. To that end, the government has filed this response early.

* * * * *

The petitions for rehearing should be denied.

Respectfully submitted.

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JUNE 2007

Nos. 06-1195, 06-1196

IN THE

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

04-cv-1166

LAKHDAR BOUMEDIENE, *et al.*
Petitioners,

v.

GEORGE WALKER BUSH, *et al.*
Respondents.

DOCKET ENTRIES

Date	No.	Proceeding
07/12/04	1	PETITION for Writ of Habeas Corpus (Filing fee $ 5.) filed by BADRA BAOUCHE, ABASSIA BOUADJMI, LAKHDAR BOUMEDIENE, MOHAMMED NECHLA. * * *[1]
		* * *
08/04/04	12	MOTION Joint Case Management Conference, Entry of Coordination Order, and Request for Expedition by GEORGE WALKER BUSH * * *.
08/16/04	13	Memorandum in opposition to motion re 12 MOTION Joint Case Management Conference, Entry of Coordination Order, and Request for Expedition filed by BADRA BAOUCHE * * *.
08/17/04	14	ORDER granting in part and denying in part 12 the Government's Motion for Entry of Coordination Order. Signed by Judge Gladys Kessler on 8/17/04.
08/18/04	15	ORDER Granting in part Respondents' motion for Joint Case Management Conference, Entry of

[1] Clerk's notations (*e.g.*, list of attachments, "(jf,) (Entered : 07/14/2004)") deleted from all entries.

Date	No.	Proceeding
		Coordination Order. Initial Conference set for 8/23/2004 09:30 AM before Joyce Hens Green. Signed by Judge Gladys Kessler on 8/18/04.
08/20/04	16	AMENDED PETITION for Writ of Habeas Corpus filed by EMINA LAHMAR * * *.
		* * *
10/04/04	25	MOTION to Dismiss or for Judgment as a Matter of Law and Response Pursuant to the Court's Sept. 20, 2004 Order by GEORGE WALKER BUSH * * *.
		* * *
10/12/04	31	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Lakhdar Boumediene by GEORGE WALKER BUSH * * *.
		* * *
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		* * *
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		* * *
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		* * *
10/29/04	41	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Mohammed Nechle by GEORGE WALKER BUSH * * *.
		* * *
11/01/04	45	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Hadj Boudella by

Date	No.	Proceeding
		GEORGE WALKER BUSH * * *.
		* * *
11/05/04	51	Memorandum in opposition to motion re 25 filed by MUSTAFA AIT IDIR * * *.
		* * *
11/06/04	53	Memorandum in opposition tc motion re 25 Joint Omnibus Brief filed by MUSTAFA AIT IDIR * * *.
		* * *
11/08/04	55	AMENDED PROTECTIVE ORDER and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba. Signed by Judge Joyce Hens Green on 11-08-04.
		* * *
11/09/04	57	Memorandum in opposition to motion re 25 Amended Memorandum filed by MUSTAFA AIT IDIR * * *.
		* * *
11/16/04	66	REPLY to opposition to motion re 25 to dismiss or for judgment as a matter of law filed by GEORGE WALKER BUSH * * *.
		* * *
12/13/04	70	SUPPLEMENTAL MEMORANDUM of Law in Support of Respondents' Motion to Dismiss or for Judgment as a Matter of Law Pursuant to Court's Dec. 2, 2004 Order filed by GEORGE WALKER BUSH * * *.
12/13/04	71	SUPPLEMENTAL MEMORANDUM In Opposition To Respondents' Motion To Dismiss Or For Judgment As Matter Of Law filed by MUSTAFA AIT IDIR * * *.
12/15/04	72	SUPPLEMENTAL MEMORANDUM (Amended) In Opposition To Respondents' Mo-

Date	No.	Proceeding
		tion To Dismiss Or For Judgment As A Matter Of Law, As Referred To In December 13, 2004 Notice Of Secure Filing, And Having Been Approved By The CSO As Suitable For Public Filing filed by MUSTAFA AIT IDIR * * *.
		* * *
01/21/05	79	MEMORANDUM OPINION AND ORDER. Signed by Judge Richard J. Leon on 1/19/05.
		* * *
02/18/05	84	FINAL JUDGMENT. Signed by Judge Richard J. Leon on 2/18/05.
02/22/05	85	NOTICE OF APPEAL as to 84 Order filed on 02/18/05 by LAKHDAR BOUMEDIENE * * *. Filing fee $ 255, receipt number 132218.
		* * *
07/03/07	107	MANDATE of USCA (certified copy) vacating the judgment of the District Court and dismissing appeal for lack of jurisdiction as to 85 Notice of Appeal, filed by MOHAMMED NECHLA * * *. USCA #05-5062.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

05-5062

LAKHDAR BOUMEDIENE, *et al.*
Appellants,

v.

GEORGE W. BUSH, *et al.*
Appellees.

DOCKET ENTRIES

Date	Proceeding
03/02/05	CIVIL-US CASE docketed. Notice of Appeal filed by the Appellants Lakhdar Boumediene, Abassia Bouadjmi, Mohammed Nechla, Badra Baouche, Saber Lahmar, Sabiha Delic-Ait Idir, Mustafa Ait Idir, Anela Kobilica, Belkacem Bensayah, Emina Planja, Hadj Boudella, and Emina Lahmar.[2]
	* * *
04/08/05	INITIAL SUBMISSIONS filed by Appellants Lakhdar Boumediene, et al., in No. 05-5062: docketing statement; certificate of counsel; statement of issues; lower court decisions; the deferred appendix notice (Deferred Appendix needed = n).
	* * *
04/25/05	CLASSIFIED JOINT BRIEF filed by Appellants * * *.
	* * *
04/25/05	BRIEF lodged by Movant-Amicus Global Rights in 05-5062, 05-5063 * * *.

[2] Clerk's notations (*e.g.*, list of attachments, "[881189-1], (jth) [05-5062]") deleted from all entries.

Date	Proceeding
	* * *
05/03/05	(CORRECTED) CLASSIFIED JOINT BRIEF filed by Appellants * * *.
	* * *
05/25/05	BRIEF filed by Federal Appellees George W. Bush, et al., in Nos. 05-5062, 05-5063 * * *.
06/06/05	BRIEF (Public Copy) filed by Appellants Lakhdar Boumediene, et al., in Nos. 05-5062, 05-5063 * * *.
06/08/05	REPLY BRIEF (Public Copy) filed by the Appellants Lakhdar Boumediene, et al., in Nos. 05-5062, 05-5063 * * *.
06/09/05	JOINT APPENDIX (Public Copy—Volumes 1-3) filed by the Appellants Lakhdar Boumediene, et al., in Nos. 05-5062, and 05-5063 * * *.
06/09/05	JOINT APPENDIX (Classified Version—Volume # 3) filed by Appellants Lakhdar Boumediene, et al., in No. 05-5062, and Appellants Ridouane Khalid, et al., in 05-5063 * * *.
	* * *
07/19/05	LETTER filed by Appellees George W. Bush, et al. pursuant to FRAP 28j advising of additional authorities * * *.
	* * *
08/02/05	SUPPLEMENTAL BRIEF filed by Appellees George W. Bush, et al., in Nos. 05-5062, 05-5063 * * *.
	* * *
08/09/05	SUPPLEMENTAL BRIEF filed by Appellants Lakhdar Boumediene, et al., in Nos. 05-5062, 05-5063 * * *.
08/10/05	SUPPLEMENTAL BRIEF filed by Appellants Lakhdar Boumediene, et al., in Nos. 05-5062, et al. * * *. [THIS BRIEF WAS CLEARED BY THE COURT SECURITY OFFICER ON AUGUST 9, 2005, AND IS A DUPLICATE OF THE BRIEF FILED ON AUGUST 9, 2005]. * * *

Date	Proceeding
	* * *
09/08/05	ORAL ARGUMENT HELD before Sentelle, Randolph, Rogers.
09/15/05	LETTER filed by Appellees George W. Bush, et al. pursuant to FRAP 28j advising of additional authorities * * *.
09/20/05	TRANSCRIPT of oral argument held on 9/8/05. (This Transcript also contains the argument held the same day in Nos. 05-5064, et al.)
09/21/05	PUBLIC MOTION, with accompanying memorandum and exhibits, filed * * *. by Appellants Lakhdar et al. in * * *. for injunction CLASSIFIED EXHIBITS (Vol. I & II, Classified Annual Review Board Submissions). Response due on 10/3/05.
09/26/05	RESPONSE filed * * *. by Appellants, Boumediene, et al. in 05-5062, Appellants Abassia Bouadjmi, et al. in 05-5062 * * *. in response to the 9/15 letter of the United States advising of additional authorities pursuant Fed. R. App. P. 24(j).
10/03/05	PUBLIC RESPONSE filed * * *. by Appellees George W. Bush, et al. * * *. to a motion for injunction.
10/07/05	PER CURIAM ORDER filed denying motion for order enjoining appellees from transferring petitioners to Algeria without providing counsel for petitioners and the court with 30-days' advance notice. Pursuant to Fed. R. App. P. 8(a)(1), appellants must first seek relief in the district court. Before Judges Sentelle, Randolph, Rogers.
	* * *
01/18/06	SUPPLEMENTAL BRIEF filed by Appellees George W. Bush, et al., in Nos. 05-5062, et al., and Appellees USA, et al., in Nos. 05-5064, et al. * * *.
01/18/06	SUPPLEMENTAL BRIEF LODGED by Washington Legal Foundation as Amicus Curiae in support of

Date	Proceeding
	Government Respondents in case Nos. 05-5062, et al., and Nos. 05-5064, et al. * * *.
	* * *
01/20/06	(CORRECTED) SUPPLEMENTAL BRIEF LODGED by Washington Legal Foundation as Amicus Curiae in support of the Government Responents in case Nos. 05-5062, et al., and Nos. 05-5064, et al.* * *.
	* * *
01/25/06	SUPPLEMENTAL BRIEF filed by Appellant Lakhdar Boumediene, et al in 05-5062 and Appellant Ridouane Khalid in 05-5063 * * *.
01/25/06	SUPPLEMENTAL BRIEF lodged by Movant-Amicus Curiae British and American Scholars Denis Galligan, et al in case Nos. 05-5062, et al, and Nos. 05-5064, et al * * *.
	* * *
02/17/06	SUPPLEMENTAL BRIEF of the Federal Parties Addressing the Detainee Treatment Act of 2005 filed by respondents George W. Bush, et al in 05-5062 and 05-5063 * * *.
02/17/06	BRIEF lodged by Movant-Amici Curiae-Appellee Lindsey Graham and Jon Kyl in 05-5062 and 05-5063. * * * (NOTE: See 3/30/06 order; leave denied and this brief returned to movant)
	* * *
03/10/06	SUPPLEMENTAL BRIEF (Regarding Section 1005 of the Detainee Treatment Act of 2005) filed by the Appellants Lakhdar Boumediene, et al., in Nos. 05-5062 and 05-5063 * * *.
	* * *
03/10/06	BRIEF LODGED by Movant-Amicus Curiae (British and American Habeas Scholars) Denis Galligan * * * in Case Nos. 05-5062, et al., and Nos. 05-5064, et al. * * *.
	* * *

Date	Proceeding
03/15/06	CORRECTED SUPPLEMENTAL BRIEF LODGED by the Appellants Lakhdar Boumediene, et al., in Case No. 05-5062, and by Appellants Ridouane Khalid, et al., in Case No. 05-5063, Regarding Section 1005 of the Detainee Treatment Act of 2005. * * *
	* * *
03/17/06	SUPPLEMENTAL REPLY BRIEF of The Federal Parties Filed by George W. Bush, et al., in case Nos. 05-5062, et al., and USA, et al., in case Nos. 05-5064, et al. * * *.
03/20/06	SUPPLEMENT (Corrected Table of Contents) to the Federal Parties Supplemental Reply brief in Nos. 05-5062, et al. and Nos. 05-5064, et al.
	* * *
03/20/06	CORRECTED BRIEF LODGED by Movant-Amicus Curiae The Federal Public Defender Habeas Corpus Counsel in Case Nos. 05-5062, et al., Case Nos. 05-5064, et al. * * *.
	* * *
03/20/06	CORRECTED BRIEF LODGED by Movant Amicus Curiae National Institute of Military Justice in Nos. 05-5062, et al., and Nos. 05-5064, et al. * * *.
	* * *
03/20/06	CORRECTED BRIEF LODGED by Movant-Amicus Curiae (Legal and Historical Scholars) Paul Finkelman * * * in Nos. 05-5062, 05-5064 * * *.
03/20/06	CORRECTED BRIEF LODGED by Movant-Amicus Curiae Senator Carl Levin in Nos. 05-5062, et al., and Nos. 05-5064, et al. * * * (NOTE: See 3/30/06 order; leave denied and this brief returned to movant)
	* * *
03/22/06	ORAL ARGUMENT HELD before Sentelle, Randolph, Rogers.
03/24/06	LETTER filed by Appellees USA, et al. pursuant to

Date	Proceeding
	FRAP 28j advising of additional authorities. * * *
	* * *
03/30/06	PER CURIAM ORDER filed denying motion of Senators Lindsey Graham and John Kyl for leave to participate as amici curiae in support of government espondents-appellees regarding the effect of Detainee Treatment Act of 2005; Denying motion of Senaor Carl Levin to participate as amicus curiae in support of petitioners regarding Section 1005 of the Detainee Treatment Act of 2005 pursuant to the Court's 1/27/06 order and for leave to file corrected brief; Clerk directed to return the lodged briefs to movants-amici curiae. Before Judges Sentelle, Randolph, Rogers.
	* * *
08/01/06	SUPPLEMENTAL BRIEF (styled "Government's' supplemental brief addressing Hamdan v. Rumsfeld") filed by Appellees George W. Bush et al. in 05-5062 and 05-5063. * * *
08/08/06	SUPPLEMENTAL BRIEF filed by Appellants Lakhdar Boumediene et al. in 05-5062 and Appellant Ridouane Khalid et al. in 05-5063. * * *
08/15/06	SUPPLEMENTAL REPLY BRIEF filed by Appellees George W. Bush et al. in 05-5062 et al.* * * (Note: brief also filed in related cases 05-5064 et al.)
10/17/06	LETTER filed by Appellee George W. Bush in 05-5062 pursuant to FRAP 28j advising of additional authorities. * * *
	* * *
11/01/06	BRIEF lodged by Movant-Amicus Curiae OR FPD in 05-5062. * * *
11/01/06	CLASSIFIED SUPPLEMENTAL BRIEF filed by Appellant Lakhdar Boumediene in 05-5062, Appellant Ridouane Khalid in 05-5063. * * *.
11/01/06	ADDENDUM (VOL. I AND II) TO BRIEF OF

Date	Proceeding
	AMICI CURIAE RETIRED FED JURISTS (HIST ID 1002475) lodged in 05-5064. * * *
11/13/06	SUPPLEMENTAL BRIEF filed by Appellees/Cross-Appellants George W. Bush * * * in 05-5062 and 05-5063. * * *
11/20/06	SUPPLEMENTAL REPLY BRIEF (UNCLASSIFIED) filed by Appellant Lakhdar Boumediene, et al. in 05-5062 and Appellant Ridouane Khalid in 05-5063. * * *
	* * *
12/14/06	LETTER filed by Appellee USA pursuant to FRAP 28j advising of additional authorities. * * *
12/15/06	LETTER filed by Appellants Khaled A. F. Al Odah, et al. in response to government's letter filed pursuant to FRAP 28j advising of additional authorities. * * *
12/18/06	LETTER filed by Appellants Lakhdar Boumediene, et al. in response to government's letter filed pursuant to FRAP 28j advising of additional authorities. * * *
12/20/06	LETTER filed by Appellant David Hicks in response to government's 12/14/06 letter filed pursuant to FRAP 28j advising of additional authorities. * * *
12/29/06	PER CURIAM ORDER filed denying non-party motion to allow amicus filed by Retd Fed Jurists. The Clerk is directed to return to movant-amici curiae the lodged brief. Before Judges Sentelle, Randolph, Rogers.* (Circuit Judge Rogers would grant the motion for leave to file brief amici curiae for the reasons set forth in the statement accomanying this order)
	* * *
02/20/07	JUDGMENT that the district court's decisions are vacated and the cases are dismissed for lack of jurisdiction for the reasons in the accompanying opinion. Before Judges Sentelle, Randolph, Rogers.
02/20/07	OPINION filed (25 pgs) for the Court by Judge

Date	Proceeding
	Randolph, DISSENTING OPINION (34 pgs) filed by Rogers
	* * *
03/07/07	NOTICE filed by the Supreme Court. The petition for writ of certiorari was filed on 3/5/07 and placed on the docket as No. 06-1195.
04/05/07	LETTER received from the S.Ct. advising that the petition for a writ of certiorari is denied.
04/11/07	MOTION filed * * * by Appellants Lakhdar Boumediene in 05-5062, et al., and Appellants Khaled A. F. Al Odah, et al. in 05-5064, 05-5095 through 05-5102, 05-5104 through 05-5114 * * * to withhold issuance of the mandate.
06/04/07	LETTER dated 6/4/07 received from S.Ct. advising that the respondents are invited to file a response to the petitioners for rehearing within 30 days.
06/20/07	PER CURIAM ORDER filed denying the motions to hold case in abeyance and to stay issuance of the mandate be denied. It is FURTHER ORDERED that the motion to govern be denied as moot. Before Judges Sentelle, Randolph, Rogers
06/27/07	MANDATE ISSUED to Clerk, District Court
07/03/07	MOTION filed * * * by Appellant Lakhdar Boumediene, et al in 05-5062 * * * to recall the mandate Response due on 7/16/07 in 05-5062, in 05-5063.
07/05/07	LETTER date 6/29/07 received from S.Ct. advising that the petition for rehearing is granted. The order entered 4/2/07 denying the petition for a writ of certiorari is vacated. The petition for a writ of certiorari is granted. The case is consolidated with 06-1196 and a total of one hour is allotted for oral argument. As it would be of material assistamnce to consult and decision in Bismullah et al. v Gates, No 06-1197, and Parhat, et al. v. Gates, et al. No 06-1397 currently pend-

Date	Proceeding
	ing in the US Court of Appeals for the District of Columbia Circuit, supplemental briefing will be scheduled upon the issuance of any decision in those cases.
07/13/07	OPPOSITION filed * * * by Appellees George W. Bush, et al. * * * to Appellants' motion recall mandate.
07/20/07	(Pending Classification) REPLY filed * * * by Appellant Lakhdar Boumediene in 05-5062, et al. * * * to a response to the motion recall mandate.
07/26/07	PER CURIAM ORDER filed granting motion recall mandate filed by Lakhdar Boumediene, et al. in 05-5062, 05-5063. The Clerk of the United States District Court for the District of Columbia is directed to return forthwith to the USCA for the District of Columbia Circuit the mandate issued on June 27, 2007. Before Judges Sentelle,* Rogers, Griffith. (Circuit Judge Sentelle would deny the motion)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

04-cv-1254

MAHMOAD ABDAH, *et al.*
Petitioners,

v.

GEORGE W. BUSH, JR., *et al.*
Respondents.

DOCKET ENTRIES

Date	No.	Proceeding
07/27/04	1	PETITION for Writ of Habeas Corpus (Filing fee $ 5.) filed by Petitioners.[3]
		* * *
10/01/04	19	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Adil Saeed El Haj Obaid by GEORGE W. BUSH JR. * * *.
10/04/04	20	ANSWER to Complaint/Petition for Writ of Habeas Corpus by Petitioner Othman Abdulraheem Mohammad by GEORGE W. BUSH JR. * * *.
		* * *
10/05/04	22	MOTION to Dismiss or for Judgment as a Matter of Law and Response Pursuant to the Court's Sept. 20, 2004 Order by GEORGE W. BUSH JR. * * *.
10/06/04	24	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Salman Yahaldi Hsan Mohammed Saud by GEORGE W. BUSH JR. * * *.

[3] Clerk's notations (*e.g.*, list of attachments, "(bm) (Entered: 07282004)") deleted from all entries.

Date	No.	Proceeding
		* * *
10/12/04	30	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Farouk Ali Ahmed Saif by GEORGE W. BUSH JR. * * *
10/12/04	31	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Mahmoad Abdah by GEORGE W. BUSH JR. * * *.
10/13/04	32	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Majid Mahmoud Ahmed by GEORGE W. BUSH JR. * * *.
		* * *
10/13/04	33	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Sadeq Mohammed Said by GEORGE W. BUSH JR. * * *.
10/14/04	34	ANSWER to Complaint/Petition for Writ of Habeas Corpus by Petitioner Makhtar Yahia Naji Al-Wrafie by GEORGE W. BUSH JR. * * *.
10/14/04	35	ANSWER to Complaint/Petition for Writ of Habeas Corpus by Petitioner Yasein Khasem Mohammad Esmail by GEORGE W. BUSH JR. * * *.
		* * *
10/15/04	36	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Jamal Mar'i by GEORGE W. BUSH JR. * * *.
		* * *
10/19/04	38	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Adnan Farhan Abdul Latif by GEORGE W. BUSH JR. * * *.
		* * *
10/20/04	42	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Abdulmalik Abdulwahhab Al-Rahabi by GEORGE W. BUSH JR. * * *.

Date	No.	Proceeding
		* * *
10/21/04	45	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Mohamed Mohamed Hassan Odaini by GEORGE W. BUSH JR. * * *.
		* * *
11/06/04	58	Memorandum in opposition to motion re 22 filed by MAHMOAD ABDAH * * *
		* * *
11/08/04	60	AMENDED PROTECTIVE ORDER and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba. Signed by Judge Joyce Hens Green on 11-08-04.
		* * *
11/16/04	73	REPLY to opposition to motion re 22 to dismiss or for judgment as a matter of law filed by GEORGE W. BUSH JR. * * *.
		* * *
11/26/04	78	Memorandum in opposition to motion re 22 Supplemental Memorandum in Opposition to Motion to Dismiss filed by MAHMOAD ABDAH * * *.
		* * *
01/31/05	101	MEMORANDUM OPINION DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW. Signed by Judge Joyce Hens Green on 01-31-05.
01/31/05	102	ORDER DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW AND REQUESTING BRIEFING ON THE FUTURE PROCEEDINGS IN THESE CASES. Signed by Judge Joyce Hens Green on 01-31-05.

Date	No.	Proceeding
02/03/05	103	MOTION for Certification of Orders for Interlocutory Appeal (and for stay—see separate docket entry) by GEORGE W. BUSH, JR * * *.
02/03/05	104	MOTION to Stay (and for certification of orders for interlocutory appeal—see separate docket entry) by GEORGE W. BUSH, JR * * *.
02/03/05	105	NOTICE of Filing of Petitioners' Joint Submission Regarding How These Cases Should Proceed by MAHMOAD ABDAH re 102 Order
02/03/05	106	ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION FOR CERTIFICATION OF JANUARY 31, 2005 ORDERS AND FOR STAY. Signed by Judge Joyce Hens Green on 02-03-05.
02/07/05	107	MEMORANDUM to 102.
		* * *
02/07/05	110	MOTION for Reconsideration re 106 Order on Motion for Miscellaneous Relief, Order on Motion to Stay by MAHMOUD AHMED * * *.
02/07/05	111	ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER GRANTING STAY PENDING APPEAL. Signed by Judge Joyce Hens Green on 02-07-05.
		* * *
03/14/05	123	NOTICE OF APPEAL as to 101 Order on Motion to Dismiss, 102 Order by GEORGE W. BUSH, JR * * *.
03/14/05		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 123 Notice of Appeal
		* * *
03/17/05	128	NOTICE of Filing: Amended Unclassified Version of Memorandum Opinion Denying In Part

Date	No.	Proceeding
		And Granting In Part Respondents Motion To Dismiss by GEORGE W. BUSH, JR * * *.
		* * *
03/21/05	133	ORDER of USCA (certified copy) as to 123 Notice of Appeal filed by GEORGE W. BUSH, JR. * * *; Ordered that the petition and cross-petition for interlocutory appeal be granted; and that the motion to expedite be granted, setting briefing schedule; and that the District Court is directed to file two copies of the Order as separate notices of appeal.
03/21/05	134	NOTICE OF APPEAL as to 101 Order on Motion to Dismiss, 102 Order by GEORGE W. BUSH, JR * * *.
03/21/05	135	NOTICE OF APPEAL as to 101 Order on Motion to Dismiss, 102 Order by MAHMOUD AHMED * * *.
		* * *
03/21/05	137	NOTIFICATION OF SUPPLEMENTAL AUTHORITY by MAHMOUD AHMED * * *.
		* * *
03/23/05	141	SUPPLEMENTAL MEMORANDUM in Response to Abdah Petitioners' Notice of Supplemental Authority filed by GEORGE W. BUSH, JR * * *.
		* * *
01/04/06	167	NOTIFICATION OF SUPPLEMENTAL AUTHORITY by respondents GEORGE WALKER BUSH * * *.
		* * *
07/31/06	184	NOTIFICATION OF SUPPLEMENTAL AUTHORITY by ALL PETITIONERS.
		* * *
04/19/07	203	MOTION to Dismiss by Respondents.
		* * *

Date	No.	Proceeding
05/04/07	206	Memorandum in opposition to re 203 MOTION to Dismiss filed by ALL PETITIONERS.
05/14/07	207	REPLY to opposition to motion re 203 MOTION to Dismiss filed by GEORGE W. BUSH, JR * * *.
		* * *
07/03/07	215	MANDATE of USCA (certified copy) as to (137 in 1:04-cv-01144-RWR) Notice of Appeal filed by KATHLEEN MUBANGA * * *, (106 in 1:04-cv-01136-JDB) Notice of Appeal filed by FATMAH ELSAMNAH, OMAR KHADR, (109 in 1:02-cv-01130-CKK) Notice of Appeal filed by MAMDOUH HABIB, MAHA HABIB, (151 in 1:04-cv-01254-HHK) Notice of Appeal filed by NELSON J. CANNON * * *, (125 in 1:04-cv-01194-HHK) Notice of Appeal filed by NELSON J. CANNON * * *, (97 in 1:04-cv-01135-ESH) Notice of Appeal filed by NELSON J. CANNON * * *, (108 in 1:04-cv-01227-RBW) Notice of Appeal, filed by SALAH ABDUL RASOOL AL BLOUSHI * * *, USCA Case Number, (169 in 1:02-cv-00299-CKK) Notice of Appeal filed by TERRY HICKS * * *, (107 in 1:04-cv-01137-RMC) Notice of Appeal filed by SALLY BEGG * * *, (82 in 1:04-cv-01164-RBW) Notice of Appeal filed by FALEN GHEREBI Associated Cases: 1:02-cv-00299-CKK et al.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

04-cv-1227

ISA ALI ABDULLA ALMURBATI, *et al.*
Petitioners,

v.

GEORGE WALKER BUSH, *et al.*
Respondents.

DOCKET ENTRIES

Date	No.	Proceeding
07/22/04	1	PETITION for Writ of Habeas Corpus (Filing fee $ 5.) filed by ABDUL RASOOL ALI AL BLOUSHI, SALAH ABDUL RASOOL AL BLOUSHI, ISA ALI ABDULLA ALMURBATI, MOHAMAD ALI ABDULLA ALMURBATI, ABDULLAH KAMEL ABDULLA HAJEE, ADEL KAMEL ABDULLA HAJEE.[1]
		* * *
08/11/04	3	APPLICATION for , Amended Petition for Writ of Habeas Corpus by ABDUL RASOOL ALI AL BLOUSHI * * *.
		* * *
10/04/04	22	MOTION to Dismiss or for Judgment as a Matter of Law and Response Pursuant to the Court's Sept. 20, 2004 Order by GEORGE WALKER BUSH * * *.
		* * *
10/13/04	27	RESPONSE to Petition for Writ of Habeas

[1] Clerk's notations (*e.g.*, list of attachments, "(jf) (Entered: 07/26/2004)") deleted from all entries.

Date	No.	Proceeding
		Corpus by Petitioner Adel Kamel Abdulla Hajee by GEORGE WALKER BUSH * * *.
10/14/04	28	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Salah Abdul Rasool Al Bloushi by GEORGE WALKER BUSH * * *.
10/14/04	29	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Jum'ah Mohammed Abdullatif Aldossari by GEORGE WALKER BUSH * * *.
10/14/04	30	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Isa Ali Abdulla Almurbati by GEORGE WALKER BUSH * * *.
		* * *
11/03/04	41	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Salman Bin Ibrahim Bin Mohammed Bin Ali Al-Kalifa by GEORGE WALKER BUSH * * *.
11/03/04	42	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Abdullah Majed Sayyah Hasan Alnoaimi by GEORGE WALKER BUSH * * *.
		* * *
11/16/04	50	Memorandum in opposition to motion re 22 dismissal of claims filed by ISA ALI ABDULLA ALMURBATI.
		* * *
11/08/04	52	AMENDED PROTECTIVE ORDER and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba. Signed by Judge Joyce Hens Green on 11-08-04.
		* * *
11/16/07	62	REPLY to opposition to motion re 22 to dismiss or for judgment as a matter of law filed by

Date	No.	Proceeding
		GEORGE WALKER BUSH * * *.
		* * *
12/30/04	78	RESPONSE to 1 Petition for Writ of Habeas Corpus by Petitioner Salman Bin Ibrahim Bin Mohammed Bin Ali Al-Kalifa (Amended Factual Return) and Notice of Submission of Amended Factual Return Under Seal filed by GEORGE WALKER BUSH * * *.
12/30/04	79	RESPONSE to 1 Petition for Writ of Habeas Corpus by Petitioner Abdullah Majed Sayyah Hasan Alnoaimi (Amended Factual Return) and Notice of Submission of Amended Factual Return Under Seal filed by GEORGE WALKER BUSH * * *.
		* * *
01/31/05	90	MEMORANDUM OPINION DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW. Signed by Judge Joyce Hens Green on 01-31-05.
01/31/05	91	ORDER DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW AND REQUESTING BRIEFING ON THE FUTURE PROCEEDINGS IN THESE CASES. Signed by Judge Joyce Hens Green on 01-31-05.
02/03/05	92	MOTION Certification of Orders for Interlocutory Appeals (and for stay—see separate docket entry) by GEORGE WALKER BUSH * * *
02/03/05	93	MOTION to Stay (and for certification of orders for interlocutory appeal—see separate docket entry) by GEORGE WALKER BUSH * * *.
02/03/05	94	NOTICE of Filing of Petitioners' Joint Submission Regarding How These Cases Should Pro-

Date	No.	Proceeding
		ceed by ISA ALI ABDULLA ALMURBATI re 91 Order
02/03/05	95	ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS" MOTION FOR CERTIFICATION OF JANUARY 31, 2005 ORDERS AND FOR STAY. Signed by Judge Joyce Hens Green on 02-03-05.
02/03/05	96	MEMORANDUM to 91.
02/03/05	97	MEMORANDUM to 91.
02/08/05	98	ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER GRANTING STAY PENDING APPEAL. Signed by Judge Joyce Hens Green on 02-08-05.
		* * *
03/14/05	100	NOTICE OF APPEAL as to 89 Order on Motion for Miscellaneous Relief by GEORGE WALKER BUSH * * *.
03/16/05		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 100 Notice of Appeal
		* * *
03/17/05	105	NOTICE of Filing: Amended Unclassified Version of Memorandum Opinion Denying In Part And Granting In Part Respondents Motion To Dismiss by GEORGE WALKER BUSH * * *.
03/21/05	106	ORDER of USCA (certified copy) as to 100 Notice of Appeal filed by GEORGE WALKER BUSH * * *; Ordered that the petition and cross-petition for interlocutory appeal be granted; and that the motion to expedite be granted, setting briefing schedule; and that the District Court is directed to file two copies of the Order as separate notices of appeal.

Date	No.	Proceeding
03/21/05	107	NOTICE OF APPEAL as to 90 Order on Motion to Dismiss, 91 Order by GEORGE WALKER BUSH * * *.
03/21/05	108	NOTICE OF APPEAL as to 90 Order on Motion to Dismiss, 91 Order by SALAH ABDUL RASOOL AL BLOUSHI * * *.
		* * *
03/30/05		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 107 Notice of Appeal * * *
03/30/05		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 108 Notice of Appeal * * *
		* * *
01/04/06	146	NOTIFICATION OF SUPPLEMENTAL AUTHORITY by respondents GEORGE WALKER BUSH * * *.
		* * *
01/31/07	172	ORDER. This matter is administratively closed until such time as the District of Columbia Circuit resolves the jurisdictional questions raised by the Military Commissions Act of 2006. Signed by Judge Reggie B. Walton on January 31, 2007.
04/19/07	173	MOTION to Dismiss by Respondents.
		* * *
05/07/07	175	Memorandum in opposition to 173 MOTION to Dismiss filed by ISA ALI ABDULLA AL-MURBATI.
05/14/07	176	REPLY to opposition to motion re 173 MOTION to Dismiss filed by GEORGE WALKER BUSH * * *.
		* * *
07/03/07	180	MANDATE of USCA (certified copy) as to (137 in 1:04-cv-01144-RWR) Notice of Appeal filed

Date	No.	Proceeding
		by KATHLEEN MUBANGA * * *, (106 in 1:04-cv-01136-JDB) Notice of Appeal filed by FATMAH ELSAMNAH, OMAR KHADR, (109 in 1:02-cv-01130-CKK) Notice of Appeal filed by MAMDOUH HABIB, MAHA HABIB, (151 in 1:04-cv-01254-HHK) Notice of Appeal filed by NELSON J. CANNON * * *, (125 in 1:04-cv-01194-HHK) Notice of Appeal filed by NELSON J. CANNON * * *, (97 in 1:04-cv-01135-ESH) Notice of Appeal filed by NELSON J. CANNON * * *, (108 in 1:04-cv-01227-RBW) Notice of Appeal, filed by SALAH ABDUL RASOOL AL BLOUSHI * * *, USCA Case Number, (169 in 1:02-cv-00299-CKK) Notice of Appeal filed by TERRY HICKS * * *, (107 in 1:04-cv-01137-RMC) Notice of Appeal filed by SALLY BEGG * * *, (82 in 1:04-cv-01164-RBW) Notice of Appeal filed by FALEN GHEREBI Associated Cases: 1:02-cv-00299-CKK et al.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

02-cv-0828

KHALED A. F. AL ODAH, *et al.*
Plaintiffs,

v.

UNITED STATES, *et al.*
Defendants.

DOCKET ENTRIES

Date	No.	Proceeding
05/01/02	1	COMPLAINT filed by plaintiffs FAWZI KHALID AL ODAH, KHALED A. F. AL ODAH, OMAR RAJAB AMIN, MOHAMMD R. M. R. AMEEN, NASSER AL MUTAIRI, NAYEF N. N. B. J. AL MUTAIRI, KHALID ABDULLAH MISHAL AL MUTAIRI, MESHAL A. M. TH AL MUTAIRI, MANSOUR K. A. KAMEL, ABDULAZIZ SAYER OWAIN AL SHAMMARI, ABDULLAH SALEH ALI AL AJMI, MESFER SALEH ALI AL AJMI, MUBARA F. S. M. AL DAIHANI, FAYIZ MOHAMMED AHMED AL KANDARI, MOHAMMAD A. J. M. H. AL KANDARI, FWAD MAHMOUD AL RABIAH, MONZER M. H. A. AL RABIEAH, ADIL ZAMIL ABDULL MOHSSIN AL ZAMIL, WALID Z. A. AL ZAMEL[5]

* * *

[5] Clerk's notations (*e.g.*, list of attachments, "(bcs) (Entry date 05/06/02)") deleted from all entries.

Date	No.	Proceeding
07/08/02	22	AMENDED COMPLAINT by plaintiffs adding plaintiff SAAD MADAI SAAD HAWASH AL-AZMI, HAMAD MADAI SAAD, and amending complaint [1-1].
		* * *
07/30/02	30	ORDER by Judge Colleen Kollar-Kotelly: granting motion to dismiss first amended petition for writ of habeas corpus [25-1] [26-1] by TERRY CARRICO * * * in 1:02-cv-00299. Granting motion to dismiss plaintiffs' motion for preliminary injunction [9-1] and complaint [1-1]. [15-1] by federal defendants in 1:02-cv-00828. RASUL v BUSH, 02cv299, and ODAH v. UNITED STATES, 02cv828, are dismissed with prejudice.
		* * *
08/02/02	32	NOTICE OF APPEAL by plaintiffs in 1:02-cv-00828 from order [30-1] * * *. (COPY) Modified on 08/08/02
		* * *
09/09/02		NOTICE OF APPEAL by petitioners SHAFIQ RASUL in 1:02-cv-00299 * * * from order [43-1], order [41-1] * * *.
		* * *
07/02/03	34	CERTIFIED COPY of judgment filed in USCA dated 3/11/03, on appeal [32-1], affirming the judgment of USDC. USCA # 02-5251
		* * *
07/19/04	42	USCA JUDGMENT (certified copy) reversing and remanding case to district court as to 44 Notice of Appeal filed by DAVID HICKS * * *; USCA # 02-5251
07/21/04	56	MANDATE of USCA (certified copy) as to 44 Notice of Appeal filed by DAVID HICKS * * *. It is hereby ordered and adjudged that the judgments of the District Court appealed from in these causes are hereby affirmed; USCA #03-5198

Date	No.	Proceeding
		* * *
07/26/04	40	MEMORANDUM OPINION. Signed by Judge Colleen Kollar-Kotelly on July 26, 2004.
07/26/04	41	ORDER of USCA (certified copy) that the court's mandate issued 6/23/03 be recalled; USCA # 02-5251
		* * *
07/27/04	44	APPLICATION for Writ of Habeas Corpus by FAWZI KHALID ABDULLAH FAHAD AL ODAH.
		* * *
07/30/04	46	MEMORANDUM—Response to Complaint In Accordance With Court's Order of July 25, 2004 from Respondents.
		* * *
08/04/04	48	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' "RESPONSE TO COMPLAINT."
		* * *
08/09/04	51	REPLY Memorandum in Further Support of Reponse to Complaint filed by RICK BACCUS * * *.
		* * *
09/17/04	85	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Abdullah Saleh Ali Al Ajmi by RICK BACCUS * * *.
09/17/04	86	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Adil Zamil Abdull Mohssin Al Zamil by RICK BACCUS * * *.
		* * *
09/24/04	92	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Nasir Najr Nasir Balud Al Mutayri by RICK BACCUS * * *.
		* * *
09/27/04	94	ANSWER to Complaint /Petition for Writ of

Date	No.	Proceeding
		Habeas Corpus by Petitioner Sa'ad Madhi Sa'ad Ha Wash Al-Azmi by RICK BACCUS * * *.
		* * *
10/04/04	100	MOTION to Dismiss or for Judgment as a Matter of Law and Response Pursuant to the Court's Sept. 20, 2004 Order by JOHN D. ALTENBURG JR. * * *.
		* * *
10/08/04	104	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Fawzi Khalid Abdullah Fahad Al Odah by RICK BACCUS * * *.
		* * *
10/12/04	108	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Fwad Mahmoud Al Rabiah by RICK BACCUS * * *.
		* * *
10/13/04	109	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Abdullah Kamal Abdullah Kamal Al Kandari by RICK BACCUS * * *.
10/13/04	110	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Khalid Abdullah Mishal Al Mutairi by RICK BACCUS * * *.
10/14/04	111	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Mohammed Funaitel Al Dihani by RICK BACCUS * * *.
		* * *
10/18/04	113	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Abdulaziz Sayer Owain Al Shammari by RICK BACCUS * * *
		* * *
10/20/04	116	ORDER DENYING the Government's motion 46 to conduct real time monitoring of meetings be-

Date	No.	Proceeding
		tween counsel and Petitioners Mohammed Ahmed al Kandari, Fawzi Khalid Abdullah Fahad al Odah, and Khalid Abdullah Mishal al Mutairi, and to conduct a classification review of notes taken during these meetings and of legal mail sent between these Petitioners and counsel, contingent on Petitioners' compliance with the framework set out by the Court at the August 16, 2004, hearing, and to which Petitioners agreed. Signed by Judge Colleen Kollar-Kotelly on October 20, 2004.
10/20/04	117	MEMORANDUM OPINION. Signed by Judge Colleen Kollar-Kotelly on October 20, 2004.
10/20/04	118	RESPONSE to the Government's "Response to Petition for Writ of Habeas Corpus and Motion to Dismiss" filed by FAWZI KHALID ABDULLAH FAHAD AL ODAH.
		* * *
10/22/04	124	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Fayiz Mohammed Ahmed Al Kandari by RICK BACCUS * * *.
		* * *
10/27/04	127	REPLY Memorandum in Support of Respondents' Motion to Dismiss or for Judgment as a Matter of Law filed by RICK BACCUS * * *.
		* * *
11/03/04	133	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Omar Rajab Amin by RICK BACCUS * * *.
		* * *
11/08/04	141	AMENDED PROTECTIVE ORDER and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba. Signed by Judge Joyce Hens Green on 11-08-04.

Date	No.	Proceeding
		* * *
12/16/04	170	CROSS MOTION for Summary Judgment by RICK BACCUS * * *.
		* * *
12/30/04	173	RESPONSE to [1], [22] Petition for Writ of Habeas Corpus by Petitioner Omar Rajab Amin (Amended Factual Return) and Notice of Submission of Amended Factual Return Under Seal filed by UNITED STATES OF AMERICA * * *.
		* * *
01/31/05	188	MEMORANDUM OPINION DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW. Signed by Judge Joyce Hens Green on 01-31-05.
01/31/05	189	ORDER DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW AND REQUESTING BRIEFING ON THE FUTURE PROCEEDINGS IN THESE CASES. Signed by Judge Joyce Hens Green on 01-31-05.
		* * *
02/03/05	192	MOTION for Certification of Orders for Interlocutory Appeal (and for Stay—see separate docket entry) by TERRY CARRICO * * *.
		* * *
02/07/05	207	NOTICE OF APPEAL as to 196 Order on Motion for Miscellaneous Relief, Order on Motion to Stay, 204 Order on Motion for Reconsideration by MANSOUR K. A. KAMEL * * *.
		* * *
03/14/05	229	NOTICE OF APPEAL as to 187 Order on Motion for Miscellaneous Relief, 188 Order on Motion to Dismiss by UNITED STATES OF

Date	No.	Proceeding
		AMERICA * * *.
		* * *
03/17/05	218	NOTICE of Filing: Amended Unclassified Version of Memorandum Opinion Denying In Part And Granting In Part Respondents' Motion To Dismiss by TERRY CARRICO * * *.
		* * *
03/21/05	220	ORDER of USCA (certified copy) as to 207 Notice of Appeal, filed by KHALED A.F. AL ODAH * * *; Ordered that the petition and cross-petition for interlocutory appeal be granted; and that the motion to expedite be granted, setting briefing schedule; and that the District Court is directed to file two copies of the Order as separate notices of appeal.
03/21/05	221	NOTICE OF APPEAL as to 188 Order on Motion to Dismiss, 189 Order by UNITED STATES OF AMERICA * * *.
03/21/05	222	NOTICE OF APPEAL as to 188 Order on Motion to Dismiss, 189 Order by MANSOUR K. A. KAMEL * * *.
		* * *
01/04/06	282	NOTIFICATION OF SUPPLEMENTAL AUTHORITY by respondents GEORGE WALKER BUSH * * *.
02/21/06	283	NOTICE of Filing by FAWZI KHALID ABDULLAH FAHAD AL ODAH
		* * *
04/19/07	320	MOTION to Dismiss by Respondents.
04/26/07	321	Memorandum in opposition to re 320 MOTION to Dismiss filed by FAWZI KHALID ABDULLAH FAHAD AL ODAH.
05/07/07	322	REPLY to opposition to motion re 320 MOTION to Dismiss filed by UNITED STATES

Date	No.	Proceeding
		OF AMERICA * * *.
		* * *
07/03/07	324	MANDATE of USCA (certified copy) vacating cases and dismissing for lack of jurisdiction as to 222 Notice of Appeal filed by FWAD MAHMOUD AL RABIAH * * *, 207 Notice of Appeal filed by FWAD MAHMOUD AL RABIAH * * *, 221 Notice of Appeal filed by UNITED STATES OF AMERICA * * *, 229 Notice of Appeal filed by UNITED STATES OF AMERICA * * *. USCA #'s 05-5064; 05-5095; 05-5096; and 05-5117.
		* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

04-cv-1194

SUHAIL ABDU ANAM, *et al.*
Petitioners,

v.

GEORGE W. BUSH, JR., *et al.*
Respondents.

DOCKET ENTRIES

Date	No.	Proceeding
07/15/04	1	PETITION for Writ of Habeas Corpus filed by ATAG ALI ABDOH, FAHMI ABDULLAH AHMED, KMAL ABDULLAH AHMED, ABDULLAH AHMED MOHAMMED AL RAZEHI, ALI AHMED MOHAMMED AL RAZEHI, ABDUALAZIZ ABDOH AL SWIDI, ABDULKHALIQ AL-BAIDHANI, KHALID AL-BAIDHANI, MASAAB OMAR AL-MADHWANI, SAEED AHMED AL-SARIM, SAMIR AHMED AL-SARIM, ABDULLAH AHMED UBAD AL-TAWLAQI, FAHMI ABDULLAH UBAD AL-TAWLAQI, AL HUSSIN AL-TIS, HADI HUSSIN AL-TIS, BISHER NASER ALI ALMARWALH, HUISSEN NASER ALI ALMARWALH, ADNAN ABDOH ALSWIDI, FAEZ BIN AMER, JALAL SALIM BIN AMER, MOHAMED ABDU ANAM, SUHAIL ABDU ANAM, AMRO ABDULLAH HASSAN, IMAD ABDULLAH HASSAN, FADHLE AHMED KASSIM, KHALID AHMED KAS-

Date	No.	Proceeding
		SIM, ALI OMAR MADHWANI, ALI YAHYA MAHDI, MOHAMED YAHYA MAHDI[6]
09/17/04	15	RESPONSE to 1 Petition for Writ of Habeas Corpus by Petitioner Atag Ali Abdoh Al-Haj by GEORGE W. BUSH JR. * * *.
		* * *
10/01/04	22	AMENDED PETITION for Writ of Habeas Corpus filed by ATAG ALI ABDOH AL HAG * * *.
10/01/04	23	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Bisher Naser Ali Almarwalh by GEORGE W. BUSH JR. * * *.
		* * *
10/04/04	25	MOTION to Dismiss or for Judgment as a Matter of Law and Response Pursuant to the Court's Sept. 20, 2004 Order by GEORGE W. BUSH JR. * * *.
		* * *
10/06/04	27	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Abdulkhaliq Al-Baidhani by GEORGE W. BUSH JR. * * *.
10/06/04	28	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Saeed Ahmed Al-Sarim by GEORGE W. BUSH JR. * * *.
10/06/04	29	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Abdualalaziz Abdoh Al Swidi by GEORGE W. BUSH JR. * * *.
10/06/04	30	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Suhail Abdu Anam by GEORGE W. BUSH JR. * * *.

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[6] Clerk's notations (*e.g.*, list of attachments, "(rje) (Entry date: 07/19/04) [1:04cv1194]") deleted from all entries.

Date	No.	Proceeding
10/06/04	31	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Ali Hussin Al-Tis by GEORGE W. BUSH JR. * * *.
10/06/04	32	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Ali Yahya Madhi Al Raimi by GEORGE W. BUSH JR. * * *.
10/06/04	33	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Musaab Omar Al-Madhwani by GEORGE W. BUSH JR. * * *.
10/06/04	34	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Khalid Ahmed Kassim by GEORGE W. BUSH JR. * * *.
		* * *
10/12/04	39	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Imad Abdullah Hassan by GEORGE W. BUSH JR. * * *.
		* * *
10/13/04	40	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Jalal Salim Bin Amer by GEORGE W. BUSH JR. * * *
10/14/04	41	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Ali Ahmed Mohammed Al Razehi by GEORGE W. BUSH JR. * * *.
10/14/04	42	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Fahmi Abdullah Ahmed by GEORGE W. BUSH JR. * * *.
		* * *
11/06/04	58	Memorandum in opposition to motion re 25 Respondents' Motion to Dismiss Petitions filed by ATAG ALI ABDOH * * *.
		* * *
11/08/04	60	AMENDED PROTECTIVE ORDER and Procedures for Counsel Access to Detainees at the

Date	No.	Proceeding
		United States Naval Base in Guantanamo Bay, Cuba. Signed by Judge Joyce Hens Green on 11-08-04.
		* * *
11/16/04	68	REPLY to opposition to motion re 25 to dismiss or for judgment as a matter of law filed by GEORGE W. BUSH JR. * * *.
		* * *
01/31/05	95	MEMORANDUM OPINION DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW. Signed by Judge Joyce Hens Green on 01-31-05.
01/31/05	96	ORDER DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW AND REQUESTING BRIEFING ON THE FUTURE PROCEEDINGS IN THESE CASES. Signed by Judge Joyce Hens Green on 01-31-05.
02/03/05	97	MOTION for Certification of Orders for Interlocutory Appeal (and for stay—see separate docket entry) by GEORGE W. BUSH, JR * * *.
02/03/05	98	MOTION to Stay (and for certification of orders for interlocutory appeal—see separate docket entry) by GEORGE W. BUSH, JR * * *.
02/03/05	99	NOTICE of Filing of Petitioners' Joint Submission Regarding How These Cases Should Proceed by SUHAIL ABDU ANAM re 96 Order
02/03/05	100	ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION FOR CERTIFICATION OF JANUARY 31, 2005 ORDERS AND FOR STAY. Signed by Judge Joyce Hens Green on 02-03-05.

Date	No.	Proceeding
02/03/05	101	MEMORANDUM to 96.
02/08/05	102	ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER GRANTING STAY PENDING APPEAL. Signed by Judge Joyce Hens Green on 02-08-05.
		* * *
03/14/05	108	NOTICE OF APPEAL as to 96 Order, 95 Order on Motion to Dismiss by GEORGE W. BUSH, JR * * *.
03/14/05	–	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 108 Notice of Appeal
03/17/05	109	NOTICE of Filing: Amended Unclassified Version of Memorandum Opinion Denying In Part And Granting In Part Respondents Motion To Dismiss by GEORGE W. BUSH, JR * * *.
03/21/05	110	ORDER of USCA (certified copy) as to 108 Notice of Appeal filed by GEORGE W. BUSH, JR. * * *; Ordered that the petition and cross-petition for interlocutory appeal be granted; and that the motion to expedite be granted, setting briefing schedule; and that the District Court is directed to file two copies of the Order as separate notices of appeal.
03/21/05	111	NOTICE OF APPEAL as to 96 Order, 95 Order on Motion to Dismiss by GEORGE W. BUSH, JR * * *
03/21/05	112	NOTICE OF APPEAL as to 96 Order, 95 Order on Motion to Dismiss by BISHER NASER ALI ALMARWALH * * *.
03/30/05	–	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 114 Notice of Appeal

Date	No.	Proceeding
03/30/05	–	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 112 Notice of Appeal
		* * *
05/09/05	119	Order granting 116 petitioner's motion for preliminary injunction. Signed by Judge Henry H. Kennedy, Jr., on May 9, 2005.
		* * *
06/10/05	125	NOTICE OF APPEAL as to 119 Order on Motion for Preliminary Injunction by GEORGE W. BUSH, JR * * *
06/13/05	–	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 125 Notice of Appeal
		* * *
08/30/05	130	Further Amended PETITION for Writ of Habeas Corpus filed by BISHER NASER ALI ALMARWALH * * *
		* * *
01/04/06	137	NOTIFICATION OF SUPPLEMENTAL AUTHORITY by respondents GEORGE WALKER BUSH * * *
		* * *
03/16/06	142	Order Staying Case. Signed by Judge Henry H. Kennedy, Jr., on March 16, 2006.
		* * *
04/19/07	176	MOTION to Dismiss by Respondents.
05/03/07	177	NOTICE of Filing of Petitioners' Opposition to Respondents' Motion to Dismiss and Cross-Motion for Alternative Relief by BISHER NASER ALI ALMARWALH * * *
05/07/07	178	Memorandum in opposition to re 176 MOTION to Dismiss filed by BISHER NASER ALI

Date	No.	Proceeding
		ALMARWALH * * *.
05/07/07	179	CROSS-MOTION for Alternative Relief by ALL PETITIONERS * * *.
05/11/07	180	REPLY to opposition to motion re 176 MOTION to Dismiss filed by GEORGE W. BUSH, JR * * *.
05/11/07	181	Memorandum in opposition to re [179] MOTION CROSS-MOTION for Alternative Relief filed by GEORGE W. BUSH, JR * * *.
07/03/07	183	MANDATE of USCA (certified copy) as to (137 in 1:04-cv-01144-RWR) Notice of Appeal filed by KATHLEEN MUBANGA * * *, (106 in 1:04-cv-01136-JDB) Notice of Appeal filed by FATMAH ELSAMNAH, OMAR KHADR, (109 in 1:02-cv-01130-CKK) Notice of Appeal filed by MAMDOUH HABIB, MAHA HABIB, (151 in 1:04-cv-01254-HHK) Notice of Appeal filed by NELSON J. CANNON * * *, (125 in 1:04-cv-01194-HHK) Notice of Appeal filed by NELSON J. CANNON * * *, (97 in 1:04-cv-01135-ESH) Notice of Appeal filed by NELSON J. CANNON * * *, (108 in 1:04-cv-01227-RBW) Notice of Appeal, filed by SALAH ABDUL RASOOL AL BLOUSHI * * *, USCA Case Number, (169 in 1:02-cv-00299-CKK) Notice of Appeal filed by TERRY HICKS * * *, (107 in 1:04-cv-01137-RMC) Notice of Appeal filed by SALLY BEGG * * *, (82 in 1:04-cv-01164-RBW) Notice of Appeal filed by FALEN GHEREBI Associated Cases: 1:02-cv-00299-CKK et al.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

04-cv-1144

JAMIL EL-BANNA, *et al.*
Petitioners,

v.

GEORGE W. BUSH, JR., *et al.*
Respondents.

DOCKET ENTRIES

Date	No.	Proceeding
07/06/04	1	PETITION for Writ of Habeas Corpus (Filing fee $ 5.) filed by BISHER AL-RAWI, JAMIL EL-BANNA, JAHIDA SAYYADI, SABAH SUNNRQROUT.[1]
07/08/04	2	FIRST AMENDED PETITION for Writ of Habeas Corpus filed by BISHER AL-RAWI * * *.
07/22/04	3	MOTION for Writ of Habeas Corpus Pursuant to 28 U.S.C. 2243, or, Alternatively, to Issue an Order to Show Cause by BISHER AL-RAWI * * *.
		* * *
07/23/04	5	SUPPLEMENTAL MEMORANDUM to Motion for the Immediate Issuance of a Writ of Habeas Corpus from Petitioners.
		* * *
10/04/04	41	MOTION to Dismiss or for Judgment as a Matter of Law and Response Pursuant to the Court's Sept. 20, 2004 Order by GEORGE W.

[1] Clerk's notations (*e.g.*, list of attachments, "(jf,) (Entered: 07/09/2004)") deleted from all entries.

Date	No.	Proceeding
		BUSH JR., NELSON J. CANNON, JAY HOOD, DONALD RUMSFELD.
		* * *
10/21/04	53	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Bisher Al-Rawi by GEORGE W. BUSH JR. * * *.
10/21/04	54	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Jamil El-Banna by GEORGE W. BUSH JR. * * *.
		* * *
11/03/04	67	RESPONSE to Petition for Writ of Habeas Corpus by Petitioner Martin Mubanga by GEORGE W. BUSH JR. * * *.
		* * *
11/08/04	73	Memorandum in opposition to motion re 41 RESPONDENT'S MOTION TO DISMISS filed by BISHER AL-RAWI * * *.
		* * *
11/08/04	75	SUPPLEMENTAL MEMORANDUM REPLY AND OPPOSITION TO THE GOVERNMENT'S RESPONSE TO PETITIONS FOR WRIT OF HABEAS CORPUS AND MOTION TO DISMISS OR FOR JUDGEMENT AS A MATTER OF LAW from PETITIONERS BOUMEDIENE AND EL-BANNA.
		* * *
11/08/04	77	AMENDED PROTECTIVE ORDER and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba. Signed by Judge Joyce Hens Green on 11-08-04.
		* * *
11/16/04	86	REPLY to opposition to motion re 41 to dismiss or for judgment as a matter of law filed by

Date	No.	Proceeding
		GEORGE W. BUSH JR. * * *.
		* * *
12/30/04	107	RESPONSE to 1, 2 Petition for Writ of Habeas Corpus by Petitioner Martin Mubanga (Supplement to the Factual Return) and Notice of Submission Under Seal filed by GEORGE W. BUSH, JR * * *.
		* * *
01/31/05	117	MEMORANDUM OPINION DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW. Signed by Judge Joyce Hens Green on 01-31-05.
01/31/05	118	ORDER DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW AND REQUESTING BRIEFING ON THE FUTURE PROCEEDINGS IN THESE CASES. Signed by Judge Joyce Hens Green on 01-31-05.
02/03/05	119	MOTION Certification of Orders for Interlocutory Appeal (and stay—see separate docket entry) by GEORGE W. BUSH, JR * * *.
02/03/05	120	MOTION to Stay (and for certification of orders for interlocutory appeal—see separate docket entry) by GEORGE W. BUSH, JR * * *.
02/03/05	121	NOTICE of Filing of Petitioners' Joint Submission Regarding How These Cases Should Proceed by JAMIL EL-BANNA re 118 Order
02/03/05	122	ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION FOR CERTIFICATION OF JANUARY 31, 2005 ORDERS AND FOR STAY. Signed by Judge Joyce Hens Green on 02-03-05.

Date	No.	Proceeding
02/03/05	123	MEMORANDUM to 118.
02/08/05	124	ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER GRANTING STAY PENDING APPEAL. Signed by Judge Joyce Hens Green on 02-08-05.
		* * *
03/14/05	130	NOTICE OF APPEAL as to Court's 116 Order filed on 01/31/05 as to petitioners' motion for access to unredacted factual returns by GEORGE W. BUSH, JR * * *.
		* * *
03/16/05		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 130 Notice of Appeal
03/17/05	131	NOTICE of Filing: Amended Unclassified Version of Memorandum Opinion Denying In Part And Granting In Part Respondents Motion To Dismiss by GEORGE W. BUSH, JR * * *
		* * *
03/21/05	135	ORDER of USCA (certified copy) as to 130 Notice of Appeal filed by DONALD RUMSFELD * * *; Ordered that the petition and cross-petition for interlocutory appeal be granted; and that the motion to expedite be granted, setting briefing schedule; and that the District Court is directed to file two copies of the Order as separate notices of appeal.
03/21/05	136	NOTICE OF APPEAL as to 118 Order, 117 Order by GEORGE W. BUSH, JR * * *.
03/21/05	137	NOTICE OF APPEAL as to 118 Order, 117 Order by MARTIN MUBANGA * * *.
		* * *
03/30/05		Transmission of Notice of Appeal and Docket

Date	No.	Proceeding
		Sheet to US Court of Appeals re 136 Notice of Appeal
03/30/05		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 137 Notice of Appeal
		* * *
06/02/05	146	NOTICE OF INTERLOCUTORY APPEAL as to 141 Order on Motion for Preliminary Injunction, by GEORGE W. BUSH, JR * * *.
06/03/05		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 146 Notice of Interlocutory Appeal
		* * *
12/23/05		MINUTE ORDER: It is hereby ORDERED that because this case is stayed pending resolution of the appeals in In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005), appeal docketed, No. 05-8003 (D.C. Cir. March 10, 2005), and Khalid v. Bush et al., 355 F. Supp. 2d 311 (D.D.C. 2005), appeal docketed sub nom. Boumediene v. Bush et al., No. 05-5062 (D.C. Cir. March 10, 2005), this case be, and hereby is, ADMINISTRATIVELY CLOSED until the stay is lifted. While the case is administratively closed parties may still submit filings as permitted or required under the Court's orders. Issued by Judge Richard W. Roberts on 12/23/2005.
01/04/06	159	NOTIFICATION OF SUPPLEMENTAL AUTHORITY by respondents GEORGE WALKER BUSH * * *.
		* * *
04/19/07	193	MOTION to Dismiss by Respondents.
		* * *
05/04/07	195	Memorandum in opposition to re 193 MOTION

Date	No.	Proceeding
		to Dismiss (Submitted to and Cleared by CSO) filed by JAMIL EL-BANNA.
		* * *
05/14/07	197	REPLY to opposition to motion re 193 MOTION to Dismiss filed by GEORGE W. BUSH, JR * * *.
07/03/07	200	MANDATE of USCA (certified copy) as to (137 in 1:04-cv-01144-RWR) Notice of Appeal filed by KATHLEEN MUBANGA * * *, (106 in 1:04-cv-01136-JDB) Notice of Appeal filed by FATMAH ELSAMNAH, OMAR KHADR, (109 in 1:02-cv-01130-CKK) Notice of Appeal filed by MAMDOUH HABIB, MAHA HABIB, (151 in 1:04-cv-01254-HHK) Notice of Appeal filed by NELSON J. CANNON * * *, (125 in 1:04-cv-01194-HHK) Notice of Appeal filed by NELSON J. CANNON * * *, (97 in 1:04-cv-01135-ESH) Notice of Appeal filed by NELSON J. CANNON * * *, (108 in 1:04-cv-01227-RBW) Notice of Appeal, filed by SALAH ABDUL RASOOL AL BLOUSHI * * *, USCA Case Number, (169 in 1:02-cv-00299-CKK) Notice of Appeal filed by TERRY HICKS * * *, (107 in 1:04-cv-01137-RMC) Notice of Appeal filed by SALLY BEGG * * *, (82 in 1:04-cv-01164-RBW) Notice of Appeal filed by FALEN GHEREBI Associated Cases: 1:02-cv-00299-CKK et al.
		* * *
07/03/07	199	SUPPLEMENTAL MEMORANDUM to re 195 Memorandum in Opposition to Motion to Dismiss filed by JAMIL EL-BANNA.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

02-cv-1130

MAMDOUH HABIB, *et al.*
Petitioners,

v.

GEORGE WALKER BUSH, *et al.*
Respondents.

DOCKET ENTRIES

Date	No.	Proceeding
06/10/02	1	PETITION filed by petitioners MAMDOUH HABIB, and MAHA HABIB for writ of habeas corpus[8]
		* * *
08/08/02	5	MEMORANDUM OPINION by Judge Colleen Kollar-Kotelly dismissing this case.
08/08/02	6	ORDER by Judge Colleen Kollar-Kotelly: dismissing petition for Writ of Habeas Corpus with prejudice for the reasons set forth in the Court's July 30, 2002, Memorandum Opinion filed in Rasul v. Bush, C.A. 02-0299, and Odah v. United States, C.A. 02-828.
09/09/02	7	NOTICE OF APPEAL by petitioner MAMDOUH HABIB, petitioner MAHA HABIB from order [6-1] * * *
		* * *
09/19/04	12	USCA JUDGMENT (certified copy) reversing and remanding case to district court as to [7]

[8] Clerk's notations (*e.g.*, list of attachments, "(bm) (Entered: 06/13/2002)") deleted from all entries.

Date	No.	Proceeding
		Notice of Appeal filed by MAMDOUH HABIB, MAHA HABIB; USCA # 02-5251
		* * *
10/04/04	31	MOTION to Dismiss or for Judgment as a Matter of Law and Response Pursuant to the Court's Sept. 20, 2004 Order by RICK BACCUS * * *.
10/06/04	32	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Mamdouh Habib by RICK BACCUS * * *.
		* * *
11/05/04	54	Memorandum in opposition to motion re 31 motion to dismiss and motion for judgment as matter of law filed by MAHA HABIB, MAMDOUH HABIB.
		* * *
11/08/04	57	AMENDED PROTECTIVE ORDER and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba. Signed by Judge Joyce Hens Green on 11-08-04.
		* * *
11/16/04	67	REPLY to opposition to motion re 31 to dismiss or for judgment as a matter of law filed by RICK BACCUS * * *.
		* * *
01/31/05	98	MEMORANDUM OPINION DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW. Signed by Judge Joyce Hens Green on 01-31-05.
01/31/05	99	ORDER DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW AND REQUESTING BRIEFING ON THE FUTURE PROCEED-

Date	No.	Proceeding
		INGS IN THESE CASES. Signed by Judge Joyce Hens Green on 01-31-05.
		* * *
02/03/05	101	MOTION to Stay (and for Certification of Orders for Interlocutory Appeal—see separate docket entry) by GEORGE WALKER BUSH * * *.
		* * *
03/14/05	106	NOTICE OF APPEAL as to 98 Order on Motion to Dismiss, 99 Order by GEORGE WALKER BUSH * * *.
03/14/05		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 106 Notice of Appeal
03/16/05	107	ORDER of USCA (certified copy) as to 106 Notice of Appeal filed by WILLIAM L. CLINE * * *, Notice of Appeal filed by MAMDOUH HABIB, MAHA HABIB; Ordered that the petition and cross-petition for interlocutory appeal be granted; and that the motion to expedite be granted, setting briefing schedule; and that the District Court is directed to file two copies of the Order as separate notices of appeal.
03/16/05	108	NOTICE OF APPEAL * * * by GEORGE WALKER BUSH * * *.
03/16/05	109	NOTICE OF APPEAL by MAMDOUH HABIB, MAHA HABIB.
03/17/05	110	NOTICE of Filing: Amended Unclassified Version of Memorandum Opinion Denying In Part And Granting In Part Respondents[']' Motion To Dismiss by GEORGE WALKER BUSH * * *
		* * *
04/19/07	123	MOTION to Dismiss by Respondents.
		* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

04-cv-1135

MURAT KURNAZ, *et al.*
Petitioners,

v.

GEORGE W. BUSH, JR., *et al.*
Respondents.

DOCKET ENTRIES

Date	No.	Proceeding
07/02/04	1	PETITION FOR WRIT OF HABEAS CORPUS against GEORGE W. BUSH JR., NELSON J. CANNON, JAY HOOD, DONALD RUMSFELD filed by MURAT KURNAZ, RABIYE KURNAZ.[9]
		* * *
10/04/04	20	MOTION to Dismiss or for Judgment as a Matter of Law and Response Pursuant to the Court's Sept. 20, 2004 Order by GEORGE W. BUSH JR. * * *.
		* * *
10/18/04	25	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Murat Kurnaz by GEORGE W. BUSH JR. * * *.
		* * *
11/08/04	41	AMENDED PROTECTIVE ORDER and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo

[9] Clerk's notations (*e.g.*, list of attachments, "(Entered: 07/07/2004)") deleted from all entries.

Date	No.	Proceeding
		Bay, Cuba. Signed by Judge Green on 11-08-04.
		* * *
11/09/04	43	Memorandum in opposition to motion re 20 Dismiss Habeas Petition or for Judgment as Matter of Law filed by MURAT KURNAZ, RABIYE KURNAZ.
		* * *
11/16/04	52	REPLY to opposition to motion re 20 to dismiss or for judgment as a matter of law filed by GEORGE W. BUSH JR. * * *.
		* * *
01/31/05	69	MEMORANDUM OPINION DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW. Signed by Judge Green on 01-31-05.
01/31/05	70	ORDER DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW AND REQUESTING BRIEFING ON THE FUTURE PROCEEDINGS IN THESE CASES. Signed by Judge Green on 01-31-05.
02/03/05	71	MOTION for Certification of Orders for Interlocutory Appeal (and for Stay—see separate docket entry) by JAY HOOD * * *.
02/03/05	72	MOTION to Stay (and for Certification of Orders for Interlocutory Appeal—see separate docket entry) by JAY HOOD * * *.
02/03/05	73	NOTICE of Filing of Petitioners' Joint Submission Regarding How These Cases Should Proceed by MURAT KURNAZ * * *.
02/03/05	74	ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION

Date	No.	Proceeding
		FOR CERTIFICATION OF JANUARY 31, 2005 ORDERS AND FOR STAY. Signed by Judge Green on 02-03-05.
02/03/05	75	MEMORANDUM to 70.
		* * *
02/07/05	77	Joint MOTION for Reconsideration re 74 Order on Motion for Miscellaneous Relief, Order on Motion to Stay Proceedings Pending Appeal by MURAT KURNAZ, RABIYE KURNAZ.
02/08/05	78	ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER GRANTING STAY PENDING APPEAL. Signed by Judge Green on 02-08-05.
02/16/05	79	ORDER administratively closing this matter pending resolution of appeal. Signed by Judge Huvelle on 2/16/05.
		* * *
03/15/05	84	NOTICE OF APPEAL as to Court's 68 Order filed on 01/31/05 granting petitioners' Motion for access to unredacted factual returns by JAY HOOD * * *.
		* * *
03/17/05	85	NOTICE of Filing: Amended Unclassified Version of Memorandum Opinion Denying In Part And Granting In Part Respondents Motion To Dismiss by JAY HOOD * * *.
03/21/05	86	ORDER of USCA (certified copy) as to 84 Notice of Appeal filed by GEORGE W. BUSH, JR. * * *; Ordered that the petition and cross-petition for interlocutory appeal be granted; and that the motion to expedite be granted, setting briefing schedule; and that the District Court is directed to file two copies of the Order as separate notices of appeal.

Date	No.	Proceeding
03/21/05	87	NOTICE OF APPEAL as to 69 Order on Motion to Dismiss, 70 Order by JAY HOOD * * *.
03/21/05	88	NOTICE OF APPEAL as to 69 Order on Motion to Dismiss, 70 Order by MURAT KURNAZ * * *.
		* * *
01/04/06	100	NOTIFICATION OF SUPPLEMENTAL AUTHORITY by respondents GEORGE WALKER BUSH * * *.
		* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

04-cv-1164

FALEN GHEREBI,
Petitioner,

v.

GEORGE WALKER BUSH, *et al.*
Respondents.

DOCKET ENTRIES

Date	No.	Proceeding
07/12/04	1	Case transferred from United States Court of Appeals for the Ninth Circuit; Case Number 03-55785[10]
		* * *
08/06/04	11	MOTION to Dismiss or for Judgment as a Matter of Law by GEORGE WALKER BUSH * * *.
		* * *
08/18/04	14	REPLY to opposition to motion re 11 Respondents' Motion to Dismiss or For Judgment as a Matter of Law filed by GEORGE WALKER BUSH * * *.
		* * *
09/13/04	19	SUPPLEMENTAL MEMORANDUM in Support of Motion to Dismiss (in Response to September 2, 2004 Order) from Respondents.
09/14/04	21	SUPPLEMENTAL MEMORANDUM by petitioner on jurisdiction/venue.
		* * *

[10] Clerk's notations (*e.g.*, list of attachments, "(jf,) (Entered: 07/14/2004)") deleted from all entries.

Date	No.	Proceeding
09/22/04	25	REPLY to 21 Respondents' Supplemental Reply Memorandum in Support of Motion to Dismiss (in Response to September 2, 2004 Order) filed by GEORGE WALKER BUSH * * *.
		* * *
09/29/04	27	ORDER Severing, Denying in Part 11 Motion to Dismiss and Confirming This Court as the Appropriate Forum for Resolution of Petition for Writ of Habeas Corpus. Signed by Judge Joyce Hens Green on 09/29/04.
		* * *
10/04/04	29	MOTION to Dismiss or for Judgment as a Matter of Law and Response Pursuant to the Court's Sept. 20, 2004 Order by GEORGE WALKER BUSH * * *
10/06/04	30	ANSWER to Complaint /Petition for Writ of Habeas Corpus by Petitioner Falen Gherebi by GEORGE WALKER BUSH * * *.
		* * *
11/08/04	47	AMENDED PROTECTIVE ORDER and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba. Signed by Judge Joyce Hens Green on 11-08-04.
		* * *
11/16/04	55	REPLY to opposition to motion re 29 to dismiss or for judgment as a matter of law filed by GEORGE WALKER BUSH * * *.
		* * *
01/31/05	69	MEMORANDUM OPINION DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW. Signed by Judge Joyce Hens Green on 01-31-05.
01/31/05	70	ORDER DENYING IN PART AND GRANT-

Date	No.	Proceeding
		ING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW AND REQUESTING BRIEFING ON THE FUTURE PROCEEDINGS IN THESE CASES. Signed by Judge Joyce Hens Green on 01-31-05.
02/03/05	71	MOTION for Certification of Orders for Interlocutory Appeal (and for stay—see separate docket entry) by GEORGE WALKER BUSH * * *.
02/03/05	72	MOTION to Stay (and for certification of orders for interlocutory appeal—see separate docket entry) by GEORGE WALKER BUSH * * *.
02/03/05	73	NOTICE of Filing of Petitioners' Joint Submission Regarding How These Cases Should Proceed by FALEN GHEREBI re 70 Order
02/03/05	74	ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION FOR CERTIFICATION OF JANUARY 31, 2005 ORDERS AND FOR STAY. Signed by Judge Joyce Hens Green on 02-03-05.
02/03/05	75	MEMORANDUM to 70.
02/08/05	76	ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER GRANTING STAY PENDING APPEAL. Signed by Judge Joyce Hens Green on 02-08-05.
02/08/05	77	ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER GRANTING STAY PENDING APPEAL. Signed by Judge Joyce Hens Green on 02-08-05.
03/14/05	78	NOTICE OF APPEAL as to 68 Order on Motion for Miscellaneous Relief by GEORGE WALKER BUSH * * *.

Date	No.	Proceeding
03/16/05		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 78 Notice of Appeal
03/17/05	79	NOTICE of Filing: Amended Unclassified Version of Memorandum Opinion Denying In Part And Granting In Part Respondents Motion To Dismiss by GEORGE WALKER BUSH * * *.
03/21/05	80	ORDER of USCA (certified copy) as to 78 Notice of Appeal filed by GEORGE WALKER BUSH * * *; Ordered that the petition and cross-petition for interlocutory appeal be granted; and that the motion to expedite be granted, setting briefing schedule; and that the District Court is directed to file two copies of the Order as separate notices of appeal.
03/21/05	81	NOTICE OF APPEAL as to 69 Order on Motion to Dismiss, 70 Order by GEORGE WALKER BUSH * * *.
03/21/05	82	NOTICE OF APPEAL as to 69 Order on Motion to Dismiss, 70 Order by FALEN GHEREBI. * * *.
03/30/05		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 81 Notice of Appeal
03/30/05		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 82 Notice of Appeal
		* * *
01/04/06	85	NOTIFICATION OF SUPPLEMENTAL AUTHORITY by respondents GEORGE WALKER BUSH * * *
		* * *
01/11/06	86	ORDER denying without prejudice all pending motions until such time as the District of Co-

Date	No.	Proceeding
		lumbia Circuit resolves the question of this Court's jurisdiction to adjudicate these cases; staying the action pending the jurisdictional ruling of the District of Columbia Circuit, signed by Judge Reggie B. Walton on 1/11/06.
		* * *
01/31/07	96	ORDER. This matter is administratively closed until such time as the District of Columbia Circuit resolves the jurisdictional questions raised by the Military Commissions Act of 2006. Signed by Judge Reggie B. Walton on 1/31/07. Modified on 2/1/2007.
		* * *
04/19/07	100	MOTION to Dismiss by Respondents.
07/03/07	101	MANDATE of USCA (certified copy) as to (137 in 1:04-cv-01144-RWR) Notice of Appeal filed by KATHLEEN MUBANGA * * *, (106 in 1:04-cv-01136-JDB) Notice of Appeal filed by FATMAH ELSAMNAH, OMAR KHADR, (109 in 1:02-cv-01130-CKK) Notice of Appeal filed by MAMDOUH HABIB, MAHA HABIB, (151 in 1:04-cv-01254-HHK) Notice of Appeal filed by NELSON J. CANNON * * *, (125 in 1:04-cv-01194-HHK) Notice of Appeal filed by NELSON J. CANNON * * *, (97 in 1:04-cv-01135-ESH) Notice of Appeal filed by NELSON J. CANNON * * *, (108 in 1:04-cv-01227-RBW) Notice of Appeal, filed by SALAH ABDUL RASOOL AL BLOUSHI * * *, USCA Case Number, (169 in 1:02-cv-00299-CKK) Notice of Appeal filed by TERRY HICKS * * *, (107 in 1:04-cv-01137-RMC) Notice of Appeal filed by SALLY BEGG * * *, (82 in 1:04-cv-01164-RBW) Notice of Appeal filed by FALEN GHEREBI Associated Cases: 1:02-cv-00299-CKK et al.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

05-5064

KHALED A. F. AL ODAH, *et al.*
Appellants,

v.

UNITED STATES, *et al.*
Appellees.

DOCKET ENTRIES

Date	Proceeding
03/07/05	CIVIL-US CASE docketed. Notice of Appeal filed by all of the Plaintiff/Appellants Khaled A. F. Al Odah, et al.[11]
	* * *
04/12/05	CLERK'S ORDER filed, on the court's own motion, that case No. 05-5064, & case Nos. 05-5095 through 05-5116 are consolidated as cross-appeals.
	* * *
04/27/05	OPENING BRIEF filed by United States of America, et al., in Nos. 05-5064, et al. * * *
04/27/05	JOINT APPENDIX (VOLUMES I-III) filed by United States of America, et al., in Nos. 05-5064, et al. * * *
	* * *
04/27/05	BRIEF filed by Amicus Curiae Washington Legal Foundation, and Allied Educational Fund in support of Federal Parties (United States of America, et al.) in Nos. 05-5064, et al. * * *

[11] Clerk's notations (*e.g.*, list of attachments, "[1881938-1]. (jth) [05-5064]") deleted from all entries.

Date	Proceeding
	* * *
05/25/05	SUPPLEMENTAL JOINT APPENDIX [PUBLIC VERSION] lodged by Appellees USA in 05-5064, George W. Bush * * *.
05/25/05	(CLASSIFIED) SUPPLEMENTAL JOINT APPENDIX filed by Appellees USA, et al., in Case Nos. 05-5064, et al. * * *
	* * *
05/27/05	BRIEF lodged by Movant-Amicus Curiae Omar Deghayes in support of appellees/cross-appellants in 05-5064. * * *
	* * *
05/27/05	BRIEF lodged by Movant-Amicus Curiae Wrld Orgn Rights USA in 05-5064. * * *
05/27/05	CLASSIFIED BRIEF filed by Guantanamo Detainees Khaled A. F. Al Odah, et al., in Case Nos. 05-5064, et al. * * *.
	* * *
06/10/05	[PUBLIC VERSION] BRIEF of the Guantanamo Detainees filed by Appellees-Plaintiffs Khaled A. F. Al Odah, et al. * * *.
	* * *
06/10/05	CORRECTED (CLASSIFIED) SUPPLEMENTAL APPENDIX (Volumes I-II) filed in Case Nos. 05-5064, et al. * * *
06/17/05	REPLY/CROSS-APPELLEE BRIEF filed by USA, et al., in case Nos. 05-5064, et al. * * *
06/28/05	REPLY BRIEF filed by Guantanamo Detainee Cross-Appellants Khaled A. F. Al Odah, et al., in case Nos. 05-5064, et al. * * *
	* * *
07/19/05	LETTER filed by Appellees USA, et al. pursuant to FRAP 28j advising of additional authorities. * * *
	* * *

Date	Proceeding
08/01/05	SUPPLEMENTAL (PUBLIC JOINT) APPENDIX filed by USA, et al., in Case Nos. 05-5064, et al. * * *
08/02/05	SUPPLEMENTAL BRIEF filed by USA, et al., in Nos. 05-5064, et al. * * *
	* * *
08/09/05	SUPPLEMENTAL BRIEF filed by The Guantanamo Detainees Khaled A. F. Al Odah, et al., in Nos. 05-5064, et al. * * *
	* * *
09/08/05	ORAL ARGUMENT HELD before Sentelle, Randolph, Rogers. * * *
09/13/05	LETTER filed by Appellants Khaled A. F. Al Odah, et al. identifying joint appendix citations at requested by the court at oral argument. * * *
09/15/05	LETTER filed by Appellees/Cross-Appellants George W. Bush et al. pursuant to FRAP 28j advising of additional authorities. * * *
	* * *
09/22/05	LETTER filed * * * by Appellants Khaled A. F. Al Odah, et al. in response to appellees' 9/15/05 letter. * * *
01/03/06	LETTER filed by Appellants Khaled A. F. Al Odah, et al. pursuant to FRAP 28j advising of additional authorities. * * *
	* * *
01/18/06	SUPPLEMENTAL BRIEF filed by Appellees George W. Bush, et al., in Nos. 05-5062, et al., and Appellees USA, et al., in Nos. 05-5064, et al. * * *
	* * *
01/20/06	(CORRECTED) SUPPLEMENTAL BRIEF LODGED by Washington Legal Foundation as Amicus Curiae in support of the Government Respo[d]nents in case Nos. 05-5062, et al., and Nos. 05-5064, et al. * * *
	* * *

Date	Proceeding
01/25/06	SUPPLEMENTAL BRIEF filed by Plaintiffs-Petitioners-Appellees /Cross-Appellants Khaled A. F. Al Odah, et al, in 05-5064, and 05-5095 through 05-5116. * * *
01/25/06	BRIEF filed by Amicus Curiae for Appellee Wrld Orgn For Human Rights USA in 05-5064 and 05-5064 through 05-5116. * * *
01/25/06	SUPPLEMENTAL BRIEF lodged by Movant-Amicus Curiae British and American Scholars Denis Galligan, et al in case Nos. 05-5062, et al, and Nos. 05-5064, et al. * * *
	* * *
01/27/06	PER CURIAM ORDER filed, on the court's own motion, scheduling these cases for oral argument before this panel on 3/22/06 at 9:30 a.m. to address the effect of the Detainee Treatment Act of 2005 on this court's jurisdiction in these cases (see order for citation); While not limited, the parties are directed to address the following question in their briefs: "Assuming this court determines it lacks jurisdiction over these cases by reason of the enactment of the Detainee Treatment Act of 2005, what is the appropriate disposition of the conflicting district court judgments entered before enactment of the statute?" * * *
02/17/06	SUPPLEMENTAL BRIEF filed by Federal Parties Addressing the Detainee Treatment Act of 2005 USA, et al * * *
02/17/06	BRIEF lodged by Movant-Amici Curiae-Appellee Lindsey Graham and Jon Kyl in 05-5064. * * * (NOTE: See 3/30/06 order; leave denied and this brief returned to movant)
	* * *
03/10/06	SECOND SUPPLEMENTAL BRIEF filed by Guantanamo/Detainee Appellants Khaled A. F. Al Odah, et al., in Nos. 05-5064, et al., (ADDRESSING THE EFFECT OF THE DETAINEE TREATMENT ACT

Date	Proceeding
	OF 2005 ON THIS COURT'S JURISDICTION OVER THE PENDING APPEALS). * * *
03/10/06	2ND SUPPLEMENTAL BRIEF in support of petitioner/appellants position on the jurisdictional impact of the detainee treatment Act of 2005 filed by Amicus Curiae in support of Detainee/Appellants' (World Organization for Human Rights USA) in No. 05-5064. * * *
	* * *
03/10/06	BRIEF LODGED by Movant-Amicus Curiae (British and American Habeas Scholars) Denis Galligan * * * in Case Nos. 05-5062, et al. and Nos. 05-5064, et al. * * *
	* * *
03/13/06	CORRECTED SECOND SUPPLEMENTAL BRIEF filed by Appellants Khaled A. F. Al Odah, et al., in Nos. 05-5064 * * *
	* * *
03/17/06	SUPPLEMENTAL REPLY BRIEF of The Federal Parties Filed by George W. Bush, et al., in case Nos. 05-5062, et al., and USA, et al., in case Nos. 05-5064, et al. * * *
03/20/06	SUPPLEMENT (Corrected Table of Contents) to the Federal Parties Supplemental Reply brief in Nos. 05-5062, et al. and Nos. 05-5064, et al. * * *
	* * *
03/20/06	CORRECTED BRIEF LODGED by Movant-Amicus Curiae The Federal Public Defender Habeas Corpus Counsel in Nos. 05-5062, et al. and Nos. 05-5064, et al. * * *
	* * *
03/20/06	CORRECTED BRIEF LODGED by Movant Amicus Curiae National Institute of Military Justice in Nos. 05-5062, et al. and Nos. 05-5064, et al. * * *
	* * *
03/20/06	CORRECTED BRIEF LODGED by Movant-Amicus

Date	Proceeding
	Curiae (Legal and Historical Scholars) Paul Finkelman * * * in Nos. 05-5062, et al. and Nos. 05-5064, et al. * * *
	* * *
03/20/06	CORRECTED BRIEF LODGED by Movant-Amicus Curiae Senator Carl Levin in Nos. 05-5062, et al., and Nos. 05-5064, et al. * * * (NOTE: See 3/30/06 order; leave denied and this brief returned to movant)
	* * *
03/22/06	ORAL ARGUMENT HELD before Sentelle, Randolph, Rogers.
03/23/06	LETTER filed by Appellants Khaled A. F. Al Odah, et al. filed pursuant to FRAP 28j advising of additional authorities. * * *
03/24/06	LETTER filed by Appellees USA, et al. pursuant to FRAP 28j advising of additional authorities. * * *
	* * *
03/30/06	PER CURIAM ORDER filed denying motion of Senators Lindsey Graham and John Kyl for leave to participate as amici curiae in support of government [R]espondents-appellees regarding the effect of Detainee Treatment Act of 2005; Denying motion of Senaor Carl Levin to participate as amicus curiae in support of petitioners regarding Section 1005 of the Detainee Treatment Act of 2005 pursuant to the Court's 1/27/06 order and for leave to file corrected brief; Clerk directed to return the lodged briefs to movants-amici curiae. * * *
	* * *
08/01/06	SUPPLEMENTAL BRIEF filed by Appellees George W. Bush et al. in 05-5064 et al. * * *
	* * *
08/07/06	SUPPLEMENTAL BRIEF filed by Amicus Curiae for Appellee Wrld Orgn Rights USA in 05-5064. * * *

Date	Proceeding
08/08/06	SUPPLEMENTAL BRIEF (styled "Guantanamo Detainees' supplemental brief addressing the effect of Supre[me] Court's opinion in Hamdan v. Rumsfeld . . .") filed by Appellants Khaled A. F. Al Odah et al. in 05-5064 et al. * * *
08/15/06	SUPPLEMENTAL REPLY BRIEF filed by Appellees George W. Bush et al. in 05-5064 et al. * * *
	* * *
10/17/06	LETTER filed by Appellee George W. Bush in 05-5064 pursuant to FRAP 28j advising of additional authorities. * * *
	* * *
11/01/06	SUPPLEMENTAL BRIEF filed by Amicus Curiae for Appellee Wrld Orgn Rights USA in 05-5064. * * *
11/01/06	SUPPLEMENTAL BRIEF filed by Appellant Khaled A. F. Al Odah in 05-5064 * * *.
	* * *
11/01/06	BRIEF IN SUPPORT OF PETITIONER'S SUPPLEMENTAL BRIEF lodged by Movant-Amicus Curiae Ret Fed Jur in 05-5064. * * * [RETURNED TO PARTY PER COURT ORDER ON 12/29/06]
11/01/06	ADDENDUM (VOL. I AND II) TO BRIEF OF AMICI CURIAE RETIRED FED JURISTS (HIST ID 1002475) lodged in 05-5064. * * *
11/13/06	SUPPLEMENTAL BRIEF filed by Appellees/Cross-Appellants USA, et al. in 05-5064 * * *.
11/20/06	SUPPLEMENTAL REPLY BRIEF (Unclassified) filed by Appellants/Cross-Appellees Khaled A. F. Al Odah, et al. in 05-5064, 05-5095 through 05-5116. * * *
	* * *
12/14/06	LETTER filed by Appellee USA pursuant to FRAP 28j advising of additional authorities. * * *

Date	Proceeding
12/15/06	LETTER filed by Appellants Khaled A. F. Al Odah, et al. in response to government's letter filed pursuant to FRAP 28j advising of additional authorities. * * *
	* * *
12/29/06	PER CURIAM ORDER filed denying non-party motion to allow amicus filed by Retd Fed Jurists. The Clerk is directed to return to movant-amici curiae the lodged brief. Before Judges Sentelle, Randolph, Rogers.* (Circuit Judge Rogers would grant the motion for leave to file brief amici curiae for the reasons set forth in the statement accomanying this order)
	* * *
02/20/07	JUDGMENT that the district court's decisions are vacated and the cases are dismissed for lack or jurisdiction for the reasons in the accompanying opinion. Before Judges Sentelle, Randolph, Rogers.
02/20/07	OPINION filed (25 pgs) for the Court by Judge Randolph, DISSENTING OPINION (34 pgs) filed by Rogers
02/20/07	CLERK'S ORDER filed The Clerk is directed to withhold issuance of the mandate pending disposition of any timely petition for rehearing.
03/08/07	NOTICE filed by the Supreme Court. The petition for writ of certiorari was filed on 3/5/07 and placed on the docket as No. 06-1196.
04/05/07	LETTER received fom S.Ct. advising that the petition for a writ of certiorari is denied.
	* * *
06/04/07	LETTER dated 6/4/07 received from the S.Ct. advising that the Court entered the following order in the cases: the respondents are invited to file a response to the petitioner for rehearing within 30 days.
	* * *

Date	Proceeding
06/27/07	MANDATE ISSUED to Clerk, District Court
07/02/07	MOTION filed * * * by Appellant/Cross-Appellee Khaled A. F. Al Odah, et al. * * * to recall the mandate. * * *
07/05/07	LETTER date 6/29/07 received from the S.Ct. advising that the petition for rehearing is granted. The order entered 4/2/07, denying the petition for writ of certiorari is vacated. The petition for a writ of certiorari is granted. This case is consolidated with 06-1195 and a total of one hour is allotted for oral argument. As it would be material assistance to consult any decision in Bismullah, et al. v. Gates, No 06-1197, and Parhat, et al., v. Gates, et al. No. 06-1397 currently pending in the United States Court of Appeals for the District of Columbia Circuit, supplemental briefing will be scheduled upon the issuance of any decision in those cases.
07/13/07	OPPOSITION filed * * * by Appellees USA, et al. * * * to Appellants' motion recall mandate.
	* * *
07/20/07	(Pending classification) REPLY filed * * * by Appellant Khaled A. F. Al Odah, et al. in 05-5064 * * * to a response to motion recall mandate in 05-5116
07/26/07	PER CURIAM ORDER filed granting motion recall mandate filed by Khaled A. F. Al Odah, et al. in 05-5064, et al. The Clerk of the USDC for the District of Columbia is directed to return forthwith to the USDC for the District of Columbia Circuit the mandate issued June 27, 2007. Before Judges Sentelle,* Rogers, Griffith. (Circuit Judge Sentelle would deny the motion)

UNCLASSIFIED SUMMARY OF CSRT PROCEEDING TRANSCRIPT (ABDULLAH KAMAL ABDULLAH KAMAL AL KANDARI) [*Al Odah* Court of Appeals Supplemental Appendix 1367]

* * *

Regarding the allegation 3.A.3. (One of the Detainee's known aliases was on a list of captured hard drives associated with a senior Al-Qaeda member.)

Detainee: Can you tell me the name that was found in the computer?

Tribunal President: We don't have that information in the unclassified evidence. I don't know what name was in the computer at this time.

Detainee: If he put my name Adullah Kamal, I am famous at home. I play on the National Volleyball team. Why he put my name in the computer, I don't know. They don't know me I swear they don't know me. Look at me, look at the clothes I wear and how tall I am. I have a large scar on my hand. (inaudible) I would like to know the name. I go by Saliman, my son is [redacted by government] and there are many Salimans. The problem is the secret information, I can't defend myself. I have money, I have cars, I have my children, I have my wife and unborn children and I'm going to be Al-Qaeda? I'm not stupid and I'm going to do this against the biggest country in the world, America. When I was told I was Al-Qaeda I was shocked. They don't have any evidence against me, to put me here. I don't have a choice, God is well here, so I'll be patient. Why did they put me here like this?

Tribunal President: That's what we are here to determine.

* * *

UNCLASSIFIED SUMMARY OF BASIS FOR TRIBUNAL DECISION (MURAT KURNAZ) [*Al Odah* Court of Appeals Supplemental Appendix 1661-1663]

(Enclosure (1) to Combatant Status Review Tribunal Decision Report)

TRIBUNAL PANEL: #5

ISN #: 061

1. Introduction

As the Combatant Status Review Tribunal (CSRT) Decision Report indicates, the Tribunal has determined that this detainee is properly classified as an enemy combatant and is a member of al-Qaida. In reaching its conclusions, the Tribunal considered both classified and unclassified information. The following is an account of the unclassified evidence considered by the Tribunal and other pertinent information. Classified evidence considered by the Tribunal is discussed in Enclosure (2) to the CSRT Decision Report.

2. Synopsis of Proceedings

The unclassified summary of evidence presented to the Tribunal by the Recorder indicated that the detainee is a member or ally of al-Qaida or its network and that the detainee participated in activities with a group that is part of al-Qaida network. Those allegations are as follows:

1. The detainee admitted he traveled from Frankfurt, Germany to Karachi, Pakistan (via plane), to Islamabad, PK (via plane), and to Lahore, PK (via bus) and unnamed village (vicinity of Peshawar, PK) and attempted travel back to Peshawar when he was arrested and brought into custody.
2. The timeline associated with the detainee is as follows: Became associated with an Islamic missionary group named Jama'at-Al-Tabliq in June 01, the United States is attacked on 11 September 01, travels to PK on 3 October 01, continues travels until his capture.

3. Detainee is a close associate with, and planned to travel to PK with, an individual who later engaged in a suicide bombing. Selcuk Bilgin possibly is the Elananutus suicide bomber.

4. The detainees stated he received free food, lodging and schooling from a NGO known to support terrorist acts against the United States while traveling in PK. He was sponsored by this NGO.

5. The detainee admitted that the school in Lahore, PK was run by this NGO, specifically the NGO President.

[1662] The detainee chose to participate in the Tribunal process. He called no witnesses and requested no documents be produced. He made a sworn verbal statement in which he attempted to explain the reasons for his trip to Pakistan and denied being a member of al Qaida.

3. Evidence Considered by the Tribunal

The Tribunal considered the following evidence in reaching its conclusions:

a. Exhibits: D-a and R-1 through R-24

b. Sworn testimony of the detainee

4. Rulings by the Tribunal on Detainee Requests for Evidence or Witnesses

The Detainee requested no witnesses; no rulings were required.

The Detainee requested no additional evidence be provided.

5. Discussion of Unclassified Evidence

The Tribunal considered the following unclassified evidence in making its determinations:

a. The Recorder offered Exhibits R-1, R-2 and R-3 into evidence during the unclassified portion of the proceeding. Exhibit R-1 is the Unclassified Summary of Evidence. While this summary is helpful in that it provides a broad

outline of what the Tribunal can expect to see, it is not persuasive in that it provides conclusory statements without supporting unclassified evidence. Exhibit R-2 is an Affidavit of [redacted by government]. Mrs. [redacted by government] is the detainee's mother and provided the detainee's background and confirmed the date the detainee departed Frankfurt, Germany to Pakistan. Exhibit R-3 is a sworn affidavit of Berhard Docke, a lawyer retained for the detainee's Habeas Corpus case. The Tribunal found this information somewhat helpful in making its determinations, but considered the sworn testimony of the detainee. The detainee explained that he frequented a mosque in Bremen, Germany that was considered moderate in it views of Islam and tolerant of other religions; however, it also housed a branch of the Jama'at-Al-Tabliq (JT) a Muslim missionary organization, alleged to support terrorist organizations. The detainee stated that an Imam for JT advised the detainee to travel to Pakistan to immerse himself in the study of Islam. The detainee then purchased a ticket to Pakistan, and with this friend Selcuk Belgin, they began their travels. Upon checking in for the flight to Pakistan in Frankfurt, the detainee's friend, Mr. Belgin, was arrested. Mr. Belgin stated that he was arrested because he had outstanding warrants as a result of his dogs biting people. Mr. Belgin is the alleged Elalanutus suicide bomber. Once in Pakistan, the detainee testified that he traveled to Lahore to attend the JT Muslim school there and traveled to Peshawar, Pakistan for further studies. Upon his return from Peshawar to Lahore the Pakistan Police stopped the [1663] bus he was traveling on and arrested him. The Pakistani Police asked the detainee about Mr. Belgin and his relation with the detainee and then turned him over to Americans who transferred him to Bagram Airbase for further travel to Guantanamo Bay, Cuba. Tribunal had to look to the detainee's sworn statement and classified exhibits for support of the Unclassified Summary of Evidence.

b. Essentially the only unclassified evidence the Tribunal had to consider was the detainee's testimony and the

affidavits submitted by the detainee's mother and habeas attorney. A summarized transcript of the detainee's testimony is attached as CSRT Decision Report Enclosure (3). He denied being a member of al Qaida, but confirmed that he went to Pakistan to study the Koran at the advice of a Jama'at-Al-Tabliq Imam. The Tribunal found certain aspects of the detainee's testimony persuasive, but also turned to classified sources for further clarification.

The Tribunal also relied on certain classified evidence in reaching its decision. A discussion of the classified evidence is found in Enclosure (2) to the Combatant Status Review Tribunal Decision Report.

6. Consultations with the CSRT Legal Advisor

No issues arose during the course of this hearing that required consultation with the CSRT legal advisor.

7. Conclusions of the Tribunal

Upon careful review of all the evidence presented in this matter, the Tribunal makes the following determinations:

a. The detainee was mentally and physically capable of participating in the proceeding. No medical or mental health evaluation was deemed necessary.

b. The detainee understood the Tribunal proceedings. The detainee asked no questions regarding his rights and actively participated in the hearing.

c. The detainee is properly classified as an enemy combatant. Specifically, he is a member of al Qaida.

8. Dissenting Tribunal Member's report

None. The Tribunal reached a unanimous decision.

Respectfully submitted,

[redacted by government]

Colonel, USAF
Tribunal President

UNCLASSIFIED SUMMARY OF BASIS FOR TRIBUNAL DECISION (JAMIL EL-BANNA) [*Al Odah* Court of Appeals Supplemtental Appendix 1806-1810]

(Enclosure (1) to Combatant Status Review Tribunal Decision Report)

TRIBUNAL PANEL: #6

ISN #: 905

1. Introduction

As the Combatant Status Review Tribunal (CSRT) Decision Report indicates, the Tribunal has determined that this detainee is properly clas sified as an enemy combatant and was part of or supporting Al Qaida forces. In reaching its conclusions, the Tribunal considered both classified and unclassified information. The following is an account of the unclassified evidence considered by the Tribunal and other pertinent information. Classified evidence considered by the Tribunal is discussed in Enclosure (2) to the CSRT Decision Report.

2. Synopsis of Proceedings

The initial session of the Tribunal hearing was held on 25 September 2004. The Recorder presented Exhibit R-1, the Unclassified Summary of Evidence, and other exhibits during the unclassified portion of the Tribunal. Exhibit R-1 indicates that the detainee is a member of Al Qaida; that he visited Abu Qatada, a known Al Qaida operative, while Abu Qatada was in hiding from the British police; that Abu Qatada was arrested in the United Kingdom as a danger to national security; that the detainee has been indicted by a Spanish National High Court Judge for membership in a terrorist organization; and that the detainee was arrested in Gambia while attempting to board an airplane with equipment that resembled a homemade electronic device. The Recorder presented several other unclassified exhibits, but called no witnesses.

The detainee participated actively in the Tribunal proc-

ess and testified under oath. In sum, he denied being a member of or having any connection to Al Qaida. He admitted visiting Abu Qatada on one occasion, and stated it was simply to take Abu Qatada's family to visit him. He stated he has no knowledge of the Spanish indictment, and noted he was arrested in Great Britain, not Gambia, relating to the electronic device. He also noted that the electronic device was found in a traveling companion's luggage—not his—and that both he and his friend were released because the electronic device was simply a battery charger. The detainee also answered questions posed by the Personal Representative and Tribunal Members. The detainee's testimony, including his responses to the questions posed to him, is summarized in Enclosure (3) to the CSRT Decision Report. The detainee also requested 2 witnesses, both of which were denied. Explanations for the Tribunal President's decision appear in paragraph 4, below.

[1807] During the classified session of the Tribunal, the Recorder initially presented Exhibits R-5 through R-15 and commented on the evidence. The Personal Representative had nothing additional to offer and made no comments. After reading the exhibits, the Tribunal asked for additional information and recessed to permit the Recorder the opportunity to obtain the evidence.

The Tribunal reconvened in a classified session on 28 September 2004. In response to the Tribunal's request for additional evidence, the Recorder introduced Exhibits R-16 through R-18, all of which are classified. After reading these exhibits, the Tribunal again requested that the Recorder provide additional evidence. In response, the Tribunal reconvened on 2 October 2004 to allow the Recorder to present Exhibits R-19 through R-24. Because Exhibits R-23 and R-24 are unclassified, both exhibits were shown to the detainee prior to reconvening on 2 October 2004, and the detainee was given the opportunity to be present when the exhibits were offered into evidence. At the hearing on 2 October 2004, the Personal Representative informed the Tribunal that he had discussed both Exhibit R-23 and R-24 with the

detainee, and the detainee elected not to attend the open session of the hearing where both exhibits were offered into evidence. The detainee did provide the Personal Representative with comments on the exhibits to bring to the attention of the Tribunal. These comments are discussed in paragraph 5, below. The Tribunal then closed for deliberations and, after considering both the unclassified and classified exhibits, as well as the detainee's sworn testimony and comments on Exhibits R-23 and R-24, the Tribunal concluded that the detainee is properly classified as an enemy combatant.

On 9 October 2004, the Tribunal reconvened to consider additional evidence made known to the Tribunal after 2 October 2004. At this session, the Recorder introduced Exhibits R-25 through R-35, all of which are classified and all of which had been shown to the Personal Representative prior to the Tribunal session. Neither the Recorder nor the Personal Representative had any comments on the additional exhibits. After considering the additional exhibits, the Tribunal reaffirmed its decision of 2 October 2004 that the detainee is properly classified as an enemy combatant.

3. Evidence Considered by the Tribunal

The Tribunal considered the following evidence in reaching its conclusions:

a. Exhibits: D-a, and R-1 through R-35.

b. Testimony of the following persons: None.

c. Sworn statement of the detainee:

See Enclosure (3) to the CSRT Decision Report.

[1808]

4. Rulings by the Tribunal on Detainee Requests for Evidence or Witnesses

The Detainee requested two witnesses:

a. [redacted by government] ISN # [redacted by government]. The detained indicated that ISN # [redacted by government] would testify that the electronic device re-

ferred to in paragraph 3.a.4 of the Unclassified Summary of Evidence (Exhibit R-1) belonged to ISN # [redacted by government] and not to the detainee. The Tribunal President denied the request in writing (see Enclosure (5) to the CSRT Decision Report) and explained at the Tribunal hearing on 25 September that under the allegation, it did not matter who the device belonged to, as long as it was the detainee that tried to board the plane with it. In any case, the Tribunal considered the matter moot because the Tribunal believed the detainee's account relating to the allegation; that is, the device was a harmless battery charger being transported by the detainee's traveling companion, ISN # [redacted by government]. Furthermore, the Tribunal found that the incident with the battery charger took place as the detainee testified—in London, not Gambia—and that paragraph 3.a.4 of the Unclassified Summary of Evidence is not supported by the evidence.

b. Al Haj Abo Ali. This request related to an allegation on the original Unclassified Summary of Evidence indicating, in part, that the detainee was a financial assistant to the detainee. The detainee asserted that the witness would testify that the financial assistance was for poor people in Jordan. However, the entire allegation was deleted prior to the hearing because, although it was unclassified, it had not yet received formal clearance. Accordingly, the Tribunal President found the requested witness not relevant. As a result, the Tribunal presumed that money raised by the detainee was for poor people in Jordan, as the detainee asserted in his witness request. (The Tribunal President's written response to the detainee's witness request is included as Enclosure (5) to the CSRT Decision Report.)

The Detainee requested no additional evidence be produced.

5. Discussion of Unclassified Evidence

The Tribunal considered the following unclassified evidence in making its determinations:

a. The Recorder offered Exhibits R-1 through R-4

into evidence during the unclassified portion of the proceeding. Exhibit R-1 is the Unclassified Summary of Evidence. While this summary is helpful in that it provides a broad outline of what the Tribunal can expect to see, it is not persuasive in that it provides conclusory statements without supporting unclassified evidence. Exhibit R-2 provided no usable evidence. Accordingly, the Tribunal had to look to other exhibits for support of the Unclassified Summary of Evidence.

b. Exhibit R-3 is an excerpt from an Internet article published by the Madrid *El Pais* indicating that the Spanish government has agreed to request the U.S. government to [1809] extradite the detainee to Spain to stand trial for membership in a terrorist organization. The article further indicates that the detainee was indicted by Spanish National High Court judge Baltasar Garzon for the detainee's connection to the Spanish Al Qaida cell led by Imad Eddin Barakat Yarkas. When considered in conjunction with the classified evidence, the Tribunal did not find this article helpful in establishing the detainee's association with Al Qaida.

c. Exhibit R-4 is an Associated Press article dated 11 November 2002 that mentions Abu Qatada's use of the Internet to communicate with terrorist cells. The Tribunal did not rely on this news article in reaching its conclusions.

d. Exhibit R-23 is a CBS News interview with Abu Qatada dated 16 March 2004. When considered in conjunction with the classified evidence, the Tribunal found this article persuasive in establishing Abu Qatada's association with Al Qaida. At the Tribunal session held on 2 October 2004, the Personal Representative indicated the detainee's comments on the article were that the article is a nice article, but it has nothing to do with the detainee. He also called the Tribunal's attention to page 4 of 6, noting that the amount of money seized from Abu Qatada's home was exaggerated, and was in envelopes marked "to the poor," and "for needy families," and "for building a mosque." He also quoted a passage where Qatada asserts that the British government owes every poor Muslim and every Muslim in England some

money because some of the money seized was to buy a place for prayer.

e. Exhibit R-24 is an excerpt from the Terrorist Organization Reference Guide dated January 2004. The excerpt describes the Armed Islamic Group (GIA) and the Salafist Group for Call and Combat. At the Tribunal session held on 2 October 2004, the Personal Representative indicated the detainee's comments on the excerpt from the Reference Guide were that the document has nothing to do with him because he does not belong to terrorist organizations. The Tribunal did not find Exhibit R-24 helpful in reaching its conclusions.

f. The Tribunal also considered the detainee's sworn testimony, given at the first session of the hearing on 25 September 2004. In sum, the detainee testified that Abu Qatada's status has nothing to do with the detainee, because the detainee is just one of hundreds of people that used to pray with Abu Qatada. He stated that if the British government had anything on him, he would have been arrested. He admitted visiting Abu Qatada once when Abu Qatada was in hiding in London, but claimed it was only to take Abu Qatada's wife and son to visit him. He said the British police raided Abu Qatada's house while the detainee was there, but allowed the detainee to take Abu Qatada's wife and son back to their home. The detainee denied knowing anything about his indictment by the Spanish court, and claimed he has never been a member of a terrorist organization. He also indicated he was not arrested in Gambia for possessing the electronic device—the arrest occurred in London and he was cleared of all wrongdoing. He stated he was arrested in Gambia for something else, but does not know what he is alleged to have done. He stated the Gambians turned him over to the United States and [1810] now he is in Guantanamo Bay, Cuba. Finally, the detainee denies being a member of Al Qaida or having any contacts with senior Al Qaida leaders. A summarized transcript of the detainee's sworn testimony is attached as CSRT Decision Report Enclosure (3).

The Tribunal also relied on certain classified evidence in reaching its decision, and found the classified evidence persuasive in establishing that the detainee is properly classified as an enemy combatant. A discussion of the classified evidence is found in Enclosure (2) to the Combatant Status Review Tribunal Decision Report.

6. Consultations with the CSRT Legal Advisor

No issues arose during the course of this hearing that required consultation with the CSRT legal advisor.

7. Conclusions of the Tribunal

Upon careful review of all the evidence presented in this matter, the Tribunal makes the following determinations:

a. The detainee was mentally and physically capable of participating in the proceeding. No medical or mental health evaluation was deemed necessary,

b. The detainee understood the Tribunal proceedings and actively participated throughout the hearing.

c. The detainee is properly classified as an enemy combatant and was part of or supporting Al Qaida forces.

8. Dissenting Tribunal Member's report

None. The Tribunal reached a unanimous decision.

Respectfully submitted,

[redacted by government]

Colonel, U.S. Army
Tribunal President

FEDERAL BUREAU OF INVESTIGATION DOCUMENT ENTITLED "DETAINEE INTERVIEW (ABUSIVE INTERROGATION ISSUES)" [*Al Odah* Court of Appeals Supplemental Appendix 1867]

5/6/04

[Seals]

Detainee Interviews (Abusive Interrogation Issues)

- In late 2002 and continuing into mid-2003, the Behavioral Analysis Unit raised concerns over interrogation tactics being employed by the U.S. Military. As a result, an EC dated 5/30/03, was generated summarizing the FBI's continued objections to the use of [redacted by government] techniques to interrogate prisoners. This EC is attached and includes a collection of military documents discussing and authorizing the techniques. We are not aware of the FBI participating directly in any [redacted by government] interrogations.
- It should be noted that FBI concerns and objections were documented and presented to Major General Geoffery Miller, who oversaw GTMO operations. MG Miller is now in Iraq serving as the commander in charge of the military jails. MG Miller appeared in the New York Time on 5/5/04 defending "coercive and aggressive" interrogation methods.
- FBI operations in Afghanistan, Iraq and GTMO have each been queried and all have reported back that they do not have any direct knowledge of any abusive interrogation techniques being used. Each location was aware of rumors of abuse which have surfaced as a direct result of pending Military investigations into abusive interrogation techniques.
- The FBI has participated in the interview of 204 individuals in Iraq and 747 in GTMO. Our Afghan operation needs additional time to prepare a list of those interviewed in theater. Attached are the lists from GTMO and Iraq.

- A key word search of the Iraq interviews identified one individual alleging abuse by military personnel. In this instance a woman indicated she was hit with a stick and she wanted to talk only to German officials.
- FBI personnel assigned to the Military Tribunal effort involving GTMO detainees has during the review of discovery material seen, on a few rare occasions, documentation of [redacted by government] techniques being noted in interviews conducted by Military personnel. In these instances the material was called to the attention of military's Criminal Investigative Task Force (CITF), and Office Military Commissions (OMC) personnel.

INTERNAL FBI EMAILS REPORTING INSTANCES OF ABUSIVE INTERROGATION TECHNIQUES [*Al Odah* Court of Appeals Supplemental Appendix 1869, 1875, 1877, 1879]

[1869]

[redacted by government] (IR) (FBI)

To: [redacted by government] (INSD) (FBI)

Subject: GTMO

As you may be aware, I was in GTMO and I did observe aggressive interrogation practices and as a Behavioral Analysis Advisor on interrogation techniques was aware of extreme interrogation techniques that were planned and implemented against certain detainees.

These events were summarized in memos and an EC written by myself and my colleagues between Oct. and May of 2002.

I have been discussing these events with GC Valerie Caproni.

SSA [redacted by government]

7/9/2004

[1875]

From: [redacted by government] (BS) (FBI)

Sent: Monday, August 02, 2004 10:46 AM

To: [redacted by government] (INSD) (FBI)

Subject: RE GTMO

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

Mr. [redacted by government],

As requested, here is a brief summary of what I observed at GTMO.

On a couple of occassions [sic], I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times

they had urinated or defacated on themselves, and had been left there for 18-24 hours or more. On one occasion [sic], the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MP's what was going on, I was told that the interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occassion [sic], the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconcious [sic] on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occassion [sic], not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.

Any questions, feel free to call or ask via email [redacted by government].

* * *

[1877]

From: [redacted by government] (BS) (FBI)

Sent: Monday, July 12, 2004 10:10 AM

To: [redacted by government] (INSD) (FBI)

Subject: RE GTMO

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

Mr. [redacted by government],

I am responding to your request for feedback on aggressive treatment and improper interview techniques used on detainees at GTMO. I did observe treatment that was not only aggressive, but personally very upsetting, although I can't say that this treatment was perpetrated by Bureau employees. It seemed that these techniques were being employed by the military, government contract employees and

[redacted by government].

My name is SA [redacted by government], Boston division, EOD [redacted by government] currently assigned to Squad C-9, telephone [redacted by government].

* * *

[1879]

From: [redacted by government]

To: Bald, Gary, BATTLE, FRANKIE, CUMMINGS, ARTHUR, . . .

Date: Fri., Dec. 5, 2003 9:53 AM

Subject: Fwd: Impersonating FBI at GTMO

Frank [redacted by government],

I am forwarding this EC up the CTD chain of command. MLDU requested this information be documented to protect the FBI. MLDU has had a long standing and documented position against use of some of DOD's interrogation practices, however, we were not aware of these latest techniques until recently.

Of concern, DOD interrogators impersonating Supervisory Special Agents of the FBI told a detainee that [redacted by government]. These same interrogation teams then [redacted by government]. The detainee was also told by this interrogation team [redacted by government].

These tactics have produced no intelligence of a threat neutralization nature to date and CITF believes that techniques have destroyed any chance of prosecuting this detainee.

If this detainee is ever released or his story made public in any way, DOD interrogators will not be held accountable because these torture techniques were done by the "FBI" interrogators. The FBI will left holding the bag before the public.

SSA [redacted by government]

CTD/MLDU

cc: [redacted by government]

LETTER FROM T.J. HARRINGTON, DEPUTY ASSISTANT DIRECTOR, COUNTERTERRORISM DIVISION, TO MAJOR GENERAL DONALD J. RYDER, DEPARTMENT OF THE ARMY, CRIMINAL INVESTIGATION COMMAND, ADDRESSING SUSPECTED MISTREATMENT OF DETAINEES [*Al Odah* Court of Appeals Supplemental Appendix 1871-1873]

[Seal]

U.S. Department of Justice
Federal Bureau of Investigation
Washington, D.C. 20535-0001
July 14, 2004

Major General Donald J. Ryder
Department of the Army
Criminal Investigation Command
6010 6th Street
Fort Belvoir, Virginia 22060-5506

Re: Suspected Mistreatment of Detainees

Dear General Ryder:

I appreciate the opportunity I had to meet with you last week. As part of a follow up on our discussion on detainee treatment, I would like to alert you to three situations observed by agents of the Federal Bureau of Investigation (FBI) of highly aggressive interrogation techniques being used against detainees in Guantanamo (GTMO). I refer them to you for appropriate action.

1. During late 2002, FBI Special Agent James Clemente was present in an observation room at GTMO and observed Sargeant (first name unknown) Lacey conducting an interrogation of an unknown detainee. (SA Clemente was present to observe the interrogation occurring in a different interrogation room.) Sgt. Lacey entered the observation room and complained that curtain movement at the observation window was distracting the detainee, although no movement of the curtain had oc-

curred. She directed a marine to duct tape a curtain over the two-way mirror between the interrogation room and the observation room. SA Clemente characterized this action as an attempt to prohibit those in the observation room from witnessing her interaction with the detainee. Through the surveillance camera monitor, SA Clemente then observed Sgt. Lacey position herself between the detainee and the surveillance camera. The detainee was shackled and his hands were cuffed to his waist. SA Clemente observed Sgt. Lacey apparently whispering in the detainee's ear, and caressing and applying lotion to his arms (this was during Ramadan when physical contact with a woman would have been particularly offensive to a Moslem male). On more than one occasion the detainee appeared to be grimacing in pain, and Sgt. Lacey's hands appeared to be making some contact with the detainee. Although SA Clemente could not see her hands at all times, he saw them moving towards the detainee's lap. He also observed the detainee pulling away and against the restraints. Subsequently, the marine who had previously taped the curtain and had been in the interrogation room with Sgt. Lacey during the interrogation re-entered the observation room. [1872] SA Clemente asked what had happened to cause the detainee to grimace in pain. The marine said Sgt. Lacey had grabbed the detainee's thumbs and bent them backwards and indicated that she also grabbed his genitals. The marine also implied that her treatment of that detainee was less harsh than her treatment of others by indicating that he had seen her treatment of other detainees result in detainees curling into a fetal position on the floor and crying in pain.

2. Also in October 2002, FBI Special Agent Robert Morton was observing the interrogation of a detainee when Dave Becker, a civilian contractor,

came into the observation room and asked SA Morton to come see something. SA Morton then saw an unknown bearded, long-haired detainee in another interrogation room. The detainee had been gagged with duct tape that covered much of his head. SA Morton asked Mr. Becker whether the detainee had spit at the interrogators. Mr. Becker laughed and stated that the detainee had been chanting the Koran and would not stop. Mr. Becker did not answer when SA Morton asked how the duct tape would be removed from the detainee.

3. In September or October of 2002 FBI agents observed that a canine was used in an aggressive manner to intimidate detainee #63 and, in November 2002, FBI agents observed Detainee #63 after he had been subjected to intense isolation for over three months. During that time period, #63 was totally isolated (with the exception of occasional interrogations) in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma (talking ton non-existent people, reporting hearing voices, crouching in a corner of the cell covered with a sheet for hours on end). It is unknown to the FBI whether such extended isolation was approved by appropriate DoD authorities.

These situations were referenced in a May 30, 2003 electronic communication (EC) from the Behavioral Analysis Unit of the FBI to FBI Headquarters. That EC attached, among other documents, a draft Memorandum for the Record dated 15 January 2003 from Capt. Mark E. McCary (USAFR), that refers to the first two events among others in a time line of events related to discussions concerning the use of aggressive interrogation techniques. Marion Bowman of the FBI's Office of General Counsel discussed the contents of those communications with Mr. Dietz, Deputy General Counsel (Intelligence) and Mr Del'Orto, Deputy General Counsel of DoD, around the time the EC was received. Al-

though he was assured that the general concerns expressed, and the debate between the FBI and DoD regarding the treatment of detainees was known to officials in the Pentagon, I have no record that our specific concerns regarding these three situations were communicated to DoD for appropriate action.

[1873] If I can provide any further information to you, please do not hesitate to call.

Sincerely yours,

/s/

T.J. Harrington
Deputy Assistant Director
Counterterrorism Division

URGENT REPORT TO DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION REGARDING INVESTIGATION INTO ABUSE OF IRAQI DETAINEES [*Al Odah* Court of Appeals Supplemental Appendix 1905-1907]

DATE: JUNE 25, 2004

TO: THE DIRECTOR

CC: Deputy Director Bruce J. Gebhardt
EAD Cassandra Chandler
EAD John Pistole
AD Grant Ashley
AD Gary Bald
SC Arthur Cummings
[redacted by government]
UC [redacted by government]
SSA [redacted by government]
CT Watch
SIOC

FROM: SACRAMENTO DIVISION

FOR FURTHER INFORMATION CONTACT:

ASAC David A. Picard
[redacted by government] (Main Office)

PREPARER OF URGENT REPORT: SSA [redacted by government]

PURPOSE: THE FOLLOWING INFORMATION PROVIDES INITIAL DETAILS FROM AN INDIVIDUAL [redacted by government] WHO OBSERVED SERIOUS PHYSICAL ABUSES OF CIVILIAN DETAINEES IN [redacted by government] IRAQ DURING THE PERIOD OF [redacted by government]. IT IS BEING FURNISHED TO THE DIRECTOR BASED UPON POTENTIAL SIGNIFICANT PUBLIC, MEDIA AND CONGRESSIONAL INTEREST WHICH MAY GENERATE CALLS TO THE DIRECTOR.

SUBJECT: PRELIMINARY STATEMENTS MADE BY [redacted by government] TO SACRAMENTO SPE-

CIAL AGENTS [redacted by government] AND [redacted by government]

DESCRIPTION OF MATTER:

[redacted by government] was advised that the Sacramento Field Office was not aware of any such report. [1906] [redacted by government] came into the Sacramento Field Office and provided the following:

[redacted by government] observed numerous physical abuse incidents of Iraqi civilian detainees conducted in [redacted by government] Iraq. He described that such abuses included strangulation, beatings, placement of lit cigarettes into the detainees ear openings, and unauthorized interrogations. [redacted by government]

[redacted by government] was providing this information to the FBI based on his knowledge that [redacted by government] were engaged in a cover-up of these abuses. He stated these cover-up efforts included [redacted by government].

[redacted by government] advised that an individual did, in fact, make a complaint with Sacramento FBI Office concerning Iraqi prisoner abuse.

[redacted by government]

[1907] [redacted by government]

The Sacramento Division is continuing to interview [redacted by government] and will forward FBIHQ all details of his interview in future communications. Investigation in Sacramento is continuing.

[ARGUMENT HELD ON MAY 15, 2007]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

06-1197, 06-1397

HAJI BISMULLAH, *et al.*
Petitioners,

v.

ROBERT M. GATES, SECRETARY OF DEFENSE
Respondent.

HUZAIFA PARHAT, *et al.*
Petitioners,

v.

ROBERT M. GATES, SECRETARY OF DEFENSE
Respondent.

DECLARATION OF REAR ADMIRAL (RETIRED) JAMES M. MCGARRAH

Pursuant to 28 U.S.C. § 1746, I, James M. McGarrah, hereby declare that to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

1. I was the Director of the Office for the Administrative Review of the Detention of Enemy Combatants (OERDEC) from July 2004 until March 2006. I currently serve as a Special Assistant to the Deputy Assistant Secretary of Defense for Detainee Affairs. This declaration is intended to provide a general description of the overall Combatant Status Review Tribunal (CSRT) process during this period in which I served as the Director fo OARDEC, and concurrently as the CSRT Convening Authority. CSRT Order, 7 July 2004, para f. This declaration is based on my personal knowledge as well as information obtained in my official [2]

capacity as Director of OARDEC and CSRT Convening Authority.

2. In July 2004, the Department of Defense established the CSRT process. This process was established to provide a formalized, standardized process to review the combatant status of all "foreign nationals held as enemy combatants in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba." CSRT Order, 7 Jul 2007. OARDEC was established in July 2004, and charged with implementing this process, as well as the annual Administrative Review Boards conducted for detainees at Guantanamo. As Director of OARDEC, I was appointed the CSRT Convening Authority by the Secretary of the Navy in July 2004. During my tenure as Director, we conducted 558 Combatant Status Review Tribunals (CSRTs). During that time frame, over 200 personnel (including active duty and reserve military, civilians and contractors) were assigned to OARDEC, and were involved in carrying out OARDEC's missions. The primary OARDEC mission during this period was preparing for and conducting these Tribunals, and involved the vast majority of these assigned personnel. Some of the personnel were assigned to work at Guantanamo Bay while others were assigned in the Washington, D.C. area.

3. The CSRT procedures provide that the CSRT "Tribunal is authorized to * * * request the production of such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings (cumulatively called hereinafter the 'Government Information')." CSRT Procedures, Enc. 1, § E(3). The CSRT Recorder is charged with, among other things, "obtain[ing] and examin[ing] the Government [3] Information." CSRT Procedures, Enc. 2,

§ C(1). Additionally, "the Recorder has a duty to present to the CSRT such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of the U.S. or allied forces (the "Government Evidence")." CSRT Procedures, Enc. 2, § B(1).

4. Prior to September 1, 2004, the CSRT Recorder personally collected the Government Information. At that time, due to the other extensive responsibilities of the Recorder[1] and in order to provide greater efficiency in the collection of this information, additional individuals were assigned to assist the Recorder in gathering detainee information. Responsibilities of Recorder, CSRT Procedures, Enc. 2, § C(2). Accordingly, after September 1, 2004, the task of gathering and analyzing the Government Information was performed by a specially-formed research, collection and coordination team (hereinafter referred to as "Team"). This Team, which was dedicated to the functions of obtaining, examining and analyzing detainee information, brought greater manpower resources to this important function. In addition, due to the location of the Team in the Washington, D.C. area in close proximity to other Government agencies, the interagency approval procedure used for clearance of the Government Evidence was much more efficient. *See supra* text accompanying Paragraph 10. The dedicated Team focused on the tasks of identifying relevant information on each detainee, including information that might suggest that the detainee should not be designated as an enemy combatant.

5. Members assigned to the Team each received approximately two weeks of training prior to assuming their data collection responsibilities, as well as additional instruction, as appropriate, [4] during their tenures. The training

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[1] Among other duties, the Recorder must attend and present evidence at CSRT hearings and prepare the records of those proceedings. *See* CSRT Procedures, Enc. 2, § C.

included instruction on the CSRT process with specific emphasis on the Recorder's functions and responsibilities, operator training on the pertinent government databases, as well as cultural awareness and intelligence training to assist Team members in better understanding the potential significance of individual data elements. The Team was organized in three separate functions.

a. The first function, Case Writer, had primary responsibility for researching, reviewing and ultimately collecting information from government sources. The Case Writers would then use this information to draft an unclassified summary of the factual basis for the detainee's designation as an enemy combatant.

b. The second function, Quality Assurance (QA), reviewed t..e draft products from the Case Writers to ensure they were logical, consistent and grammatically correct.

c. The third function, Coordination, worked with the various government agencies whose information was to be used as Government Evidence, in order to receive clearance to use their information in the Tribunal, as well as to verify the accuracy of the Unclassified Summary.

6. Although the Team functioned as a data collection "staff" for the Recorders, each Recorder was held personally responsible for reviewing and verifying the information provided by the Team, for finalizing each package of unclassified and classified Government Evidence (to include the Unclassified Summary), and for presenting this evidence to the tribunal. In reviewing and verifying the information received from the Team, the Recorder had access to the same information systems used by the Team, and could add information to be presented to the CSRT panel as Government Evidence or as material that might suggest that the detainee should not be designated [5] as an enemy combatant; could decline to use as Government Evidence any material provided by the Team; and/or could submit requests for further information to obtain additional evidence from government entities. New information obtained by the Recorder in this manner would be treated as Government Information and, if

appropriate, would be included in the Government Evidence presented to the CSRT panel. Throughout the CSRT process, the Recorder was responsible for making the final determination of what material would be presented to the CSRT as the Government Evidence. CSRT Procedures, Enc. 2, § B(1). In addition, both the Personal Representative and the Tribunal members had, and exercised, the ability to request additional information; the Recorder had the responsibility to respond to such requests.

7. The Team pursued leads found in government files relating to a detainee to identify other material that would qualify as Government Information. First, the Team conducted computer searches via a Defense Department database called the Joint Detainee Information Management System (JDIMS).

a. JDIMS is an information management tool developed and used primarily to support interrogations. Information stored on this database includes interrogation reports, intelligence messages, intelligence reports, analyst products, and periodic detainee assessments by DoD and other U.S. Government organizations, such as the U.S. Army Criminal Investigation Task Force (CITF). Only information classified at the SECRET level and below is placed into the JDIMS system. The information also must be in the possession and control of the Joint Intelligence Group (JIG), an element of Joint Task Force Guantanamo (JTF-GTMO). The JDIMS system is a repository of centralized information, but does not and could not hold all information that is in the possession of the United States Government regarding a particular detainee.

[6] b. JIG personnel regularly use and rely on this database as a primary resource when conducting research about detainees and their interrelationships, when preparing for interrogations and when responding to official requests for information about detainees, as well as for other mission-critical functions. Accordingly, the JIG regularly populates the database with new detainee information developed or

uncovered through research and interrogations, and that is assessed as pertinent to the detainee.

c. Because the JDIMS system represented one of the most complete repositories of information on each detainee, it was used as the starting point for gathering the material that would qualify as the Government Information. Additionally, this database permits the interrelationships between individuals and/or organizations to be searched and cross-referenced electronically. Ultimately, most of the data qualifying as Government Information were found through JDIMS. The Team also followed references that arose in these files—if a file revealed possible locations for more information, the Team pursued those leads.

8. The second database regularly searched by the Team was the database system called I2MS, used primarily by investigators from the Criminal Investigation Task Force (the investigatory arm for the Office of Military Commissions). This system holds information pertaining to individual detainees collected by CITF from both the law enforcement and intelligence communities, and would include files on the detainees developed by the authorities who captured the detainees and transferred them to Guantanamo, files relating to any subsequent reviews of the determination to continue to hold the detainee, and interrogation files. The Team also followed references that arose in these files—if a file revealed possible locations for more information, the Team pursued those leads.

9. Third, the Team reviewed paper files in the possession of JTF-GTMO, as well as other [7] Department of Defense databases and files that might contain information on the detainee.

10. The Team also had the ability to submit requests for information to other organizations within the Department of Defense and to other federal agencies that might have information bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, that was not already in the JDIMS database. These

requests included information above the classification level of SECRET.

a. In both the initial data search and in requests for additional information from other agencies, the Team's requests would be for any information bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, and also specifically asked those agencies to provide any information that might suggest the detainee should *not* be designated as an enemy combatant.

b. In some instances, the Team did not directly obtain copies of Government Information from certain intelligence agencies. Instead, upon request, certain agencies allowed properly cleared members of the Team to review the organization's information responsive to their request in order to satisfy the Team's request that the agencies produce reasonably available information under the CSRT procedure. The Team could use information the agency authorized for inclusion in the CSRT record to support an enemy combatant status. However, during their review, there were instances where the Team was not permitted to use certain documents as Government Evidence or to make copies of them, because release of these documents could reasonably be expected to cause harm to national security by revealing sensitive information such as sources or methods. These searches were broadly based on names and other available identifying information, and involved voluminous responsive documents, many of which were found not relevant to the determination of whether a [8] detainee continued to meet the criteria for designation as an enemy combatant

c. In other instances, the Team would submit a request for information to law enforcement agencies; however, these agencies would not always provide the Team with information contained in certain files, due to the fact there was an ongoing investigation. In these cases, the law enforcement agencies would do a search of the information requested and provide the Team with documentation stating that none of the information withheld would support a determination that the detainee is not an enemy combatant.

d. The Team never encountered a situation where an agency objected to the use of information that suggested a detainee *should not* be designated an enemy combatant.

11. A file of information was gathered as a result of these inquiries, but it did not necessarily include all material that might be considered to meet the definition of "Government Information" in the CSRT procedures. CSRT Procedures, Enc. 1, § E(3).

a. First, material that might qualify as Government Information from government databases would be reviewed, but might not be collected in a distinct file if it was viewed as being not relevant or only marginally relevant.

b. Second, as explained in Paragraph 10, some material in the possession of intelligence agencies that would likely qualify as Government Information would be reviewed, but could not be collected or used as Government Evidence, because of the sensitivity of the material.

12. In some instances, all of the compiled Government Information referred to in Paragraph 11 above was included in the Government Evidence. In fact, however, the Recorder was required to present to the tribunal only "such evidence in the Government Information as may be *sufficient* to [9] support the detainee's classification as an enemy combatant..." CSRT Procedures, Enc. 1, §H(4) (emphasis added). Therefore in many instances not all of the Government Information was included as Government Evidence. Three primary considerations were employed in selecting the Government Evidence from among this information.

a. First, with respect to information derived from intelligence agencies, those agencies needed to approve the use of their information as part of the Government Evidence before it could be presented to the CSRT, particularly if that information was going to be used in the unclassified portion of the CSRT. If the agency or organization declined to approve the use of information tending to show that the detainee was an enemy combatant, it was deemed "not reasonably available." Often, the primary reason that this in-

formation could not be used as Government Evidence is because release of these documents could reasonably be expected to cause harm to national security by revealing sensitive information such as sources or methods. Also, there was a concern about dissemination of this information beyond what was necessary. That said, the Team never encountered a situation where an agency objected to the use of information that suggested a detainee should not be designated an enemy combatant.

b. Second, information was often duplicative of other information. Material was frequently not presented to the CSRT as part of the Government Evidence because it would merely duplicate other information already included in the Government Evidence and therefore would be unnecessarily redundant.

c. Third, the Recorder might elect not to use certain information as Government Evidence if the Recorder determined that other data being used as Government Evidence appeared sufficient to support the detainee's classification as an enemy combatant. For example, if a detainee was alleged [10] to be an enemy combatant based on six actions he was allegedly involved in and these six actions were supported by documents already in the Government Evidence, the Recorder could decide not to include documents about additional actions that the detainee took that would also suggest that the detainee is an enemy combatant. As a result, no Government Information excluded from the Government Evidence was taken into consideration by the CSRT in reaching a determination as to enemy combatant status.

13. The CSRT procedures specify that "[i]n the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also provide such evidence to the Tribunal." CSRT Procedures, Enc. 2, § B.1; *see* CSRT Procedures, Enc. 1, § H.4 (same).

a. The Team and Recorder ensured that, as they reviewed Government Information, *all* material that might

suggest the detainee should not be designated as an enemy combatant was identified and included in the materials presented to the CSRT and included in the CSRT Record. Thus, the Team and Recorder did not exclude any such material even if it had been originally obtained from other intelligence agencies. They also did not exclude any such material based on any sort of sufficiency assessment. However, if certain information which suggested that the detainee should not be designated as an enemy combatant was duplicative, the Recorder might decide not to include that duplicative information in the Government Evidence.

b. There was one other circumstance where this type of material may be excluded from the Government Evidence—if it did not relate to a specific allegation being made against the detainee. For example, if the government had data that indicated the detainee had engaged in a certain specific combatant activity and also had evidence that he had not engaged in that specific activity, the Team [11] and Recorder could elect to present no data about that specific activity at all. In short, if the Recorder decided not to demonstrate to the CSRT that a specific incident relating to the detainee occurred, the Recorder could decide not to submit evidence to the CSRT suggesting that this specific incident did not occur.

14. In addition to the Government Evidence, the following factual material was presented to the CSRT and made part of the CSRT record:

(a) material submitted by the detainee or his Personal Representative;

(b) testimony of the detainee or witnesses deemed relevant and reasonably available.

(c) material obtained by the CSRT panel through its own requests for information.

15. After the CSRT deliberated and reached its conclusion, the CSRT determination was reviewed by the CSRT Legal Advisor and the CSRT Director. CSRT Procedures, Enc. 1, § I(7) & (8). If the CSRT concluded, based upon the

evidence before it, that the detainee should no longer be classified as an enemy combatant, the CSRT Director would notify the intelligence agencies and provide them an opportunity to submit additional information relating to the detainee or to reconsider any of their prior decisions that had prevented the Recorder from using their material as Government Evidence at the CSRT. Additionally, if the CSRT Legal Advisor or CSRT Director returned the record to the CSRT for further proceedings, the Recorder would have the ability to supplement the material presented to the CSRT as Government Evidence.

16. Both the CSRT Order and CSRT Regulations specifically defined the record as including (among other things) "all the documentary evidence presented to the tribunal" (Government Evidence). CSRT Order, 7 July 2004, para g(3), and CSRT Procedures, Encl. 1., para I(5). There was no requirement for OARDEC to compile a record of material comprising all of the records in [12] government files that would qualify as Government Information. The Recorder was required only to prepare a "Record of Proceedings" which must include 1) a statement of the time and place of the hearing, persons present, and their qualifications; 2) the Tribunal Report Cover Sheet; 3) the classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based; 4) copies of all documentary *evidence presented to the tribunal* and summaries of all witness testimony; and 5) a dissenting member's summary report, if any. CSRT Procedures, Enc. 2, §C(8). However, OARDEC made an effort to retain the Government Information as referred to in Paragraph 11, compiled for each CSRT. It is my understanding that despite their efforts, some of these electronic files became corrupted following a technical change-over from one computer system to another in 2005. This has made it difficult to fully recreate the electronic files of Government Information compiled for each tribunal. I also understand that OARDEC is currently working to retrieve stored data from system archives to see

if it is possible to recreate the files. As of this date, OARDEC is uncertain whether this is possible.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true, accurate, and correct.

Dated: 31 May 2007

/s/
James M. McGarrah
Rear Admiral, Civil Engineer Corps, U.S. Navy (Retired)
Special Assistant
Office of the Deputy Assistant Secretary of Defense,
Detainee Affairs

DECLARATION OF STEPHEN ABRAHAM

I, Stephen Abraham, hereby declare as follows:

1. I am a lieutenant colonel in the United States Army Reserve, having been commissioned in 1981 as an officer in Intelligence Corps. I have served as an intelligence officer from 1982 to the present during periods of both reserve and active duty, including mobilization in 1990 ("Operation Desert Storm") and twice again following 9-11. In my civilian occupation, I am an attorney with the law firm Fink & Abraham LLP in Newport Beach, California.

2. This declaration responds to certain statements in the Declaration of Rear Admiral (Retired) James M. McGarrah ("McGarrah Dec."), filed in *Bismullah* v. *Gates*, No. 06-1197 (D.C. Cir.). This declaration is limited to unclassified matters specifically related to the procedures employed by Office for the Administrative Review of the Detention of Enemy Combatants ("OARDEC") and the Combatant Status Review Tribunals ("CSRTs") rather than to any specific information gathered or used in a particular case, except as noted herein. The contents of this declaration are based solely on my personal observations and experiences as a member of OARDEC. Nothing in this declaration is intended to reflect or represent the official opinions of the Department of Defense or the Department of the Army.

3. From September 11, 2004 to March 9, 2005, I was on active duty and assigned to OARDEC. Rear Admiral McGarrah served as the Director of OARDEC during the entirety of my assignment.

4. While assigned to OARDEC, in addition to other duties, I worked as an agency liaison, responsible for coordinating with government agencies, including certain Department of Defense ("DoD") and non-DoD organizations, to gather or validate information relating to detainees for use in CSRTs. I also served as a member of a CSRT, and had the opportunity to observe and par-

ticipate in the operation of the CSRT process.

5. As stated in the McGarrah Dec., the information comprising the Government Information and the Government Evidence was not compiled personally by the CSRT Recorder, but by other individuals in OARDEC. The vast majority of the personnel assigned to OARDEC were reserve officers from the different branches of service (Army, Navy, Air Force, Marines) of varying grades and levels of general military experience. Few had any experience or training in the legal or intelligence fields.

6. The Recorders of the tribunals were typically relatively junior officers with little training or experience in matters relating to the collection, processing, analyzing, and/or dissemination of intelligence material. In no instances known to me did any of the Recorders have any significant personal experience in the field of military intelligence. Similarly, I was unaware of any Recorder having any significant or relevant experience dealing with the agencies providing information to be used as a part of the CSRT process.

7. The Recorders exercised little control over the process of accumulating information to be presented to the CSRT board members. Rather, the information was typically aggregated by individuals identified as case writers who, in most instances, had the same limited degree of knowledge and experience relating to the intelligence community and intelligence products. The case writers, and not the Recorders, were primarily responsible for accumulating documents, including assembling documents to be used in the drafting of an unclassified summary of the factual basis for the detainee's designation as an enemy combatant.

8. The information used to prepare the files to be used by the Recorders frequently consisted of finished intelligence products of a generalized nature—often outdated, often "generic," rarely specifically relating to the individual subjects of the CSRTs or to the circumstances re-

lated to those individuals' status.

9. Beyond "generic" information, the case writer would frequently rely upon information contained within the Joint Detainee Information Management System ("JDIMS"). The subset of that system available to the case writers was limited in terms of the scope of information, typically excluding information that was characterized as highly sensitive law enforcement information, highly classified information, or information not voluntarily released by the originating agency. In that regard, JDIMS did not constitute a complete repository, although this limitation was frequently not understood by individuals with access to or who relied upon the system as a source of information. Other databases available to the case writer were similarly deficient. The case writers and Recorders did not have access to numerous information sources generally available within the intelligence community.

10. As one of only a few intelligence-trained and suitably cleared officers, I served as a liaison while assigned to OARDEC, acting as a go-between for OARDEC and various intelligence organizations. In that capacity, I was tasked to review and/or obtain information relating to individual subjects of the CSRTs. More specifically, I was asked to confirm and represent in a statement to be relied upon by the CSRT board members that the organizations did not possess "exculpatory information" relating to the subject of the CSRT.

11. During my trips to the participating organizations, I was allowed only limited access to information, typically prescreened and filtered. I was not permitted to see any information other than that specifically prepared in advance of my visit. I was not permitted to request that further searches be performed. I was given no assurances that the information provided for my examination represented a complete compilation of information or that any summary of information constituted an accurate distillation of the body of available information re-

lating to the subject.

12. I was specifically told on a number of occasions that the information provided to me was all that I would be shown, but I was never told that the information that was provided constituted all available information. On those occasions when I asked that a representative of the organization provide a written statement that there was no exculpatory evidence, the requests were summarily denied.

13. At one point, following a review of information, I asked the Office of General Counsel of the intelligence organization that I was visiting for a statement that no exculpatory information had been withheld. I explained that I was tasked to review all available materials and to reach a conclusion regarding the non-existence of exculpatory information, and that I could not do so without knowing that I had seen all information.

14. The request was denied, coupled with a refusal even to acknowledge whether there existed additional information that I was not permitted to review. In short, based upon the selective review that I was permitted, I was left to "infer" from the absence of exculpatory information in the materials I was allowed to review that no such information existed in materials I was not allowed to review.

15. Following that exchange, I communicated to Rear Admiral McGarrah and the OARDEC Deputy Director the fundamental limitations imposed upon my review of the organization's files and my inability to state conclusively that no exculpatory information existed relating to the CSRT subjects. It was not possible for me to certify or validate the non-existence of exculpatory evidence as related to any individual undergoing the CSRT process.

16. The content of intelligence products, including databases, made available to case writers, Recorders, or liaison officers, was often left entirely to the discretion of the organizations providing the information. What in-

formation was not included in the bodies of intelligence products was typically unknown to the case writers and Recorders, as was the basis for limiting the information. In other words, the person preparing materials for use by the CSRT board members did not know whether they had examined all available information or even why they possessed some pieces of information but not others.

17. Although OARDEC personnel often received large amounts of information, they often had no context for determining whether the information was relevant or probative and no basis for determining what additional information would be necessary to establish a basis for determining the reasonableness of any matter to be offered to the CSRT board members. Often, information that was gathered was discarded by the case writer or the Recorder because it was considered to be ambiguous, confusing, or poorly written. Such a determination was frequently the result of the case writer or Recorder's lack of training or experience with the types of information provided. In my observation, the case writer or Recorder, without proper experience or a basis for giving context to information, often rejected some information arbitrarily while accepting other information without any articulable rationale.

18. The case writer's summaries were reviewed for quality assurance, a process that principally focused on format and grammar. The quality assurance review would not ordinarily check the accuracy of the information underlying the case writer's unclassified summary for the reason that the quality assurance reviewer typically had little more experience than the case writer and, again, no relevant or meaningful intelligence or legal experience, and therefore had no skills by which to critically assess the substantive portion of the summaries.

19. Following the quality assurance process, the unclassified summary and the information assembled by the case writer in support of the summary would then be

forwarded to the Recorder. It was very rare that a Recorder or a personal representative would seek additional information beyond that information provided by the case writer.

20. It was not apparent to me how assignments to CSRT panels were made, nor was I personally involved in that process. Nevertheless, I discerned the determinations of who would be assigned to any particular position, whether as a member of a CSRT or to some other position, to be largely the product of ad hoc decisions by a relatively small group of individuals. All CSRT panel members were assigned to OARDEC and reported ultimately to Rear Admiral McGarrah. It was well known by the officers in OARDEC that any time a CSRT panel determined that a detainee was not properly classified as an enemy combatant, the panel members would have to explain their finding to the OARDEC Deputy Director. There would be intensive scrutiny of the finding by Rear Admiral McGarrah who would, in turn, have to explain the finding to his superiors, including the Under Secretary of the Navy.

21. On one occasion, I was assigned to a CSRT panel with two other officers, an Air Force colonel and an Air Force major, the latter understood by me to be a judge advocate. We reviewed evidence presented to us regarding the recommended status of a detainee. All of us found the information presented to lack substance.

22. What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence. Statements allegedly made by percipient witnesses lacked detail. Reports presented generalized statements in indirect and passive forms without stating the source of the information or providing a basis for establishing the reliability or the credibility of the source. Statements of interrogators presented to the panel offered inferences from which we were expected to draw conclusions favoring a finding of "enemy combatant" but that, upon even limited questioning

from the panel, yielded the response from the Recorder, "We'll have to get back to you." The personal representative did not participate in any meaningful way.

23. On the basis of the paucity and weakness of the information provided both during and after the CSRT hearing, we determined that there was no factual basis for concluding that the individual should be classified as an enemy combatant. Rear Admiral McGarrah and the Deputy Director immediately questioned the validity of our findings. They directed us to write out the specific questions that we had raised concerning the evidence to allow the Recorder an opportunity to provide further responses. We were then ordered to reopen the hearing to allow the Recorder to present further argument as to why the detainee should be classified as an enemy combatant. Ultimately, in the absence of any substantive response to the questions and no basis for concluding that additional information would be forthcoming, we did not change our determination that the detainee was not properly classified as an enemy combatant. OARDEC's response to the outcome was consistent with the few other instances in which a finding of "Not an Enemy Combatant" (NEC) had been reached by CSRT boards. In each of the meetings that I attended with OARDEC leadership following a finding of NEC, the focus of inquiry on the part of the leadership was "what went wrong."

24. I was not assigned to another CSRT panel.

I hereby declare under the penalties of perjury based on my personal knowledge that the foregoing is true and accurate.

/s/

Stephen Abraham

Dated: June 15, 2007

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FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1196

In the Supreme Court of the United States

KHALED A. F. AL ODAH, ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Did the D.C. Circuit err in adopting a categorical rule that the Constitution places no limits on the authority of the government in detaining aliens outside U.S. sovereign territory?

2. Did the D.C. Circuit err in holding that the petitioners' right to the writ of habeas corpus was not protected by the Suspension Clause, in light of this Court's finding in *Rasul v. Bush*, 542 U.S. 466 (2004), that the writ would have extended to them at common law?

3. Did the D.C. Circuit err in holding that the petitioners' right to the writ of habeas corpus was not protected by the Suspension Clause, in light of the fact that these petitioners have been detained by the United States for more than five years in exclusive U.S. custody and within the "territorial jurisdiction" of the United States and are therefore entitled to fundamental constitutional protections?

4. Is the review provided under the Detainee Treatment Act of 2005 an adequate substitute for the writ of habeas corpus to which these petitioners are entitled?

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW[i]

1. Petitioners in *Al-Odah v. United States*, No. 02-CV-0828-CKK (D.D.C.), are Fawzi Khalid Abdullah Fahad Al Odah, Omar Rajab Amin, Nasser Nijer Naser Al Mutairi, Khalid Abdullah Mishal Al Mutairi, Abdullah Kamal Abdullah Kamal Al Kandari, Abdulaziz Sayer Owain Al Shammari, Abdullah Saleh Ali Al Ajmi, Mohammed Funaitel Al Dihani, Fayiz Mohammed Ahmed Al Kandari, Fwad Mahmoud Al Rabiah, Adil Zamil Abdull Mohssin Al Zamil, and Saad Madai Saad Hawash Al-Azmi, and their next friends Khaled A.F. Al Odah, Mohammad R. M. R. Ameen, Nayef N.N.B.J. Al Mutairi, Meshal A.A. Th Al Mutairi, Mansour K.A. Kamel, Sayer O.Z. Al Shammari, Mesfer Saleh Ali Al Ajmi, Mubarak F.S.M. Al Daihani, Mohammad A.J.M.H. Al Kandari, Monzer M.H.A. Al Rabieah, Walid Z.A. Al Zamel, and Hamad Madai Saad.

Respondents include the United States of America and the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Richard B. Myers, Chairman, Joint Chiefs of Staff; Gen. Rick Baccus, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Terry Carrico, Commander, Camp Delta, Camp X-Ray, Guantanamo Bay, Cuba.

2. Petitioners in *Habib v. Bush*, No. 02-CV-1130-CKK (D.D.C.), are Mamdouh Habib and his next friend Maha Habib. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Rick Baccus,

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[i] This brief is filed on behalf of all petitioners except those in *Al Odah v. United States*, No. 02-CV-0828-CKK (D.D.C.), and *Abdah v. Bush*, No. 04-CV-1254-HHK (D.D.C.).

LIST OF ALL PARTIES—continued

Commander, Joint Task Force, Guantanamo Bay, Cuba; and Lt. Col. William Cline, Commander, Camp Delta.

3. Petitioners in *Kurnaz v. Bush*, No. 04-CV-1135-ESH (D.D.C.), are Murat Kurnaz and his next friend Rabiye Kurnaz. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

4. Petitioners in *El-Banna v. Bush*, No. 04-CV-1144-RWR (D.D.C.), are Jamil El-Banna, Bisher Al-Rawi, and Martin Mubanga, and their next friends Sabah Sunnrqrout, Jahida Sayyadi, and Kathleen Mubanga. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

5. Petitioners in *Gherebi v. Bush*, No. 04-CV-1164-RBW (D.D.C.), are Falen Gherebi (also known as Salim Gherebi) and his next friend Belaid Gherebi. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; and "1,000 Unknown Named United States Military Personnel and Government Officers and/or Officials."

6. Petitioners in *Anam v. Bush*, No. 04-CV-1194-HHK (D.D.C), are Suhail Abdoh Anam, Bashir Nasir Ali Al Marwalah, Musa'ab Omar Al Madhwani, Abdul Khaleq Ahmed Sahleh Al Baidhani, Ali Ahmed Mohammed Al Raezehi, Saeed Ahmed Mohammed Al Sarim, Emad Abdullah Hassan, Jalal Salim Bin Amer, Ali Yahya Mahdi, Riyad Atag Ali Abdoh Al Haj, Khaled Ahmed Qassim Muse'd, Fahmi Abdullah Ahmed Al Tawlaqi, and Abdulaziz Abdoh Abdullah Ali Al Swidhi, and their next friends

LIST OF ALL PARTIES—continued

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Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

7. Petitioners in *Almurbati v. Bush*, No. 04-CV-1227-RBW (D.D.C.), are Isa Ali Abdulla Almurbati, Adel Kamel Abdulla Hajee, Salah Abdul Rasool Al Bloushi, Abdullah Majed Sayyah Hasan Alnoaimi, Salman Bin Ibrahim Bin Mohammed Bin Ali Al-Kalifa, and Jum'ah Mohammed Abdullatif Aldossari, and their next friends Mohamed Ali Abdulla Almurbati, Abdullah Kamel Abdulla Hajee, Abdul Rasool Ali Al Bloushi, Majed Sayah Alnoaimi, Ibrahim Bin Mohammed Bin Ali Al-Khalifa, and Khalid Mohammed Abdullatif Aldossari.

Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

8. Petitioners in *Abdah v. Bush*, No. 04-CV-1254-HHK (D.D.C.), are Mahmoad Abdah, Majid Mahmoud Ahmed (also known as Majed Mohmood, and Majid M. Abdu Ahmed), Abdulmalik Abdulwahhab Al-Rahabi, Makhtar Yahia Naji Al-Wrafie, Aref Abd II Rheem, Yasein Khasem Mohammad Esmail, Adnan Farhan Abdul Latif, Jamal Mar'i, Othman Abdulraheem Mohammad, Adil Saeed El Haj Obaid,

LIST OF ALL PARTIES—continued

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Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

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OPINIONS BELOW

The opinion of the U.S. District Court for the District of Columbia (App. 61-128)[1] is reported at 355 F. Supp. 2d 443 (D.D.C. 2005). The opinion of the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") (App. 1-54) is reported at 476 F.3d 981 (D.C. Cir. 2007).

JURISDICTION

The judgment of the D.C. Circuit was entered on February 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS

U.S. Constitution, art. I, § 9, cl. 2 and amend. V; Authorization for Use of Military Force ("AUMF"), 115 Stat. 224 (2001); Military Commissions Act of 2006 ("MCA") §§ 3(a) (adding 10 U.S.C. § 950j(b)), 7, Pub. L. No. 109-366, 120 Stat. 2600; Detainee Treatment Act of 2005 ("DTA") § 1005, Pub. L. No. 109-148, 119 Stat. 2740, 10 U.S.C. § 801 note. These provisions are reprinted at App. 129-140.

STATEMENT OF THE CASE

A. Petitioners

Petitioners are prisoners detained by the United States at the U.S. Naval Base at Guantanamo Bay. None is an enemy alien; all are nationals of countries allied with the United States. Most have been in U.S. custody for more than five years. Some were taken into custody in Afghanistan and Pakistan, and were turned over by local warlords for large financial bounties. Others were taken into custody thousands

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[1] "App." refers to the Appendix to the Petition for Writ of Certiorari (March 5, 2007). "J.A." refers to the Joint Appendix filed concurrently with this brief pursuant to Rule 26 of the Supreme Court Rules. "S.A." refers to the Supplemental Public Joint Appendix filed by the parties below in the D.C. Circuit on August 1, 2005.

of miles from the conflict in Afghanistan.[2] All maintain that they have never engaged in combat against the United States and have never participated in acts of terrorism. They seek a single remedy: a fair and impartial hearing before a neutral decision maker to determine whether there is a valid basis for detaining them. They have never received such a hearing, although this Court ruled more than three years ago that they are entitled to one. *See Rasul v. Bush*, 542 U.S. 466 (2004).

B. Guantanamo

In 1903, the United States entered into a lease for Guantanamo with the newly formed Republic of Cuba. While recognizing Cuba's "ultimate sovereignty" over Guantanamo, the lease expressly states that the United States shall exercise "complete jurisdiction and control" over the area with the right to do so permanently if it so chooses.[3] U.S. law applies at Guantanamo. Animals there, including iguanas, are protected by U.S. laws and regulations, and anyone, including any federal official, who violates those laws is subject to U.S. civil and criminal penalties.[4] The U.S. Navy web site describes Guantanamo as a "Naval reservation, which, for all practical purposes, is American territory. . . . [T]he United States has for [over one hundred years] exercised the essential elements of sovereignty over

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[2] Jamil El-Banna, for example, was seized at the airport in Gambia while on a business trip and turned over to CIA agents who rendered him to Afghanistan. He was held and brutally interrogated, first at a secret site and then at the Bagram Air Force Base, before being shipped to Guantanamo. *See* Intelligence Security Comm. (UK), RENDITION, 2007, Cm. 7171, at 40-44.

[3] Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. 418.

[4] *See* Endangered Species Act, 16 U.S.C. §§ 1536(a)(2), 1538(a)(1)(F); 50 C.F.R. §§ 17.11 (extending protection to Cuban iguanas), 17.21(f), 17.31(a).

this territory, without actually owning it."[5]

C. Prior Proceedings

This litigation has been pending for more than five and a half years. The first case was filed on February 19, 2002, *Rasul v. Bush*, D.D.C., No. 02-CV-0299 (CKK), followed soon after by *Al Odah v. United States*, D.D.C., No. 02-CV-0828 (CKK). Both cases sought impartial hearings to determine if lawful bases existed for the detentions. The government moved to dismiss for lack of jurisdiction, the district court granted the motion, and the D.C. Circuit affirmed. Relying principally *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the D.C. Circuit held that, as aliens outside the area of technical U.S. sovereignty, petitioners had no rights under the Constitution and therefore no access to the U.S. courts through the writ of habeas corpus or otherwise. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

This Court reversed. It found that the Guantanamo detainees "differ from the *Eisentrager* detainees in important respects":

> They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Rasul, 542 U.S. at 476. The Court held that aliens at Guantanamo, "no less than American citizens," have the right to challenge the legality of their detention in the U.S. courts through the writ of habeas corpus. *Id.* at 481. In

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[5] *See The History of Guantanamo Bay: An Online Edition* (1964), ch. 3, *available at* http://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistmurphy/gtmohistmurphyvol1/gtmohistmurphyvol1ch03 ("U.S. Navy Website").

addition to holding that petitioners were entitled to the writ under statute, the Court concluded that application of the writ to them was "consistent with the historical reach of the writ of habeas corpus" at common law. *Id.* It observed that "[h]abeas corpus is . . . 'a writ antecedent to statute,'" and at common law the writ extended to persons detained not only "within sovereign territory of the realm," but in "all other dominions under the sovereign's control." *Id.* at 473, 481-82. The Court also noted that the Guantanamo petitioners' claims "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" *Id.* at 484 n.15. The Court remanded to the district court with instructions "to consider in the first instance the merits of petitioners' claims." *Id.* at 485.

Just days later, Deputy Secretary of Defense Paul Wolfowitz announced, as a matter of internal department "management," a new, so-called Combatant Status Review Tribunal ("CSRT") process at Guantanamo.[6] That process did not purport to provide *de novo* determinations of whether the detainees were properly detained. According to the announcement, those determinations had already been made "through multiple levels of review by officers of the Department of Defense."

The CSRTs provided a process under which panels of three military officers would review those determinations previously made by their superiors in the Department. The detainees were not allowed counsel. They were not allowed to see any information the government considered classified, although "all of the CSRT's decisions substantially relied upon classified evidence." App. 103. They could not confront their accusers or question their reliability or whether their accusations were obtained through coercion, and they were not allowed to present evidence unless the CSRT panels found it was "reasonably available," which the

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[6] Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004) (App. 141-46).

panels rarely did.[7] The CSRT procedures established a presumption in favor of the government's evidence, including all the evidence kept secret from the detainees.

In short, the detainees had the burden of proving themselves innocent of charges that, for the most part, they could not see, let alone examine or rebut, made by anonymous sources they could not confront. Predictably, in over 90 percent of the cases, the tribunals confirmed the closed-door decisions previously made by their superiors that the detainees were properly detained as enemy combatants. And in cases where the panels concluded that a detainee was not an enemy combatant, new panels were often convened to conclude that he was.[8]

On October 4, 2004, while it was still conducting CSRTs at Guantanamo, the government moved in the district court to dismiss these cases as a matter of law. It argued again that, because petitioners are aliens detained outside sovereign U.S. territory, they have no constitutional rights and therefore no right to obtain relief. Judge Richard Leon agreed and granted the government's motion to dismiss in two of the cases that were then pending. *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). The judges in the other 11 pending cases transferred those cases for decision to Judge Joyce Hens Green, who denied the government's motion in large part. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) (App. 61-127).

Judge Green rejected the government's contention that it could deny the detainees constitutional rights by placing

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[7] The CSRTs denied every request made by a detainee for a witness who was not already detained at Guantanamo. *See* Mark Denbeaux *et al.*, Seton Hall University School of Law, *No Hearing Hearings: An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantánamo* at 2-3, 28 (2006), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf ("Denbeaux Report").

[8] *See id.* at 37-39; Declaration of Stephen Abraham ¶ 23 (J.A. 109).

them in Guantanamo. Judge Green held that "the right not to be deprived of liberty without due process of law [ ] is one of the most fundamental rights recognized by the U.S. Constitution," and that, in light of the decision in *Rasul*, "it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply." App. 96. Judge Green also rejected the government's alternative argument that the CSRT proceedings afforded petitioners the equivalent of due process. App. 96-102. She found that the CSRT procedures "deprive[d] the detainees of sufficient notice of the factual bases for their detention and den[ied] them a fair opportunity to challenge their incarceration," and also improperly allowed for reliance on statements obtained through torture and coercion. App. 103, 111-12.

On February 3, 2005, Judge Green certified respondents' request for interlocutory appeal and granted their motion for a stay of proceedings pending the outcome of the appeal. The D.C. Circuit consolidated those appeals with petitioners' appeal from Judge Leon's decision.

D. The DTA and the MCA

On December 30, 2005, after the cases had been briefed and argued before the D.C. Circuit, the President signed into law the Detainee Treatment Act of 2005 (the "DTA"). Section 1005(e) of the DTA purported to strip the courts of jurisdiction over habeas petitions filed by Guantanamo detainees. App. 132-38. In lieu of plenary habeas review in the district court, the DTA confers jurisdiction on the D.C. Circuit "to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." App. 135. It provides that the D.C. Circuit's scope of review "shall be limited" to consideration of whether the CSRT determination was "consistent with the standards and procedures specified by the Secretary of Defense," and whether the use of the Secretary's standards and procedures "is consistent with the

Constitution and laws of the United States," to "the extent that the Constitution and laws of the United States are applicable." App. 135-36.

This Court held in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764-69 (2006), that the DTA did not deprive the courts of jurisdiction over habeas cases pending in court when the legislation was enacted.

On October 17, 2006, the President signed into law the Military Commissions Act of 2006 (the "MCA"). App. 139-40. Section 7(a) of the MCA substituted for the amendment to 28 U.S.C. § 2241 made by the DTA a new amendment stripping the courts of jurisdiction over two categories of cases: (1) "application[s] for a writ of habeas corpus" and (2) "other action[s]" that relate "to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of aliens detained by the United States as enemy combatants. That amendment takes effect upon enactment of the MCA and applies "to all cases, without exception, pending on or after the date of the enactment . . . which relate to any aspect of the detention."

E. Court of Appeals Opinion

The D.C. Circuit held that the MCA eliminated the courts' jurisdiction over petitioners' pending habeas cases. App. 6-10. The majority (Randolph & Sentelle, JJ.) also held that the elimination of habeas did not violate the Suspension Clause of the U.S. Constitution. App. 14-21. In reaching that decision, the majority found it unnecessary to examine whether the review process under the statute provided an adequate substitute for habeas because it held that, as aliens detained outside U.S. sovereign territory, petitioners had no right to the writ under common law or the Constitution. Relying again principally on *Eisentrager*, the majority concluded categorically that "the Constitution does not confer rights on aliens without property or presence within the United States." App. 15.

Judge Rogers dissented. She concluded that petitioners' right to obtain habeas review of their detentions is protected by the Suspension Clause, which "is a limitation on the powers of Congress." App. 23. She further concluded that the DTA review procedure did not provide an adequate substitute for the habeas review to which petitioners were entitled. She found that:

> Far from merely adjusting the mechanism for vindicating the habeas right, the DTA imposes a series of hurdles while saddling each Guantanamo detainee with an assortment of handicaps that make the obstacles insurmountable . . . . [The statutory] alternatives are neither adequate to test whether detention is unlawful nor directed toward releasing those who are unlawfully held.[9]

SUMMARY OF ARGUMENT

More than three years ago, this Court rejected the government's contention that it could operate a prison at Guantanamo outside the law. The Court held that the Guantanamo detainees had the statutory right to habeas, but also found more broadly that Guantanamo was not "extraterritorial," but rather that, as an area within the complete jurisdiction and control of the United States, it was within U.S. "territorial jurisdiction," and that the writ of habeas corpus to review the reasonableness of their detentions would have extended to detainees there at common law. *Rasul*, 542 U.S. at 480-81.

The D.C. Circuit decision rejects those central findings of *Rasul*. Narrowly, it holds that the MCA does not violate the Suspension Clause because petitioners have no common law or constitutionally protected right to habeas corpus. But, more broadly, it says that Congress could repeal the

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[9] App. 41.

petitioners' right to habeas corpus because aliens detained outside the area of technical U.S. sovereignty have no constitutional protections whatsoever. In so holding, the D.C. Circuit opinion establishes a broad and far-reaching rule that would allow the Executive Branch to disregard any constitutional restraints on its actions simply by choosing to detain foreigners outside U.S. sovereign territory even in areas where the U.S. exercises complete jurisdiction and control such as Guantanamo. The executive's exemption from constitutional restraint and from legal review of its actions would not depend on a state of war, or the duration of the imprisonment, or the treatment of the detainees. The government could forever avoid any constitutional restraint merely by choosing to hold foreigners in areas outside technical U.S. sovereignty. Quite simply, the D.C. Circuit opinion authorizes the U.S. government to establish off-shore prison camps far removed from any battlefield that are totally outside the law. There is no precedent for that in U.S. history, and it is contrary to our most fundamental traditions.

The petitioners seek modest relief, but relief that is essential to America's standing as a nation committed to the rule of law. Petitioners do not challenge the government's authority to capture and detain members of enemy armed forces who engage in combat against the United States and its allies. Nor do petitioners challenge the government's authority to arrest and incarcerate people who engage in acts of international terrorism. But petitioners contend that they have not engaged in combat against the United States or its allies and have not participated in acts of terrorism. All they seek – and have ever sought for the almost six years that they have been detained – is a fair and impartial hearing at which they have the opportunity to confront and rebut whatever accusations there are against them and to present evidence of their own to establish their innocence. They have never had that opportunity, and the MCA would deprive them of it forever.

There is good reason to believe that petitioners' claims may be true. The *National Journal* summarized its exhaustive study of the government's CSRT records as follows:

> A high percentage [of the detainees] . . . were not captured on any battlefield . . .
>
> Fewer than 20 percent . . . have ever been Qaeda members.
>
> Many scores, and perhaps hundreds, of the detainees were not even Taliban foot soldiers, let alone Qaeda terrorists. They were innocent, wrongly seized non-combatants with no intention of joining the Qaeda campaign to murder Americans.
>
> The majority were not captured by U.S. forces but rather handed over by reward-seeking Pakistanis and Afghan warlords and by villagers of highly doubtful reliability.[10]

Military personnel at Guantanamo have acknowledged that many of the detainees are there by mistake. The former Guantanamo commander stated: "Sometimes we just didn't get the right folks," and the reason these "folks" were still in Guantanamo was that "Nobody wants to be the one to sign the release papers . . . . There's no muscle in the system."[11] We now know that five years ago the CIA had sent a confidential memorandum to Washington reporting that most of the Guantanamo detainees "didn't belong there."[12]

This Court held in *Rasul* that petitioners are entitled to challenge the legality of their detentions through the writ of

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[10] Stuart Taylor, Jr., *Falsehoods About Guantanamo*, NAT'L J., Feb. 4, 2006, at 13; Corine Hegland, *Who Is at Guantanamo Bay*, NAT'L J., Feb. 4, 2006, at 33-35.

[11] Christopher Cooper, *Detention Plan: In Guantanamo, Prisoners Languish in Sea of Red Tape*, WALL ST. J., Jan. 26, 2005, at A1, A10.

[12] That report was brought to the attention of White House officials and ignored. *See* Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, NEW YORKER, July 3, 2006, at 54.

habeas corpus. That right is protected by the Suspension Clause in Article I, Section 9, Clause 2 of the Constitution. The D.C. Circuit's decision that the Suspension Clause is inapplicable here because the petitioners have no rights to the writ under the common law or the Constitution is simply incorrect:

1. The Suspension Clause is a direct and explicit structural limit on the power of Congress. Unless the circumstances specified in the Constitution for a suspension exist – and they clearly do not – Congress may not suspend the writ. It is simply without power to do so.

2. Moreover, petitioners' right to habeas corpus falls squarely within the protections of the Suspension Clause. As this Court has made clear, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). The Court concluded in *Rasul* that petitioners would have been entitled to the writ as of 1789. Thus, it held not only that petitioners were entitled to the writ under the habeas statute, but also that application of the writ to them "is consistent with the historic reach of the writ of habeas corpus" at common law, where it extended to such persons detained not only "within sovereign territory of the realm," but in "all other dominions under the sovereign's control." *Id.* at 473, 481-82.

3. Petitioners' constitutional protections are not limited to the Suspension Clause. These petitioners, who have been detained by the U.S. government for more than five years in exclusive U.S. custody and within the territorial jurisdiction of the United States, are entitled to fundamental constitutional protections, including the protections of due process of law as well as the Suspension Clause.

They are entitled to those protections, first, because as the Court made clear in *Rasul*, Guantanamo is not extraterritorial; it is within U.S. "territorial jurisdiction." *Rasul*, 542 U.S. at 480. Fundamental constitutional protections apply to "all persons within the territorial

jurisdiction" of the United States. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

Second, they are entitled to those protections because the rights they assert – to habeas corpus and due process of law – are fundamental. The courts long ago rejected the proposition that the Constitution limits U.S. government action only within our borders. As Justice Frankfurter stated: that "notion . . . has long since evaporated. Governmental action abroad is performed under both the authority and the restrictions of the Constitution . . . ." *Reid v. Covert*, 354 U.S. 1, 56 (1957) (Frankfurter, J., concurring); *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring). Although certain provisions of the Constitution might not apply in all locations and in all circumstances, "a fundamental right . . . goes wherever the jurisdiction of the United States extends . . . ." *Dorr v. United States*, 195 U.S. 138, 148 (1904). No court has ever found that the rights of habeas corpus and due process of law are anything less than fundamental.

Finally, petitioners are entitled to fundamental constitutional protections because they are being confined – potentially indefinitely – by the U.S. government. The United States has deprived them of their liberty and imposed its control over them and, in doing so, must act in accordance with those principles of fairness fundamental to our constitutional system. The government has never cited a case holding that it may deprive people of their liberty except in accordance with due process of law. The process that is due may differ depending on the circumstances, but there is no rigid rule automatically exempting U.S. government officials abroad from the obligation to act in accordance with the "traditional notions of fair play and substantial justice" embodied in the Fifth Amendment. *See Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 113 (1987).

Accordingly, fundamental constitutional protections, including the protections of the Suspension Clause and due process of law, apply. In the absence of a rebellion or invasion, Congress cannot suspend the writ to which petitioners are entitled without providing them an adequate and effective substitute that is equivalent to habeas. *See Swain v. Pressley*, 430 U.S. 372, 381 (1977). It has not done so. The alternative process under the DTA is not commensurate with habeas and was not intended to be. It was purposely designed to curtail the detainees' rights to challenge the legality of their detentions.

Unlike the plenary reviews conducted by district courts in habeas, under the DTA, the D.C. Circuit is not allowed to accept or consider new evidence; rather, it is restricted to considering, based solely on the evidence already before the government, whether the CSRTs followed their own "standards and procedures" in reaching their decisions. Those standards and procedures, however, deprived the detainees of the most basic requirements of due process: an alien prisoner held virtually incommunicado was required to overcome secret allegations, the particulars of which he could not know and the reliability of which he could not test, before a military panel whose superiors had repeatedly prejudged the result, and he was required to do all this without counsel.

The DTA does not correct those problems; it condones and perpetuates them. Most importantly, by continuing to deprive the detainees of the ability to confront the accusations against them and to introduce evidence to the court rebutting those accusations and establishing their innocence, the DTA is patently inadequate. Those rights are essential to any fair hearing, and they are fundamental to the writ of habeas corpus.

ARGUMENT

"Freedom of the person under the protection of the habeas corpus I deem [one of the] essential principles of our government."

– THOMAS JEFFERSON, 1ST INAUGURAL ADDRESS.

"It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement."

– SECRETARY OF STATE FOR HOME AFFAIRS V. O'BRIEN [1923] A.C. 603, 609 (H.L.).

"Under the best tradition of Anglo-American law, courts will not deny hearing to an unconvicted prisoner just because he is an alien whose keep, in legal theory, is just outside our gates . . . . United States officers [may not] take without due process of law the life, the liberty or the property of an alien who has come within our jurisdiction; and that means he must meet a fair hearing with fair notice of the charges."

– SHAUGHNESSY V. UNITED STATES EX REL. MEZEI, 345 U.S. 209, 218-19, 226-27 (1953) (JACKSON, J., DISSENTING).

"[W]hy are we proud? We are proud, first of all, because from the beginning of this Nation, a man can walk upright, no matter who he is . . . . He can walk upright and meet his friend – or his enemy; and he does not fear that because that enemy may be in a position of great power that he can be suddenly thrown in jail to rot there without charges and with no recourse to justice. We have the habeas corpus act, and we respect it."

– PRESIDENT DWIGHT D. EISENHOWER, B'NAI B'RITH ANTI-DEFAMATION LEAGUE (NOV. 23, 1953).

I. THE GOVERNMENT MAY NOT AVOID THE CONSTITUTIONAL LIMITS ON ITS AUTHORITY BY ELECTING TO HOLD PRISONERS OUTSIDE U.S. SOVEREIGN TERRITORY.

The D.C. Circuit decision creates a categorical rule that, if allowed to stand, would have far reaching effect. It empowers the government to disregard any constitutional restraints on its actions whenever it chooses to imprison aliens in areas outside technical U.S. sovereignty.

It is important to understand the breadth of that rule. It does not depend on a state of war or whether the foreigners detained are enemy combatants. It would apply in times of peace as well as war. It would as clearly authorize executive officials to seize an English civilian off the streets of London in time of peace as an Arab fighter off the battlefield in Afghanistan in time of war. In either case, the officials would not need to explain to any court why their actions are required to further the nation's security interests, or attempt to reconcile those interests with the commands of legality, fairness, or due process – so long as its prisoners are foreigners jailed outside U.S. sovereign territory.

That would be so no matter how long the prisoners are held – for a few months, or a few years, or forever. U.S. officials could do whatever they want to those foreigners, denying them not only the most basic procedural protections but substantive protections as well, including guarantees against discrimination, torture and coercion. Indeed, the U.S. courts would even be barred from considering a claim by detainees that U.S. government officials had suddenly ordered them to be placed before a firing squad and shot, without charge, trial or conviction of any crime.[13] The D.C. Circuit's decision quite literally empowers the government

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[13] In fact, the government has expressly asserted its authority to take just such actions with respect to aliens it holds prisoner outside U.S. sovereign territory. *See Gherebi v. Bush*, 374 F.3d 727, 738 (9th Cir. 2004) (concerning Falen Gherebi, a petitioner in this case).

to establish offshore prison camps for aliens far from any battlefield and totally outside the law.

Preserving the military's flexibility on the battlefield does not require the executive to be exempted from our laws in safer times and more secure locations. Whatever support there might be for denying aliens in certain foreign locations certain constitutional protections in certain circumstances, there is absolutely no support for the broad and rigid rule that the D.C. Circuit has adopted. It is without precedent in the law and contrary to our most fundamental values.

II. THE SUSPENSION CLAUSE LIMITS CONGRESS' AUTHORITY TO SUSPEND THE WRIT OF HABEAS CORPUS TO WHICH THIS COURT HELD PETITIONERS ARE ENTITLED.

The D.C. Circuit held the Suspension Clause inapplicable to this case because, it said, petitioners have no constitutional rights under the Suspension Clause or otherwise. In so doing, the D.C. Circuit misconstrued both the nature of the Suspension Clause and the rights to which petitioners are entitled.

A. The Suspension Clause is an Explicit Structural Limitation on the Power of Congress.

Article I, Section 9, Clause 2 of the Constitution provides: "The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Unlike the Fourth, Fifth, and Sixth Amendments, this Clause does not itself confer rights on individuals. Rather, it provides constitutional protection to a preexisting right founded in the common law: the right to obtain independent judicial review of a detention to ensure that no person is deprived of liberty by the Executive without a satisfactory basis in law and in fact.

The Founders considered that right essential. *See* Federalist No. 84 (Hamilton). They recognized that in times of stress the political branches might be tempted to restrict

the liberties of those most subject to the current public ire, and they adopted the Suspension Clause to protect the Great Writ from intrusion by the legislature except in the most extreme public emergencies.[14]

The Suspension Clause is a direct and explicit limit on the power of Congress. That is why the Framers placed it in Article I of the Constitution. It permits Congress to suspend the writ only in certain, narrowly defined circumstances, and no others. Unless those circumstances exist – and they clearly do not – Congress may not suspend the writ. That is the beginning and end of the inquiry. Congress may no more suspend the writ in the absence of "Rebellion" or "Invasion" consistently with Article I, Section 9, Clause 2 of the Constitution than it may pass a bill of attainder or ex-post facto law consistently with Article I, Section 9, Clause 3. It could not pass a bill of attainder with respect to a foreign national abroad any more than it could with respect to a U.S. citizen at home. It is simply without power to do so.

The Founders also made clear that they expected the courts to enforce these constitutional limits on Congress' authority and to declare void any legislative act in excess of those limits. As Alexander Hamilton explained:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the

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[14] *See* Brief of Legal Historians as *Amici Curiae* in Support of Petitioners; Brief for *Amici Curiae* Coalition of Non-Government Organizations.

> reservations of particular rights or privileges would amount to nothing. . . .
>
> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm that . . . men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

Federalist No. 78 (Hamilton); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Congress has authorized suspension of the Great Writ only four times, and each occurred during times of undisputed, and congressionally declared, rebellion or invasion.[15] In enacting the MCA, Congress did not even purport to find the constitutionally required rebellion or invasion. Thus, Congress has no power to suspend the writ.[16]

B. Petitioners' Right to Habeas Corpus Established by This Court in *Rasul* Falls Directly Within the Protections of the Suspension Clause.

This Court has not yet resolved whether the protections of the Suspension Clause encompass all of the evolutions the writ has undergone since 1789. The Court has emphasized, however, that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301.

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[15] *See* William F. Duker, *A Constitutional History of Habeas Corpus* 149, 178 n.190 (1980).

[16] Like any litigants aggrieved by unauthorized congressional action, petitioners are entitled to raise this issue and challenge whether Congress has acted beyond the constitutional limits of its authority in depriving them of their right to habeas. *See INS v. Chadha*, 462 U.S. 919, 936-37 (1983).

The Court found in *Rasul* not only that these petitioners are entitled to the writ under statute, but also that they would have been entitled to it at common law as of 1789. The Court stated:

> Application of the habeas statute to persons detained at the [Guantanamo] base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called "exempt jurisdictions," where ordinary writs did not run, and all other dominions under the sovereign's control. As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown."

542 U.S. at 481-82. The Court thus found that the writ of habeas corpus at common law applied to aliens detained outside the realm but in territories under the subjection of the Crown. The Court also noted that "[l]ater cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" *Id.* at 482.

Because the United States exercises "complete jurisdiction and control" over Guantanamo, petitioners detained there would have been entitled to petition for the writ as of 1789, and their right to do so falls squarely within the core protection of the Suspension Clause.[17]

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[17] Restricting the reach of the writ on the basis of rigid, formal notions of territorial sovereignty would be inconsistent with the essential purpose of the writ; to protect individuals, whether citizens or aliens, against arbitrary executive detention. *See St. Cyr*, 533 U.S. at 301 ("it is in that context that [the writ's] protections have been strongest"). As this Court has emphasized, habeas corpus "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its

C. These Petitioners, Who Have Been Detained by U.S. Officials for More than Five Years in Exclusive U.S. Custody and Within the "Territorial Jurisdiction" of the United States, are Entitled to Fundamental Constitutional Protections.

In addition, as prisoners held in U.S. custody at Guantanamo, an area within the complete jurisdiction and control of the United States, petitioners are entitled to fundamental constitutional protections, including the protections of the Suspension Clause and of due process.

1. Fundamental Constitutional Protections Apply to All Persons Within the "Territorial Jurisdiction" of the United States.

As the history on the Navy web site states: Guantanamo, "for all practical purposes, is American territory."[18] The Guantanamo lease differs significantly from other leases for U.S. military bases; it is the only one that continues indefinitely so long as the United States chooses to stay there.[19] As Justice Kennedy pointed out: "Guantanamo Bay is in every practical respect a United States territory . . . . [The Guantanamo] lease is no ordinary lease. Its term is indefinite and at the discretion of the United States . . . . From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring).

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grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). *See also* Brief of Legal Historians as *Amici Curiae* in Support of Petitioners; Brief for the Commonwealth Lawyers Association as *Amicus Curiae*.

[18] *The History of Guantanamo Bay*, *supra* note 6.

[19] *See* Lease of Lands for Coaling and Naval Stations, T.S. 418.

The Court held in *Rasul* that Guantanamo is not "extraterritorial." As an area under the "complete jurisdiction and control" of the United States, the Court found that Guantanamo is within U.S. "territorial jurisdiction." *Id.* at 480. Fundamental constitutional protections apply to "all persons within the territorial jurisdiction" of the United States. *See Yick Wo*, 118 U.S. at 369 (the Due Process Clause of the Fourteenth Amendment protects "all persons within the territorial jurisdiction" of the United States); *see also Plyler v. Doe*, 457 U.S. 202, 215 (1982); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2681-82 (2006). Because petitioners are within the "territorial jurisdiction" of the United States, they are entitled to fundamental constitutional protections.[20]

2. Fundamental Constitutional Protections Apply Wherever the Jurisdiction of the United States Extends.

As Justice Frankfurter pointed out fifty years ago, the notion that the Constitution operates only in lands over which the United States flag flies "has long since evaporated. Governmental action abroad is performed both under the authority and the restrictions of the Constitution . . . ." *Reid v. Covert*, 354 U.S. at 56 (Frankfurter, J., concurring). *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) ("[T]he

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[20] Holding these petitioners entitled to constitutional protection is thus entirely consistent with *Eisentrager*. To the extent that the Court in *Eisentrager* relied on territorial considerations, it placed greater weight on the "territorial jurisdiction" of the United States than on sovereignty. *See* 339 U.S. at 771 ("in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its *territorial jurisdiction* that gave the Judiciary the power to act") (emphasis added). In finding that Guantanamo is within the "territorial jurisdiction" of the United States, the Court in *Rasul* thus used the very words identified by *Eisentrager* as defining the scope of the geographic application of the Constitution.

Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic"). As Justice Harlan phrased it:

> The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions of the Constitution which do not *necessarily* apply in all circumstances in every foreign place. . . . [T]here is no rigid and abstract rule . . . .

Reid, 354 U.S. at 74 (Harlan, J., concurring). The adoption of just such a rigid rule by the D.C. Circuit – categorically denying constitutional protections to aliens outside sovereign U.S. territory – is, of course, directly contrary to that teaching.

Justice Harlan went on to explain that, depending on the particular locality, conditions and circumstances, adherence to specific constitutional guarantees abroad might prove to be "impractical and anomalous." *Id.* As Justice Frankfurter explained further: "The territorial cases . . . held that certain specific constitutional restrictions on the Government did not automatically apply . . . . [M]any of our laws and customs found an uncongenial soil because they ill accorded with the history and habits of [the local] people." *Id.* at 51 (Frankfurter, J., concurring).

That was never the case, however, with respect to "fundamental" rights. As Justice Frankfurter pointed out, quoting one of the earlier Insular Cases, "a fundamental right . . . goes wherever the jurisdiction of the United States extends . . . ." *Id.* at 51-52 (quoting *Dorr v. United States*, 195 U.S. at 148). The rights that petitioners assert here – to due process of law and independent review of the legality of their detentions – are "fundamental right[s]" that apply "wherever the jurisdiction of the United States extends." *Id.* *See Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922) ("The guaranties of certain fundamental personal rights declared in the Constitution, *as for instance that no person could be deprived of life, liberty or property without due*

process of law, had from the beginning full application in the Philippines and Porto Rico . . . .") (emphasis added).

3. Petitioners are Entitled to Fundamental Constitutional Protections Because the United States has Deprived Them of their Liberty.

In addition, petitioners are entitled to fundamental constitutional protections because they are being imprisoned by the United States. The U.S. government has forcibly taken, transported and jailed them against their will, deprived them of their liberty, and asserted exclusive control over them.[21] In doing so, the U.S. government must act in accordance with the authority granted to it by the Constitution and the limits on that authority imposed by the Constitution. No rigid rule exempts the government from its constitutional obligations when it imprisons people outside the sovereign borders of the United States.

No case is cited in the D.C. Circuit decision, has ever been cited by the government, or exists, for the proposition that where, as here, the U.S. government has forcibly taken, transported, and jailed aliens against their will, deprived them of their liberty, and asserted exclusive custodial authority over them, it is entitled to a blanket exemption from the Constitution simply because it is holding them outside U.S. sovereign territory. *Eisentrager* does not stand

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[21] In that regard, these cases differ from the Insular Cases discussed earlier. *See, e.g., Dorr v. United States*, 195 U.S. 138; *Balzac v. Porto Rico*, 258 U.S. 298. The question in those cases was the extent to which the Constitution applied in proceedings pending against the plaintiffs in the local courts of those territories, which had their own, different legal customs and traditions. The plaintiffs in those cases – unlike here – were not challenging U.S. government actions upon them. The issue before the Court was whether the plaintiffs were entitled to full U.S. constitutional protections in those proceedings because they happened to be residents of territories acquired by the United States. As discussed, the Court held that residents of these territories are entitled to "fundamental" constitutional protections.

for that proposition. The petitioners in that case had been convicted after trial before a duly constituted commission where they were represented by counsel, had the right to examine and rebut the evidence against them, cross examine witnesses and present evidence of their own. Indeed, six of the detainees charged in that case were acquitted. They received due process of law and never even challenged in this Court the fairness of the procedures under which they were tried. *Eisentrager* provides no support for the D.C. Circuit's holding that the U.S. government may avoid the obligation of providing due process and fundamental fairness to aliens under its exclusive custodial authority by acting outside U.S. sovereign territory.[22]

Recognizing that obligation will not hamstring our military or threaten our security. *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.") The process due an individual on or near a battlefield in the heat or immediate aftermath of battle is clearly different from the process due more than five years

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[22] The government and the D.C. Circuit have cited this Court's decision in *Verdugo-Urquidez*, 494 U.S. 259, to support this proposition, but its holding clearly does not. That case involved the application of the warrant requirement of the Fourth Amendment to a search in Mexico of the residence of a Mexican citizen. The search was authorized by Mexican officials, and the different traditions and institutions there made "adherence to the Fourth Amendment's warrant requirement impracticable and anomalous." *Id.* at 278 (Kennedy, J., concurring).

Guantanamo, of course, is not a foreign jurisdiction like Mexico. It is under the complete jurisdiction and control of the United States; only U.S. laws apply and only U.S. courts have jurisdiction there. Recognition of fundamental rights for Guantanamo detainees therefore would not conflict with or disrupt the legal systems of any foreign country. But failure to afford fundamental constitutional protections to detainees there would leave Guantanamo a legal black hole – a land without law – where the executive can rule arbitrarily and absolutely. Such a result would be "anomalous."

later, thousands of miles from any battlefield, in a secure and safe location, such as Guantanamo.

The experience of other nations facing ongoing threats of terrorism demonstrates that judicial review of detentions can be exercised consistently with national security. Perhaps more than any other nation, the State of Israel has faced terrorism, both within and outside its territorial sovereignty, but its courts have always remained open to challenges to the legality of national security measures alleged to infringe fundamental rights. Although the Israel High Court of Justice has ruled that "the court will not take any stance on the manner of conducting the combat,"[23] the court has ruled on various petitions challenging detentions of suspected terrorists, and struck down an order issued in the midst of a terrorist crisis that allowed suspected terrorists to be detained for up to 30 days without access to an impartial judicial official.[24]

The court recognized that "there is room to postpone . . . the judicial intervention until after detainees are taken out of the battlefield to a place where the initial investigation and judicial intervention can be carried out properly."[25] Once that happened, however, access to a judicial official cannot be delayed. The court held that allowing detention for 30 days without access to judicial authority "unlawfully infringes upon the judge's authority, thus infringing upon the detainee's liberty, which the international and Israeli legal frameworks are intended to protect."[26]

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[23] *Barakeh v. Minister of Defense*, HCJ 3114/02, 56(3) P.D. 11, 16 (Israel High Ct. of Justice 2002).

[24] *Marab v. IDF Commander in the West Bank*, HCJ 3239/02, slip op. at 15 (Israel High Ct. of Justice 2003).

[25] *Marab*, slip op. at 20.

[26] *Id.* at 23. In 2002, the President of the Israel Supreme Court emphasized the critical role that judges play in fighting terrorism:

* * *

These petitioners, detained by the United States in its exclusive custody for more than five years far from any battlefield and in a place that is for all practical purposes American territory, must be accorded fundamental constitutional protections. They are entitled to due process of law, and their right to habeas corpus established by this Court in *Rasul* is protected by the Suspension Clause.

III. THE DTA PROVIDES NO ADEQUATE OR EFFECTIVE SUBSTITUTE FOR HABEAS.

The Suspension Clause brooks no compromise. There is no rebellion or invasion and Congress is therefore without authority to suspend the writ. It may provide a substitute remedy, but only if the substitute is "commensurate with habeas corpus relief" and is "neither inadequate nor ineffective to test the legality" of the detention. *Swain v. Pressley*, 430 U.S. at 381, 384.

The substitute Congress has provided here falls well short of meeting that test. It is not commensurate with habeas and was not intended to be.

A. Habeas Provides a "Swift and Imperative Remedy," Guaranteeing Petitioners in Executive Detention a Searching Judicial Review into the Legal and Factual Bases for their Detentions.

As Justice Jackson explained, the writ of habeas corpus was the fundamental protection developed by the English common law courts to protect the right secured by the

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> We, the judges in modern democracies, are responsible for protecting democracies both from terrorism and from the means that the state wants to use to fight terrorism . . . .
>
> The power of society to stand up against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values.

Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 149-51 (2002).

Magna Carta to be free from unwarranted executive restraint. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218-19 (1953) (Jackson, J., dissenting). Chief Justice Marshall explained: "the great object of [the writ] is the liberation of those who may be imprisoned without sufficient cause." *Ex parte Watkins*, 28 U.S. 193, 202 (1830). The writ has always been interpreted broadly to give courts flexibility to accomplish its great purpose and "to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

This Court has emphasized that, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301. In cases such as these of pure executive detention, where the petitioners are not being detained following judicial trial and have no prospect of a prompt judicial trial, a habeas court at common law would itself conduct a searching and plenary examination into the basis for the detention. The government would be required to file a return specifying its asserted legal and factual justifications for the detention, but the court would not simply accept the government's return as true. Rather, the petitioner would be entitled to controvert the return and to present evidence. The whole purpose of the procedure was to require the government to come forward and present its factual and legal grounds for the detention so that the prisoner could confront and have the opportunity to refute those grounds before a neutral decision maker. In cases of executive detention, the court would review the evidence, hold a hearing if necessary and resolve disputed facts. *See* Brief of Legal Historians as *Amici Curiae* (describing the factual review undertaken by common law habeas courts); *Harris v. Nelson*, 394 U.S. at 298 ("Petitioners in habeas corpus proceedings . . . are entitled to careful consideration and

plenary processing of their claims including full opportunity for the presentation of the relevant facts.").

At common law, if the Executive had undertaken some prior process of its own to justify the detention, such as the CSRT process, a habeas court could not be bound by that process, or restricted simply to reviewing whether the executive had followed its own rules in conducting the process. Indeed, the Habeas Corpus Act of 1640 was passed by the English Parliament largely to prevent judicial deference to internal processes employed by the King and his Council – including the infamous Star Chamber – and to require independent judicial review of the factual and legal bases for the detention so that the court itself could "examine and determine whether the cause of commitment . . . be just and legal[] or not." 16 Car. 1 (1640). *See* R. J. Sharpe, *The Law of Habeas Corpus* 7-16 (2d ed. 1989). As Justice Holmes stated:

> [H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from outside, not in subordination to the [prior] proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.

Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). *See Moore v. Dempsey*, 261 U.S. 86, 92 (1923).

In conducting its review, the court would disregard any evidence obtained through torture or coercion. At common law, there was a clear prohibition against the use of evidence obtained by torture, not simply because of its "inherent unreliability" but also because "it degraded all those who lent themselves to the practice." *A. v. Secretary of State*, [2006] A.C. 221, ¶ 11, ¶ 51 (H.L.) (the "common law has regarded torture and its fruits with abhorrence for over 500 years"). *See Jackson v. Denno*, 378 U.S. 368, 385-86 (1964).

Particularly in cases of executive detention, habeas is also supposed to provide speedy relief, so that innocent people are not left rotting in jail at the whim of the executive

without trial or judicial review. This Court has emphasized "the need to preserve the writ of habeas corpus as a '*swift and imperative remedy* in all cases of illegal restraint or confinement,'" *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490 (1973) (emphasis added) (citing *Secretary of State for Home Affairs v. O'Brien*, [1923] A.C. 603, 609 (H.L.) (habeas is "perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy")).

Finally, there is but one remedy in habeas if the executive is unable to justify the detention: "an order releasing the petitioner." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). *See Ex parte Watkins*, 28 U.S. at 202 ("the great object of [the writ] is the liberation of those . . . imprisoned without sufficient cause."); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 136 (1807) (when detention has not been justified a habeas court "can only direct [the prisoner] to be discharged").

B. Congress Intended to Deprive Petitioners of a Review Commensurate with Habeas.

As discussed in detail below, the limited judicial review permitted under the DTA does not provide petitioners a remedy that is even remotely equivalent to the searching judicial review that would be available in habeas. In fact, that was Congress' purpose; it had no intention of providing petitioners a review commensurate with habeas.

This case differs markedly in that regard from the earlier cases of *Swain v. Pressley*, 430 U.S. 372; *Hill v. United States*, 368 U.S. 424 (1962); and *United States v. Hayman*, 342 U.S. 205 (1952). In upholding the substitute procedures provided by Congress in those cases, the Court placed great weight on Congress' intent *not* to impinge on the petitioners' full rights to pursue habeas relief. It found that Congress' purpose was to provide a remedy "exactly commensurate" with habeas, *Hill*, 368 U.S. at 427, and that "[n]owhere" in the legislative history was there an indication of "any

purpose to impinge upon prisoners' [habeas] rights . . . ." *Hayman*, 342 U.S. at 217, 219.[27]

That is certainly not the case here. As Senator Cornyn said during the debates on the MCA, the purpose of the legislation was to replace the habeas "litigation instigated by *Rasul v. Bush* with a narrow D.C. Circuit-only review of the [CSRT] hearings." 152 Cong. Rec. S10403 (daily ed. Sept. 28, 2006). As Senator Kyl, another sponsor of the legislation, explained: "It is not for the courts to decide if someone is an enemy combatant . . . . The only thing the DTA asks the courts to do is check that the record of the CSRT hearings reflect that the military *has used its own rules*." 152 Cong. Rec. S10271 (daily ed. Sept. 27, 2006) (Sen. Kyl) (emphasis added).

In other words, Congress had no intention of providing petitioners a remedy commensurate with habeas. The entire purpose of the legislation was to deprive petitioners of habeas or anything remotely resembling it. Congress accomplished that purpose and, in doing so, violated the Suspension Clause.

C. Rather than the Plenary Review Required in Habeas, the DTA Allows Only a Limited Appellate Review of an Existing Record that is Inherently Incomplete, Inadequate and Corrupt.

The scope of the review permitted under the DTA is plainly not commensurate with habeas. Rather than the plenary review conducted by trial courts in habeas, the DTA restricts the D.C. Circuit to conducting an appellate review of existing evidence developed under procedures that deprived detainees of the most basic rights to confront the accusations against them. It precludes the court from accepting and considering new evidence and limits it to

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[27] Congress, in enacting the laws at issue in those cases, also included express "savings clauses" providing that traditional habeas relief remained available if the substitute provisions proved "inadequate" or "ineffective." Congress put no such savings clause in the MCA or DTA.

considering, on the basis of existing evidence before the government, whether the CSRT determination "was consistent with the standards and procedures specified by the Secretary of Defense"[28] – in other words, as Senator Kyl said, whether "the record of the CSRT hearings reflect that the military has used its own rules." 152 Cong. Rec. S10271.

Congress placed the responsibility for conducting the review in the D.C. Circuit rather than the district court to ensure that it would be an appellate review of the existing record. *See* 152 Cong. Rec. S10403 (daily ed. Sept. 28, 2006) (the MCA authorizes limited DTA review "by design" because "[c]ourts of appeals do not hold evidentiary hearings or otherwise take in evidence outside of the administrative record") (remarks of Sen. Cornyn); 152 Cong. Rec. S10268 (daily ed. Sept. 27, 2006) ("the DTA does not allow re-examination of the facts . . . and it limits the review to the administrative record.") (remarks of Sen. Kyl).[29]

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[28] App. 135-36. Subsection (C)(ii) also authorizes the D.C. Circuit to consider "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures . . . is consistent with the Constitution and laws of the United States." Most importantly, subsection (C)(ii) does not allow a plenary, trial-level review of the factual basis for the petitioner's detention, as would habeas review under 28 U.S.C. §2241 and the common law. Subsection (C)(ii) would allow the court to determine whether the CSRT procedures were consistent with the Constitution, if the Constitution applies. But, if this Court agrees that the Constitution applies, then it is clear, as Judge Green held, that the CSRT procedures violate the most basic requirements of due process. *See* App. 62, 103, 111-12. In that case, the review permitted under the DTA, of whether the CSRTs had followed their constitutionally deficient procedures, would clearly not be an adequate substitute for habeas, and habeas would be required to test the legality of the detentions.

[29] As the government has put it: "This language evokes [the D.C. Circuit's] familiar function of reviewing a final administrative decision based upon the record before the agency" and "underscores the fact that Congress intended [the D.C. Circuit] to assess the CSRT record rather than attempt to create a new factual record based on discovery." Corrected Brief for Respondent Addressing Pending Preliminary Motions

There is a dispute over the scope of the "record" in a DTA case.[30] But however the issue is eventually resolved, it is clear that a plenary factual hearing of the type conducted by trial courts in habeas proceedings is not allowed, and new facts and evidence, even of innocence and torture, are not permitted. DTA review is limited to an appellate review by the D.C. Circuit of existing evidence already in the government's possession.[31]

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at 51-52, *Bismullah v. Gates* and *Parhat v. Gates*, Nos. 06-1197, 06-1397 (D.C. Cir. Apr. 10, 2007).

[30] In a recent order in *Bismullah v. Gates*, Nos. 06-1197, 06-1397, 2007 WL 2067938, at *13 (D.C. Cir. July 20, 2007), the D.C. Circuit ruled that the "record" consists of "all 'reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant.'" It rejected the government's contention that the record is limited to the portion of that information which a military agent selected for presentation to the CSRT. However, on August 22, 2007, the government asked the D.C. Circuit not to order production of the record until November 12, 2007, while it considers whether to seek rehearing, or until 60 days after the D.C. Circuit disposes of a motion for rehearing, whichever is later. It is evidently the government's view that, in contrast to habeas, under the DTA the Executive rather than the Judiciary decides what the courts should know about the cases before them. *See Bracy v. Gramley*, 520 U.S. 899, 903 & n.3, 909 (1997); *Harris v. Nelson*, 394 U.S. at 300.

[31] The government has claimed that, under a new DoD instruction (OARDECINST 5421.1, May 7, 2007), petitioners may submit new evidence regarding their status as enemy combatants. Brief for the Respondents in Opposition to Petition for Certiorari at 17, *Boumediene v. Bush* and *Al Odah v. United States*, Nos. 06-1195, 06-1196 (U.S. Mar. 21, 2007) However, the new instruction, which purportedly implements DTA § 1005(a)(3) requiring CSRT procedures to "provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee," allows petitioners to submit new evidence *only* to DoD, which has "unreviewable discretion" to decide whether to convene a CSRT to reconsider a detainee's status on the basis of new evidence. Critically, neither the new instruction nor DTA § 1005(a)(3) permits petitioners to present *any* new evidence to the court, or permits the court to consider it. The D.C. Circuit may consider only existing evidence already before the government.

Because the CSRT procedures themselves were so flawed, the record produced as a result of those procedures is flawed as well, and inherently incomplete and corrupt. By limiting judicial review to an appellate review by the D.C. Circuit of the existing record, the DTA locks those flaws in place forever.

1. The Record Is Incomplete Because, Without Counsel or Notice of the Accusations Against Them, Petitioners Could Not Introduce Evidence to Establish Their Innocence.

At their CSRTs, the petitioners had the burden of proving themselves innocent of charges that, for the most part, they could not see, let alone examine or rebut, made by anonymous sources they could not confront. The DTA does not correct those basic problems; it perpetuates them.

Under the CSRT rules, detainees were not shown or given an opportunity to rebut any information the government considered classified. As Judge Green found, "it appears that all of the CSRT's decisions substantially relied upon classified evidence." App. 103. In fact, the record shows that, in every case, the CSRTs relied upon classified evidence that was withheld from the detainees, and in many cases, this secret evidence provided the only justification for the CSRT's decision.[32]

The unfairness of this procedure is apparent even from the face of the unclassified CSRT records. For instance, Mustafa Ait Idir was deemed an enemy combatant based, in part, on the allegation that while he lived in Bosnia he "associated with a known Al Qaeda operative." *See* App. 103. Mr. Ait Idir pleaded for the CSRT panel to give him the name of this alleged associate or the basis for the

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[32] *See* S.A. 1315-22; 1335-42; 1360-64; 1373-82; 1661-64; 1694-1700; 1760-63; 1772-78; 1806-14; 1850-52; *see also* Denbeaux Report, *supra* note 2, at 37-39.

allegation that this unknown individual was an al Qaeda operative. The panel refused; the information was classified. App. 104-06. Mr. Ait Idir could only attempt to defend himself against the accusation that *someone* he associated with was an al Qaeda operative, but of course it is not possible to prove that *everyone* with whom one has ever associated is unconnected to al Qaeda. As Mr. Ait Idir stated, "I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation." App. 104.

Likewise, Abdullah Al Kandari was designated an enemy combatant principally because, more than a year after he was brought to Guantanamo and more than a year after this suit was brought, an "alias" of his name was allegedly found on a list of names on a document saved on a computer hard drive allegedly "associated with a senior al Qaeda member." S.A. 1360. Mr. Al Kandari stated that he is not known by any alias, and asked what name appeared on the list. He was not allowed to know; the information was classified. J.A. 68. The name of the "senior al Qaeda member" was likewise classified, as was the place where the hard drive was found. *Id.* Mr. Al Kandari was thus left to defend himself against the accusation that an unknown alias of his appeared on a list on a computer found somewhere in the world associated with someone. It is impossible to rebut such a charge, and Mr. Al Kandari said so: "The problem is the secret information, I can't defend myself." *Id.*

Because the CSRTs relied on classified information in every case, these examples can be readily multiplied.[33] They underscore the impossibility of defending against allegations based on secret evidence because the accused, "like Joseph K. in *The Trial* – can prevail . . . only if he can rebut the undisclosed evidence against him . . . . It is difficult to imagine how even someone innocent of all wrongdoing

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[33] *See generally* Brief for *Amici Curiae* Coalition of Non-Government Organizations.

could meet such a burden." *Rafeedie v. INS*, 880 F.2d 506, 516 (D.C. Cir. 1989).[34]

The DTA simply perpetuates the problem. Because the detainees were not notified of the accusations against them, they could not put evidence into the record to rebut those accusations. And the record is now closed. The DTA locks it in place, and prevents them from ever having the opportunity to meet and rebut the charges against them.[35]

Not only were the detainees not informed of the key accusations against them, they were also not allowed lawyers, something they would clearly be entitled to in habeas. And they were denied counsel even though each of the petitioners was already represented by counsel in these habeas cases when their CSRTs took place. Instead of a lawyer, the detainees were assigned a "personal representative" who was instructed to tell the detainee: "I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing.

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[34] This Court has long held that a person may not be deprived of liberty based on such secret evidence:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental actions seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Greene v. McElroy, 360 U.S. 474, 496 (1959).

[35] The courts of appeals consistently have held that, despite *Hayman*, 28 U.S.C. § 2255 is *not* an adequate or effective substitute for habeas in circumstances where it prevents prisoners from presenting evidence of actual innocence to the courts, such as where the prisoner is making a successive motion, and to preserve section 2255 against Suspension Clause attack, the courts have invoked its "savings clause" and allowed prisoners to make those claims in applications for habeas corpus under 28 U.S.C. § 2241. *See, e.g. In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002); *Reyes-Requena v. United States*, 243 F.3d 893, 900-06 (5th Cir. 2001); *In re Davenport*, 147 F.3d 605, 608-612 (7th Cir. 1998).

None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing." App. 172.

This Court has long recognized the critical importance of counsel in assisting one accused of wrongdoing: "He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).[36]

Assistance of counsel was particularly important here because the detainees were isolated at Guantanamo with virtually no ability to communicate with the outside world. In these circumstances, assistance of counsel was essential to test the allegations and gather evidence to disprove them. For instance, one of the principal reasons for detaining Murat Kurnaz as an enemy combatant was that he was a friend of Selcuk Bilgin, who was "alleged to have been a suicide bomber." App. 107. Detained at Guantanamo, without counsel or access to the outside world, Mr. Kurnaz could only express shock at that allegation. He did not know and could not find out that that his friend, Mr. Bilgin, far from being a suicide bomber, was alive and well and living peacefully and without criminal suspicion in their hometown of Bremen, Germany.[37] That is something his counsel could have found out and proved in short order, had he been allowed counsel. Because he was not, the allegation that his friend was a suicide bomber was accepted by the CSRT as true, as it would be on review under the DTA, even though it was objectively false. Thus, even when the detainees were informed of the accusations against them, without the

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[36] *See* Brief of *Amicus Curiae* the Association of the Bar of the City of New York in Support of Petitioners.

[37] Carol Leonnig, *Panel Ignored Evidence on Detainee: U.S. Intelligence, German Authorities Found No Ties to Terrorists*, WASH. POST, March 27, 2005, at A01.

assistance of counsel, they were deprived of a meaningful opportunity to rebut the accusations and to develop and present the evidence needed to establish their innocence.

Victims of mistaken identity – a serious risk in this unconventional conflict, *see Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality opinion) – also were helpless without the assistance of counsel at their CSRT hearings. For example, one detainee was seized from his home by Pakistani officers, shipped to Guantanamo and accused at his CSRT of being Abdur Rahman Zahid, a former Taliban deputy foreign minister. The detainee protested that his name is Abdur *Sayed* Rahman, not Abdur *Rahman* Zahid, and that "I am only a chicken farmer in Pakistan."[38] Pleading the obvious, however, Mr. Rahman stated: "I have no proof because I am here at Guantanamo." *Id.* Unfortunately for Mr. Rahman, his counsel would be precluded now by the narrow review provisions of the DTA from presenting evidence of his client's true identity to the court; a preclusion unimaginable under habeas review.

As mentioned, in the *Bismullah* case, the D.C. Circuit recently ruled that, for purposes of DTA review, the "record" consists of "all 'reasonably available information in the possession of the U.S. Government . . . .'" Although that ruling is apparently of concern to the government, it is of little solace to detainees. They are not permitted to introduce new evidence to the court under the statute. And they had no practical way of introducing evidence earlier rebutting charges they were not informed of, or which they could not gather evidence to disprove while isolated in Guantanamo without counsel. Because they were uninformed and unrepresented – in accordance with the CSRT rules – the

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[38] Department of Defense, Reprocessed Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) Documents, (Mar. 3, 2006) [hereinafter "DOD Documents"], Set 3 at 00272-94 (Summarized Sworn Detainee Statement for Abdur Sayed Rahman, ISN No. 581), http://www.defenselink.mil/pubs/foi/detainees/csrt/ index.html.

record is necessarily incomplete; it lacks the exculpatory evidence that they could have introduced had they been informed and represented.

The government has argued that review under the DTA is adequate because it allows the D.C. Circuit to determine if the CSRT decision is supported by a preponderance of the evidence. But as Judge Rogers pointed out, "assessing whether the government has more evidence in its favor than the detainee is hardly the proper antidote" in these circumstances where the record is inherently incomplete. App. 43.

2. The Record is Replete With and Corrupted By Evidence Obtained Through Coercion.

As Judges Rogers and Green both pointed out, the CSRT procedures allow continued detentions to be justified on the basis of evidence resulting from torture – something that would clearly be prohibited in habeas proceedings and which the common law "has regarded . . . with abhorrence for over 500 years." *A. v. Sec'y of State*, [2006] 2 A.C. 221, ¶ 51 (H.L.) (appeal taken from Eng.) (Bingham, L.).

Judge Green described the case of Mamdouh Habib, who alleged that he had been sent by the United States to Egypt for interrogation where he was subjected to severe beatings, locked in handcuffs in a room that gradually filled with water to a level just below his chin as he stood for hours on the tips of his toes, and that he was suspended from a wall with his feet resting on an electrified cylindrical drum. Mr. Habib alleged that, while undergoing this treatment, he admitted to doing many things he had never done. App. 112-13. Without resolving the accuracy of Mr. Habib's allegations, the CSRT relied on the statements that he made while in Egypt and concluded that he was an enemy combatant. App. 111-13.

Interrogation techniques officially approved for use at Guantanamo included isolation for up to thirty days; twenty-hour interrogations; extreme and prolonged stress positions;

sleep deprivation; sensory assault; deprivation of clothing; hooding; and use of dogs.[39] Judge Green, in her opinion, refers to a number of cases of alleged abuse there and quotes from a memorandum by an FBI agent, produced in response to a Freedom of Information Act request, summarizing his observations of interrogation methods used at Guantanamo:

> On a couple of occassions [sic], I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defacated [sic] on themselves, and had been left there for 18-24 hours or more. On one occassion [sic], the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MP's what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occassion [sic], the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconcious [sic] on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occassion [sic], not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.

App. 112-14.

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[39] *See* Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism (Apr. 4, 2003), *reprinted in The Torture Papers: The Road to Abu Ghraib* at 340-43 (Karen J. Greenberg and Joshua L. Dratel, eds. 2005); Memorandum for Commander, Joint Task Force 170 from Lt. Col. Diane E. Beaver (Oct. 11, 2002), *reprinted in The Torture Papers*, *supra*, at 234.

Other memoranda from FBI agents also complained about the "torture techniques" and "extreme interrogation techniques" employed at Guantanamo, and reported, among other incidents: (1) a female interrogator grabbing the genitals of a detainee and bending his thumbs back; (2) a detainee gagged with his head wrapped with duct tape; (3) the use of dogs to intimidate detainees; and (4) a detainee left in isolation for three months in a cell constantly flooded with bright light who afterward showed signs of "extreme psychological trauma." *See* J.A. 80-90.

More information of brutal treatment at Guantanamo has come to light since those memoranda were disclosed. A government interrogation log obtained and published by *Time* magazine, for example, reveals in gruesome detail how one detainee, Mohammed al Qahtani, was subjected to gross and humiliating physical and psychological abuse over extended periods of time.[40] Significantly, according to the government, that abuse resulted in statements by Mr. al Qahtani implicating not only himself, but 30 other detainees at Guantanamo as well.[41] Under the CSRT procedures, none of these men was allowed to know the identity of his accuser, or to question the credibility of those accusations.

In some cases, DTA review might be able to identify and possibly exclude accusations made by certain individuals, such as Mr. al Qahtani, whom everyone now knows were subjected to coercive techniques. But in most cases, the record will either not identify an accuser or not reveal whether accusations were the result of coercion. There is no way for the court of appeals to know from the cold record how long the accuser had been kept awake before he made his statements, what treatment he had been subjected to or

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[40] *See* Interrogation Log: Detainee 063, *available at* http://www.time.com/time/2006/log/log.pdf.

[41] U.S. Dep't of Defense, Press Release No. 592-05, *Guantanamo provides valuable intelligence information* (June 12, 2005), *at* http://www.defenselink.mil/releases/release.aspx?releaseid=8583.

what threats or promises had been made to him in extracting information. Under the CSRT procedures and the standards applied under the DTA, a rebuttable presumption will apply that all these accusations are true, and there will be no way to rebut them.

The DTA required the Secretary of Defense to adopt new rules in 2006, requiring future CSRTs to determine, to the extent practicable, whether any statements were obtained as a result of coercion. App. 133.[42] But those rules only came into effect *after* these petitioners' CSRTs were held. There was no requirement then to determine whether any of the accusations against them were derived through torture or coercion, and there is no way of knowing that now. The record therefore was developed without any of the safeguards of reliability and integrity that are built into the records of lower court decisions and administrative proceedings normally reviewed on appeal. The record here is replete with evidence obtained through coercion and is therefore inherently corrupt and unreliable.

There is another problem. Even if a CSRT panel did identify evidence as derived from torture, there was (and is) no requirement that it disregard that evidence. To the contrary, a panel even now is authorized by the statute, and under the standards and procedures specified by the Secretary, to rely on such statements if it finds them "probative." App. 133. The CSRT rules therefore expressly permit what habeas and the common law clearly prohibit: detention based upon coerced evidence.

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[42] In enacting the DTA, Congress therefore acknowledged that the "standards and procedures specified by the Secretary of Defense" for the prior CSRTs, which were applied to these petitioners, were inadequate.

3. The Entire CSRT Process was Infected with Bias Resulting from Command Influence.

For more than two and a half years prior to the CSRTs, the President, the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and various high ranking officers had uniformly and repeatedly declared that the Guantanamo detainees were all "dangerous enemy combatants" who were "picked up on the battlefield" while "fighting American forces."[43] In its brief to this Court three and a half years ago, the government emphasized that both the commander of the U.S. Southern Command and the Secretary of Defense had personally reviewed and approved the classification of each of the Guantanamo detainees as an enemy combatant.[44]

The CSRTs, made up of panels of mid-level officers, were then convened to review whether the decisions already made "through multiple levels of review" by their superiors were correct. They were given no institutional protections of independence. Unlike military judges and panel members in courts-martial under the Uniform Code of Military Justice, and even panel members in military commissions under the MCA, members of CSRTs have no protection against unlawful command influence. *See, e.g.*, 10 U.S.C. § 837 (prohibiting unlawful command influence on court-martial judges and panel members); 10 U.S.C. § 949b (prohibiting unlawful command influence on military commission judges and panel members).[45]

For officers on the CSRT panels to conclude that a detainee was improperly classified as an enemy combatant,

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[43] Taylor, *supra* note 10, at 13.

[44] Brief for Respondents at 7, *Rasul v. Bush* and *Al Odah v. United States*, Nos. 03-334, 03-343 (U.S. Mar. 2004).

[45] The U.S. Court of Military Appeals correctly described command influence as the "mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). *See also* Brief *Amicus Curiae* of Retired Military Officers.

they would have to conclude that all their superiors, including the commander of the U.S. Southern Command, the Secretary of Defense, and the President, were wrong. Without calling into question the good faith and integrity of the military officers who served on the CSRTs, it is not reasonable to expect that they could be totally disinterested in reviewing the longstanding decisions of their superiors.[46]

Lieutenant Colonel Stephen Abraham, a long-time military intelligence officer who assisted in the CSRT process, described his experience as a member of a CSRT panel: "When our panel questioned the evidence, we were told to presume it to be true. When we found no evidence to support an enemy-combatant determination, we were told to leave the hearings open. When we unanimously held the detainee not to be an enemy-combatant, we were told to reconsider. And ultimately, when we did not alter our course . . . a new panel was selected that reached a different result."[47]

This experience was by no means unique. For example, a CSRT panel concluded that Ali Mohammed, a Chinese Uighur was not an enemy combatant. Other panels concluded that 12 identically situated Uighurs were. Defense Department officials expressed concern that "[i]nconsistencies will not cast a favorable light on the

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[46] As this Court has observed:

> [T]he requirement of due process of law . . . is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required . . . or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

Tumey v. Ohio, 273 U.S. 510, 532 (1927). *See Connally v. Georgia*, 429 U.S. 245 (1977).

[47] Testimony of Stephen Abraham, Lt. Colonel, U.S. Army Reserve, before the House Armed Services Committee (July 26, 2007).

CSRT process or the work done by OARDEC," and directed that Mr. Ali's classification be reconsidered. Petition for Original Writ of Habeas Corpus at 7-8, *In re Ali*, No. 06M73 (U.S. Feb. 12, 2007). A new panel was convened and classified Mr. Ali as an enemy combatant, notwithstanding the first tribunal's conclusions, and the fact that years before military officials had determined he "was not fighting for the Taliban or Al Qaida" and "does not represent a threat to the United States nor its interests." *Id.* at 6.

Abdulla Mohammed Kahn was declared an enemy combatant only after a third panel reversed the first two CSRTs proceedings that cleared him. Unclassified CSRT Record at 2-6 & 9-14, *Kahn v. Bush*, No. 05-1001 (D.D.C. Oct. 10, 2006). Panels were also held open and repeatedly reconvened until they reached the conclusion that the detainees were enemy combatants. *See, e.g.*, J.A. 73-75 (El-Banna) (CSRT reconvened three times before reaching enemy combatant finding over personal representative's objection); Unclassified Pages from the CSRT Administrative Record for Hammad Memet at 2 n. 1, *Parhat v. Gates*, No. 06-1197 (D.C. Cir. May 8, 2007) (applying same procedure).

Colonel Abraham summarized his experience with the CSRT process:

> What I expected to see was a fundamentally fair process in which we were charged to seek the truth, free from command influence. In reality, command influence determined not only the lightning fast pace of the 500-plus proceedings, but in large part, the outcome – little more than a validation of prior determinations that the detainees at Guantanamo were enemy-combatants, and . . . presumed to be terrorists who could be detained indefinitely. . . .
>
> The process of which I was a part did not discover the truth but ratified conclusions made long before my

assignment. Those conclusions are entitled to no deference . . . .[48]

This problem of inherent bias – conscious or not – by the finders of fact at the adjudication level has infected and corrupted the entire CSRT process. That problem cannot be fixed now by a neutral, second-level review at the appellate level. *See Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972) ("Petitioner is entitled to a neutral and detached judge in the first instance"). What petitioners are entitled to now, after more than five and a half years in jail, is habeas review by the district court of the legality of their detentions.

D. DTA Review Is Neither Swift Nor Imperative.

This Court has cautioned that, if an individual in executive detention "were subject to any substantial procedural hurdles which made his remedy . . . less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered." *Sanders v. United States*, 373 U.S. 1, 14 (1963). There is no doubt that the DTA remedy is both less "swift" and less "imperative" than habeas.

Since the DTA went into effect at the end of 2005, not a single hearing on the merits has yet been held in any of the cases filed under the DTA.[49] Indeed, the record has not even been produced in any DTA case, and what constitutes "the record" is still under dispute, as are the terms of the protective order governing counsel access to the detainees to

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[48] *Id.*

[49] In fact, the government has urged the D.C. Circuit to take the DTA cases in "stages," and effectively stay all but the five first-filed cases. *See, e.g.*, Opposition to Motion for Production of Information and Other Procedural Relief at 3, *Al-Haag v. Gates*, No. 07-1165 (D.C. Cir. Aug. 6, 2007). This suggestion, if accepted, would keep over a hundred DTA petitioners waiting in prison, possibly for years, before the D.C. Circuit would consider their clearly ripe claims.

pursue DTA claims.[50] Potential rehearings and remands portend further extensive delays.[51] In the meantime, in the year and a half since Congress enacted the DTA eliminating their habeas rights, according to press reports, four detainees have committed suicide.

The DTA is also not imperative. According to the government, the statute does not authorize the D.C. Circuit to order the release of any detainee, even if it finds no factual or legal basis for the detentions; instead, the Court may only order further remands for further CSRTs, which could end up in an endless cycle of remands without release, the single imperative remedy mandated by habeas. *See Bollman*, 8 U.S. (4 Cranch) at 136.

E. The MCA Does Not Allow a Judicial Officer to Make an Unfettered Determination of the Legal Sufficiency of the Detentions.

Under the DTA, once a CSRT determines that a detainee is properly detained as an enemy combatant, judicial review

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[50] The government has not complied with the D.C. Circuit's July 30, 2007 order requiring it to produce the "record on review," as defined in *Bismullah*, 2007 WL 2067938 at *1. The government indicated that it would provide petitioners' counsel with certain information already submitted to the court in May 2007, but only if the petitioners acquiesce to government-proposed changes to the court's July 30, 2007 protective order. Petitioners' Emergency Motion For Entry of Scheduling Order at 4 n.2 & Ex. 8, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Aug. 15, 2007).

[51] For example, in *Paracha v. Gates*, No. 06-1038 (D.C. Cir.), the first DTA case filed, the government is seeking a delay in producing the record, stating that it may move for rehearing of *Bismullah* and that a "clarification in *Bismullah* could markedly alter the scope of the record in this case." Motion for Temporary Stay of Order Requiring Respondent to File Revised Certified Index at 6, *Paracha v. Gates*, No. 06-1038 (D.C. Cir. Aug. 20, 2007). The government also stated that it will take an extensive amount of time to prepare the record because the "material that is being reviewed [by respondents] – which is for the most part highly sensitive intelligence information – was never before reviewed in anticipation that it might be filed in court or turned over to private civilian counsel." *Id.* at 8.

is limited to a decision of whether the determination was "consistent with the standards and procedures specified by the Secretary of Defense" and whether the use of those standards and procedures "is consistent with the Constitution and laws of the United States." App. 135-36. The DTA, as enforced by the MCA, thereby constricts judicial review of the Executive's justification for detaining petitioners (in this case, that they are "enemy combatants") in a manner antithetical to common law habeas.

The rule of decision applied by a judge adjudicating a common law habeas petition was drawn from whatever legal sources the judge determined to be applicable, regardless of the statutes, regulations, or other legal standards the detaining authority proposed by way of self-justification. *See, e.g.*, *Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778) (rejecting Admiralty's contention that legal sufficiency of bargeman's detention should be determined solely by reference to the statute authorizing impressment); *Sommersett v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772) (rejecting slave owner's contention that legal sufficiency of slave's detention should be determined solely by reference to the slavery laws of Virginia). Common law judges would have summarily rejected the proposition that the sole applicable standard for determining the legal sufficiency of Executive detention was the edict of the Executive itself, even if the edict were lawful.[52] That notion would gut the

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[52] The Executive's "standards" for adjudicating petitioners' detentions are based on Deputy Secretary Wolfowitz's definition of "enemy combatant," which has no precedent in U.S. statutes or case law and is contrary to longstanding principles of the laws of war as they have been interpreted and applied by the United States. *See, e.g.*, AUMF, App. 130-31; *Hamdi*, 542 U.S. at 519 (plurality opinion); *Ex parte Quirin*, 317 U.S. 1 (1942); *Al-Marri v. Wright*, 487 F.3d 160, 181 (4th Cir. 2007). That the CSRTs determined the propriety of petitioners' detentions on the basis of an erroneous legal definition is an additional flaw in the MCA/DTA process that further corrupts the CSRT records and renders the factual determinations in them inherently unreliable. *See Rogers v. Richmond*, 365 U.S. 534, 543-49 (1961).

central office of habeas – to test the legal sufficiency of the Executive's asserted justification for the detention. Indeed, by compelling the D.C. Circuit to adjudicate petitioners' pending claims solely on the basis of the Executive's putatively valid rules of decision, Congress, in derogation of the Article III principle of separation of powers, has overstepped its legislative role and impermissibly intruded into the role of the Judiciary. *See United States v. Klein*, 80 U.S. 128, 146-48 (1871).

Further, in limiting the D.C. Circuit to deciding whether the use of the Secretary's "standards and procedures" for determining the lawfulness of petitioners' detentions is consistent with "the Constitution and laws of the United States," the MCA displaced the general federal habeas statute, 28 U.S.C. § 2241(c)(3), which recognizes habeas jurisdiction over claims based on "the Constitution or laws *or treaties* of the United States" (emphasis added).[53] Inasmuch as the Constitution and other federal jurisdictional statutes similarly distinguish between "treaties" and "laws of the United States (*see, e.g.*, U.S. Constitution, Article III, Section 2; U.S. Constitution, Article VI; 28 U.S.C. § 1331; 28 U.S.C. § 1257), it would appear that one of the intended effects of the MCA is to eliminate judicial consideration of treaty-based claims.

Since the inception of this litigation petitioners have alleged that they are in custody in violation of the Geneva Conventions.[54] In *Hamdan*, 126 S. Ct. at 2796, this Court

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[53] Although Section 5(a) of the MCA purports to bar the invocation of the Geneva Conventions "in any habeas corpus . . . proceeding to which the United States" is a party, it would not bar petitioners from invoking the Conventions before a habeas court. Section 5 possesses no indicia of retroactive intent and thus cannot be given retroactive effect. *See Landgraf v. USI Film Products*, 511 U.S. 244, 272 (1994) (statutes "will not be construed to have retroactive effect unless their language requires this result") (citation omitted).

[54] The Geneva Conventions have the status of supreme federal law under Article VI of the Constitution, as a "treat[y]" within the meaning of

held that all persons detained at Guantanamo are protected by "at least" Common Article 3 of the Conventions. And in *Rasul* this Court explicitly acknowledged that petitioners' allegations "unquestionably describe 'custody in violation of the Constitution or laws *or treaties* of the United States'" that are cognizable in habeas. 542 U.S. at 483 n.15 (emphasis added). To the extent that the MCA purports to strip petitioners of the right to assert, and the D.C. Circuit to consider, their treaty-based claims, it suspends the writ.

* * *

There are other inadequacies in the DTA review process not covered here. But, most critically, the limited judicial review available under the DTA is structurally inconsistent and incompatible with the plenary and searching factual review required in habeas. Moreover, it is neither swift nor imperative. The DTA provides a substitute that is neither adequate nor effective to test the legality of the detentions.

Article III of the Constitution and 28 U.S.C. § 2241(c)(3), and therefore provide a substantive source of rights that may be vindicated on habeas. The Conventions "operate[] of [themselves] without the aid of any legislative provision." *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). The Conventions also "prescribe [] rule[s] by which the rights of the private citizen or subject may be determined" and hence to be "enforced in a court of justice." *Head Money Cases*, 112 U.S. 580, 598-99 (1884); *see also Hamdan*, 126 S. Ct. at 2794 n.57 ("the 1949 Geneva Conventions were written 'first and foremost to protect individuals, and not to serve State interests'" (citing 4 Int'l Comm. of Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 21 (1958))). Neither the text nor the surrounding legislative history of the DTA or the MCA provide any indication that Congress intended to alter the status of the Conventions as supreme federal law.

CONCLUSION

The Court should reverse and remand for the habeas hearings mandated by this Court more than three years ago to allow the detainees to test the lawfulness of their detentions before the district court.

Because of the long delays that have already occurred and the government's record of delay and obstruction, in order to ensure that these petitions receive full, fair, and prompt consideration, petitioners respectfully request that the Court remand with instructions that each of petitioners' habeas corpus petitions be reinstated in the district court, that the district court promptly hear and consider those petitions in accordance with the procedures set forth in 28 U.S.C. § 2241 *et. seq.*, and that, in any case where the district court determines that a satisfactory factual or legal basis does not exist for the detention, it order petitioners' immediate release.

Respectfully submitted,

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August 24, 2007

64 680B

68pgs (35)

No. 06-1196

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

KHALED A.F. AL ODAH, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS AL ODAH, ET AL.

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QUESTIONS PRESENTED

1. Whether the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006), as applied to foreign nationals detained at Guantánamo as enemy combatants, violates the Suspension Clause.

2. Whether foreign nationals detained at Guantánamo are entitled to plenary review of the factual and legal bases of their detention by writ of habeas corpus.

PARTIES TO THE PROCEEDING BELOW[1]

1. *Al-Odah v. United States*, No. 02-CV-0828-CKK (D.D.C.). The four petitioners are Fawzi Khalid Abdullah Fahad Al Odah; Fayiz Mohammed Ahmed Al Kandari; Khalid Abdullah Mishal Al Mutairi; and Fouad Mahmoud Al Rabiah.

2. *Abdah v. Bush*, No. 04-CV-1254-HHK (D.D.C.). The twelve petitioners are Mahmoad Abdah, Majid Mahmoud Ahmed, Abdulmalik Abdulwahhab Al-Rahabi, Makhtar Yahia Naji Al-Wrafie, Yasein Khasem Mohammed Esmail, Adnan Farhan Abdul Latif, Jamal Mar'i, Othman Abdulraheem Mohammad, Adil Saeed El Haj Obaid, Mohamed Mohamed Hassen Odaini, Farouk Ali Ahmed Saif, and Salman Yahaldi Hsan Mohammed Saud.

Respondents are the United States of America; George W. Bush, President; Robert M. Gates, Secretary of Defense; Gen. Peter Pace, Chairman, Joint Chiefs of Staff; Donald C. Winter, Secretary of the Navy, Rear Admiral Mark H. Buzby, Commander, Joint Task Force, Guantánamo; and Col. Bruce Vargo, Commander, Joint Detention Operations Group.

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[1] Petitioners are petitioners in two of the cases consolidated in No. 06-1196. Petitioners who have been released from Guantánamo have been omitted, as have next friends who authorized habeas actions in the names of any petitioner. (The next-friend authorizations remain in effect.)

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), and is printed in the Appendix to Petition for Writ of Certiorari ("Pet. App.") 1. The opinion of the United States District Court for the District of Columbia is reported at 355 F. Supp. 2d 443 (D.D.C. 2005), and is reprinted at Pet. App. 61.

JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS

The Constitutional, statutory, and international law provisions involved, which are set forth verbatim in the appendix, are U.S. Const., art. 1, § 9, cl. 2 and amend. V; 28 U.S.C. § 2241; Military Commissions Act of 2006, § 7, Pub. L. No. 109-366, 120 Stat. 2600, 2635-36 (2006); Detainee Treatment Act of 2005, § 1005(b), (e), Pub. L. No. 109-148, 119 Stat. 2680, 2741-43 (2005) (10 U.S.C. § 801 note); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); and Lease of Lands for Coaling and Naval Stations, art. III, Feb. 23, 1903, U.S.-Cuba T.S. No. 418.

STATEMENT

A. Introduction

In *Rasul v. Bush*, 542 U.S. 466 (2004), the Court remanded petitioners' habeas cases to the District Court to "consider . . . the merits of petitioners' claims." *Id.* at 485. Now, more than three years later, about 360 detainees continue to be held at Guantánamo, and not one has had a hearing on the merits of his claims. The Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, purports to strip the courts of jurisdiction to entertain petitioners' habeas cases. Meanwhile, Guan-

tánamo has become an international symbol of the Executive branch's contempt for the rule of law and a deep stain on the reputation of the United States at home and abroad.

B. The Petitioners

Beginning in January 2002, the U.S. transported more than 800 foreign nationals to Guantánamo for detention as "enemy combatants." Petitioners – the four citizens of Kuwait in *Al Odah* and the twelve citizens of Yemen in *Abdah* – are among the foreign nationals held at Guantánamo today. Petitioners deny that they have ever engaged in combat against the United States or its allies. They seek nothing more than a day in court to establish their innocence of any wrongdoing that might justify their detention – a hearing the government has fiercely fought to deny them for nearly six years.

Unlike individuals captured in previous military conflicts, none of the foreign nationals brought to Guantánamo was given a field hearing close to the time and place of his capture to determine whether he was an enemy combatant – lawful or otherwise.[2] Instead, these individuals were taken to Guantánamo for indefinite detention without judicial inquiry. As John Yoo, a Deputy Assistant Attorney General at the time, later explained: "[N]o location was perfect," but Guantánamo "seemed to

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[2] *See Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, U.S. Army Regulation 190-8, ch. 1-5, ¶ a ("All persons taken into custody by U.S. forces will be provided with the protections of the [1949 Geneva Convention Relative to the Treatment of Prisoners of War] "GPW" until some other legal status is determined by a competent authority."); ch. 1-6, ¶ b ("[a] competent tribunal shall determine the status of any person . . . concerning whom any doubt . . . exists") (Oct. 1, 1997), *available at* http://www.usapa.army.mil/pdffiles/r190_8.pdf.

fit the bill. . . . [T]he federal courts probably wouldn't consider Gitmo as falling within their habeas jurisdiction."[3]

C. History of the Case

1. In early 2002, the first habeas actions in these consolidated cases were filed in the U.S. District Court for the District of Columbia. One of the actions was brought by the Kuwaiti petitioners in *Al Odah*. The District Court dismissed the actions for lack of jurisdiction, *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), and the D.C. Circuit affirmed. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). Relying principally on this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the D.C. Circuit held that federal courts lacked jurisdiction to entertain petitioners' habeas actions because they were aliens held outside U.S. sovereign territory. *Al Odah*, 321 F.3d at 1141.

In *Rasul*, this Court reversed, holding that 42 U.S.C. § 2241 gave federal courts jurisdiction to entertain the detainees' habeas actions. The Court pointed out that the Guantánamo detainees differ "in important respects" from the *Eisentrager* detainees. 542 U.S. at 476. The Court noted that, unlike the *Eisentrager* petitioners, who were tried in China and incarcerated in Germany, the *Rasul* petitioners were held "within 'the territorial jurisdiction' of the United States," in an area "over which the United States exercises exclusive jurisdiction and control." *Id.* As Justice Kennedy stated in his concurrence, "Guantánamo Bay is in every practical respect a United States territory." *Id.* at 487 (Kennedy, J., concurring in judgment).

The Court confirmed that Guantánamo detainees, "no less than American citizens," have the right to challenge the legality of their detention in the U.S. courts through

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[3] John Yoo, *War By Other Means: An Insider's Account of the War on Terror* 142-43 (2006).

habeas actions. *Id.* at 481. In addition, the Court stated that the application of the statutory writ to petitioners was "consistent with the historical reach of the writ of habeas corpus" at common law. *Id.* Stating that the petitioners' allegations "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States,'" *id.* at 484 n.15 (quoting 28 U.S.C. § 2241), the Court remanded to the District Court to "consider . . . the merits of petitioners' claims," *id.* at 485. Following *Rasul*, the *Abdah* petitioners, and others, filed habeas actions in the District Court.

2. Days after the Court's decision in *Rasul*, the Deputy Secretary of Defense announced the creation of Combatant Status Review Tribunals ("CSRTs") to review determinations by the Department of Defense that the detainees were "enemy combatants."[4] The CSRTs were not independent tribunals. According to the announcement, and regulations the panel members were expected to follow, the "enemy combatant" determinations had already been approved "through multiple levels of review by officers of the Department of Defense." Wolfowitz Order § a, Pet. App. 141. The tribunals' procedures denied the detainees counsel and permitted "enemy combatant" designations based on secret, incomplete, unreliable, and one-sided evidence, including evidence obtained by torture or coercion. Even if a detainee is declared *not* to be an "enemy combatant," the Deputy Secretary's memorandum authorizes his continued detention for reasons of "foreign policy." Wolfowitz Order § i, Pet. App. 145.

According to Lt. Col. Stephen Abraham, a reserve military intelligence officer who gathered information for CSRT proceedings from government agencies and sat on a CSRT panel that reviewed a detainee's enemy combatant

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[4] Paul Wolfowitz, *Order Establishing Combatant Status Review Tribunal* (Jul. 7, 2004) ("Wolfowitz Order"), Pet. App. 141.

status, the CSRTs did not have access to important and potentially exculpatory information about detainees and were pressured by superiors to designate detainees as enemy combatants.[5] "[B]ased on the selective review that I was permitted, I was left to 'infer' from the absence of exculpatory evidence I was allowed to review that no such information existed in the materials I was not allowed to review." Abraham Decl. ¶ 14. Col. Abraham stated that the information provided to his CSRT panel to sustain an enemy combatant determination "lacked even the most fundamental earmarks of objectively credible evidence." *Id.* ¶ 22. Accordingly, Col. Abraham's panel determined its detainee not to be an enemy combatant. Thereafter, command pressure was brought to bear on the panel to change its decision. *Id.* ¶ 23. When the panel refused to buckle, the case was reassigned to another panel, which determined that the detainee was an enemy combatant.[6]

3. On October 4, 2004, while the CSRT proceedings were underway, the government moved to dismiss the thirteen habeas cases then pending in the District Court. The government argued that *Rasul* merely held that the District Court had statutory jurisdiction to entertain petitioners' habeas actions but that, once petitioners had filed their habeas actions, the District Court was bound to dismiss the actions because petitioners, as aliens held outside U.S. sovereign territory, had no rights that the

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[5] *See* Declaration of Stephen Abraham, Lieutenant Colonel, U.S. Army Reserve, ("Abraham Decl."), Joint Appendix ("Jt. App.") 103. *See also Upholding the Principles of Habeas Corpus for Detainees, 2007: Hearing before the House Armed Services Comm.*, 110th Cong., 1st Sess. (Jul. 26, 2007) ("HASC Hearing") (statement and testimony of Lt. Col. Abraham).

[6] *See* HASC Hearing, *supra* note 5. An original habeas petition has been filed in this Court for this petitioner, Abdul Hamid Al-Ghizzawi. *In re Al-Ghizzawi*, No. 07-M5 (filed Jul. 31, 2007).

court could enforce. Agreeing, Judge Richard Leon, on January 15, 2005, granted the government's motion to dismiss the two cases assigned to him. *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). The petitioners in those cases, *Boumediene* and *Khalid*, appealed.

In the eleven other cases (including *Al Odah* and *Abdah*), Judge Joyce Hens Green denied the government's motion to dismiss in material part. *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). Judge Green first observed that "the right not to be deprived of liberty without due process of law [ ] is one of the most fundamental rights recognized by the U.S. Constitution." *Id.* at 464. Judge Green then held that, in light of *Rasul*, "it is clear that Guantánamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply." *Id.* Judge Green found that the CSRT procedures violated Due Process and the Geneva Conventions because, among other things, the procedures "deprive[d] the detainees of sufficient notice of the factual bases for their detention," "den[ied] them a fair opportunity to challenge their incarceration," and allowed reliance on statements obtained by torture and coercion. *Id.* at 472. On February 3, 2005, Judge Green certified an interlocutory appeal by the government and granted its motion for a stay pending appeal.

4. After this Court granted review in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), a case challenging the military commissions established by the President to try Guantánamo detainees charged with war crimes, Congress passed and the President signed the Detainee Treatment Act of 2005 ("DTA"), tit. X, Pub. L. No. 109-148, 119 Stat. 2680, 2739-44 (2005) (10 U.S.C. § 801 note), amending 28 U.S.C. § 2241 to strip federal courts of jurisdiction to entertain habeas actions by Guantánamo detainees. In lieu of plenary habeas review in district court, the DTA provides for exclusive and limited review by the D.C. Circuit of final CSRT and military commission deci-

sions. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), however, this Court held that the DTA did not apply to cases, such as petitioners', that were pending at the time of the DTA's enactment. *Id.* at 2764-69. The Court went on to hold that the President lacked authority to establish the military commissions because Congress had provided a different scheme in the Uniform Code of Military Justice.

The Administration returned to Congress, attempting to obtain legislation that would strip federal courts of jurisdiction over pending habeas actions of Guantánamo detainees and leave DTA review as the detainees' only judicial recourse. Congress passed the legislation, with alterations, as the MCA, and the President signed it on October 16, 2006. MCA § 7(a) purported to strip federal courts of jurisdiction over habeas cases, and MCA § 7(b) specified an effective date for the amendment made by MCA § 7(a).

5. On February 20, 2007, a divided panel of the D.C. Circuit in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), vacated the District Court's decisions and ordered the cases dismissed for lack of jurisdiction. The panel majority (Randolph & Sentelle, JJ.) first held that MCA § 7(b), the effective date provision, made MCA § 7(a), the habeas jurisdiction-stripping provision, applicable to pending cases. *Id.* at 986-87. Relying heavily on *Eisentrager* – as it had in *Al Odah*, 321 F. 3d 1134, *rev'd sub nom. Rasul*, 542 U.S. 466, and *Hamdan*, 415 F.3d 33, *rev'd*, 126 S. Ct. 2749 – the panel majority then held that petitioners could not challenge MCA § 7(a) under the Suspension Clause because, as aliens held outside U.S. sovereign territory, they possess no constitutional rights. *See Boumediene*, 476 F.3d at 990-91.

Judge Rogers dissented. In her view, the majority "fundamentally misconstrue[d]" the nature of the Suspension Clause, which she characterized as "a limitation on the powers of Congress," and it was only by ignoring the

historical record and this Court's decision in *Rasul* that the majority was able to conclude that the Suspension Clause does not protect habeas claims of Guantánamo detainees. *See id.* at 994-96. Judge Rogers noted that this Court in *Rasul* had affirmed that application of the Great Writ to petitioners "is consistent with the historical reach of the writ of habeas corpus," *id.* at 1002, and she concluded that the limited judicial review of CSRT determinations provided under the MCA and DTA were not a sufficient substitute for habeas corpus, *see id.* at 1006.

This Court, after initially denying petitioners' certiorari petition, granted the petition.

SUMMARY OF ARGUMENT

I. The MCA violates the Suspension Clause. The writ of habeas corpus may be suspended only in cases of invasion or rebellion. Neither condition obtains. Nor are the Guantánamo detainees beyond the reach of the writ. The Suspension Clause protects the writ as it existed in 1789. The writ as it existed in 1789 depended not on formal notions of sovereignty, but on the "exact extent and nature of the jurisdiction or dominion exercised" by the government. *Rasul*, 542 U.S. at 482 (citation omitted). The writ extends to Guantánamo because it is within the "territorial jurisdiction" of the United States. *Id.* at 480. Although sovereignty is not the determining factor, the United States exercises all of the incidents of sovereignty in Guantánamo, including the power of the state to apply its laws, and its laws alone, within the territory; the power to subject all persons within the territory to the processes of its courts or other tribunals; and the power to compel compliance or punish noncompliance with its laws. Under its lease with Cuba, it may exercise these incidents of sovereignty in perpetuity.

Moreover, before 1789, the writ was available to individuals who possessed no rights under positive law. Even assuming the Guantánamo detainees have no such rights,

they are within the reach of the writ as existed in 1789, and are therefore entitled to the processes and remedies afforded by habeas.

The detainees also are entitled to habeas because they possess fundamental due process rights. The Court recognized as much in *Rasul*, and, as authority for the proposition that the petitioners had stated a claim, cited Justice Kennedy's concurring opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and the cases cited therein, which included the *Insular Cases*. In his *Verdugo* concurrence, Justice Kennedy endorsed Justice Harlan's view that the Constitution applies to U.S. government actions in the U.S. or abroad except to the extent that application of certain provisions would be "impracticable and anomalous." Habeas is available to the Guantánamo detainees to enforce these fundamental rights. Finally, habeas is available to the Guantánamo detainees to enforce the Suspension Clause as a structural limitation on the power of Congress. Just as a Guantánamo detainee in *Hamdan* enforced a structural constitutional limit on the power of the Executive to disregard a military commission system established by Congress, so a Guantánamo detainee may enforce a structural limitation on the power of Congress to negate the historic judicial remedy of habeas.

The Court, however, need not address these constitutional issues. Congress has not articulated the "specific and unambiguous statutory directive" required to effect a repeal of habeas. *INS v. St. Cyr*, 533 U.S. 289, 299 (2001). The jurisdiction-stripping provisions of the MCA therefore do not apply to habeas cases pending at the time of enactment.

II. The MCA does not provide "a remedy exactly commensurate with that which had been previously available by habeas corpus." *Hill v. United States*, 368 U.S. 424, 427 (1962). On the contrary, in the MCA Congress deliberately created a limited and narrow remedy that has none of the hallmarks of habeas. Under the MCA, the sole

judicial recourse of a Guantánamo detainee is review under the DTA. But DTA review is not an adequate substitute for habeas. *First*, the DTA does not authorize the D.C. Circuit to review the lawfulness of the detention itself. *Second*, DTA review is limited to the information reasonably available to the government. The detainee cannot present additional evidence in a DTA proceeding that might exculpate him or impeach the government's evidence. CSRT regulations direct the CSRTs to presume that the government's evidence is "genuine and accurate," but the detainee cannot rebut that presumption, or otherwise counter the government's evidence, because much of the government's evidence is classified. *Third*, the CSRT process denies the detainee the assistance of counsel. *Fourth*, the CSRT itself is not a neutral, independent decision maker but is subject to command influence and reversal by superior officers in the chain of command. DTA review cannot cure this problem to the extent that the D.C. Circuit's function is to review CSRT decisions, not to conduct a plenary review of its own. *Fifth*, CSRTs were permitted to rely on evidence obtained by torture or coercion. Due process forbids consideration in a habeas proceeding of evidence obtained by such means. *Sixth*, the DTA does not permit a prisoner to challenge the definition of "enemy combatant" under the CSRT regulations, the legal basis of the detention. *Seventh*, the DTA, at least in the government's estimation, does not authorize the remedy that lies at the heart of habeas – the prisoner's release.

III. Because it dismissed the detainees' habeas cases for lack of jurisdiction, the Court of Appeals never reached the question on which it had granted interlocutory review: whether the District Court had correctly denied the government's motion to dismiss on the ground that the detainees have no constitutional rights. The detainees have constitutional rights, but, even if they did not, habeas would still be available to test the govern-

ment's legal and factual bases for detention. The Court should therefore reverse the decision of the Court of Appeals and remand for expedited habeas corpus hearings.

On remand, the detainees are entitled to plenary review of the government's allegations that they are enemy combatants. Under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), and the law of war, as construed in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), an "enemy combatant" is an individual who is "part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States." Under the much broader definition that the Executive adopted for CSRT purposes, an "enemy combatant" is not limited to those who are part of or supporting hostile forces, and is broad enough to bring nonbelligerent civilians within its reach. The Executive may no more adopt a definition of "enemy combatant" contrary to statute than the Executive may establish military commissions contrary to the legislative regime.

ARGUMENT

I. THE MCA'S ELIMINATION OF HABEAS VIOLATES THE SUSPENSION CLAUSE.

The Suspension Clause protects the writ at least as it existed in 1789. As the Court has already determined in *Rasul* that writ extends to foreign nationals held in Guantánamo. The scope of the writ at common law depended not on "formal notions of territorial sovereignty," but on practical questions of jurisdiction and control. 542 U.S. at 482. Whether or not Guantánamo is U.S. sovereign territory, the Court recognized that it is within the "complete jurisdiction and control" of the United States, to the exclusion of any other sovereign. *Id.* at 480. *Rasul* also recognized that the Guantánamo detainees have asserted claims that "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United

States.'" *Id.* at 484 n.15. Finally, even if the detainees do not possess fundamental rights, they can enforce the Suspension Clause because the clause enforces a structural, judicial limit on the power of Congress. Nothing in *Eisentrager* precludes petitioners' access to habeas.

A. Congress May Not Suspend the Writ Absent a Rebellion or Invasion.

The MCA marks the first time Congress has suspended habeas without a finding of rebellion or invasion. On the four earlier occasions when Congress authorized suspension of the writ, Congress met the requirements of the Suspension Clause. *See* Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755 (suspension during Civil War); Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 13, 14-15 (authorizing suspension upon proclamation by President of rebellion during Reconstruction); Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692 (authorizing suspension upon proclamation by President or Governor, with approval of Philippine Commission, of rebellion or invasion in the Philippines); Hawaiian Organic Act of 1900, ch. 339, § 67, 31 Stat. 141, 153 (authorizing suspension upon proclamation by Governor of rebellion or invasion in Hawaii).

Absent a finding of rebellion or invasion, the Suspension Clause bars Congress from denying Guantánamo detainees access to the Great Writ. Congress' attempt to do so here is void. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871); *Armstrong v. United States*, 80 U.S. (13 Wall.) 154, 154 (1871).[7]

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[7] *Klein* and *Armstrong* addressed a post-Civil War statute that withdrew from the federal courts jurisdiction to hear claims for recovery of seized property brought by pardoned Confederates. See Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 Md. L. Rev. 132 (1995); Lawrence G. Sager, *Constitutional Limitations on Congress' Authority to*

(footnote cont'd)

B. The Writ As It Existed in 1789 Extends to Foreign Nationals Held At Guantánamo.

1. The historical writ extends to Guantánamo.

"[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (citation and footnote omitted). In *Rasul*, the Court concluded that applying the federal habeas statute to persons detained at Guantánamo "is consistent with the historical reach of the writ of habeas corpus." 542 U.S. at 481-82. This conclusion was not mere dictum: it was necessary support for the Court's determination that the habeas statute extended to aliens held at Guantánamo. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) ("[F]or the meaning of the term habeas corpus, resort may unquestionably be had to the common law").[8]

The writ as it existed in 1789 applied in places that were not considered sovereign territory. In *The King v. Overton* and *The King v. Salmon*, for example, the writ

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Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 71 (1981) ("It was clear to the *Klein* Court that Congress could not manipulate jurisdiction to secure unconstitutional ends.").

[8] *St. Cyr* also recognized that common law habeas was available to individuals, like petitioners, who are citizens of countries at peace with the United States: "In England prior to 1789, in the colonies, and in this nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens." *St. Cyr*, 533 U.S. at 301 (footnote omitted); *see also Rex v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (habeas corpus jurisdiction over detention of a Swedish national detained as a prisoner of war); *Case of the Hottentot Venus*, 104 Eng. Rep. 344 (K.B. 1810) (detention of a South African national); *Sommersett v. Stewart*, 20 How. St. Tr. 1 (K.B. 1772) (detention of an African slave purchased in Virginia); *United States v. Villato*, 2 U.S. (2 Dall.) 370 (C.C.D. Pa. 1797) (detention of a Spanish national).

was held to run to the Island of Jersey, which was not sovereign English territory, but rather was historically part of the Duchy of Normandy. *Overton*, 1 Sid. 387, 82 Eng. Rep. 1173 (K.B. 1668); *Salmon*, 2 Keb. 450, 84 Eng. Rep. 282 (K.B. 1669); Sir Matthew Hale, *The History of the Common Law of England* 121 (C. Gray ed. 1971); Charles Le Quesne, *A Constitutional History of Jersey* 98 (1856).[9] Despite Justice Scalia's statement in *Rasul* that there is no case in which the writ of habeas corpus has been extended to an alien held outside of sovereign territory, *see Rasul*, 542 U.S. at 502-05 (Scalia, J., dissenting), even before Great Britain in 1813 asserted sovereignty over territories in India controlled by the East India Company, the justices of Great Britain's Supreme Court in Calcutta issued writs of habeas corpus to review detentions of Indian nationals. *See Rex v. Mitter*, 1 Indian Dec. 210 (1775); B.N. Pandey, *The Introduction of English Law into India* 151 (1967).[10]

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[9] After William, Duke of Normandy, conquered England in 1066, he and later English kings held the Duchy of Normandy not as English kings but as Dukes of Normandy, under the suzerainty of the King of France. In the Treaty of Paris of 1259, Henry III of England ceded his claim as Duke of Normandy to the mainland portion of Normandy but retained control of the Norman islands of Jersey, Man, and Guernsey. The islands later separated from Normandy and assumed plenary power to legislate for themselves and conduct their own foreign affairs. *See* Le Quesne, *supra* p. 14, 98-99. Today, the Islands are considered English Crown dependencies but are not part of the United Kingdom. They are not bound by English laws or treaties except as made applicable to them by the English Crown at the request of their own legislatures.

[10] The government has argued that *Mitter* and *Rex v. Hastings*, 1 Indian Dec. 206 (1775), stand for the proposition that the Supreme Court in Calcutta lacked power to issue a writ of habeas corpus in India. *See* Br. in Opp. at 26 n.11. *Mitter*, however, af-

(footnote cont'd)

Nor does *Rex v. Cowle*, 2 Burr. 834, 97 Eng. Rep. 587 (K.B. 1759), stand for the broad proposition that common law habeas did not extend to "foreign dominions" of the Crown, as the panel majority would have it. *See Boumediene*, 476 F.3d at 989. As Judge Rogers pointed out in her dissent, *Cowle* stated only that the writ would not extend to "foreign dominions, *which belong to a prince who succeeds to the throne of England*." 97 Eng. Rep. at 599-600 (emphasis added). Judge Rogers explained: "[T]he exception noted in Lord Mansfield's qualification has nothing to do with extraterritoriality: Instead, habeas from mainland courts was unnecessary for territories like Scotland that were controlled by princes in the line of succession[,] because [those territories] had independent court systems." *Boumediene*, 476 F.3d at 1002 (citations omitted). In deciding that the King's Bench had the authority to issue a prerogative writ to Berwick – a conquered territory that was once part of Scotland – *Cowle* emphasized the need for the writ to extend to such non-sovereign English territory where no other court had authority to ensure "a fair, impartial, or satisfactory trial or judgment." 97 Eng. Rep. at 603. In such a case, the court asked, "who can judge, but this court?" *Id.* at 599.

The thrust of the historical cases, as *Rasul* found, is that "the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" 542 U.S. at 482 (quoting *Ex parte Mwenya*, [1960] 1 Q.B. 241, 303 (C.A.)).

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firmed that the *justices* of the Supreme Court had power to issue the writ. *Hastings* held that the Supreme Court lacked power to issue a writ of mandamus; but the court distinguished mandamus, then considered a remedial writ, from habeas, a prerogative writ, which the justices affirmed their power to issue. *See* 1 Indian Dec. at 209 (opinion of Chambers, J.) ("we are empowered to grant the writ of habeas corpus").

Because the United States has "complete jurisdiction and control" over Guantánamo, *Rasul*, 542 U.S. at 480-81, and because the essence of the writ of habeas corpus is to protect an individual, whether citizen or nonenemy alien, against arbitrary executive detention, the writ, as it existed in 1789, is available to individuals in the petitioners' position.

2. The United States exercises all of the incidents of sovereignty at Guantánamo.

In the case of Guantánamo, a formalistic insistence on technical sovereignty as a precondition for habeas makes no sense. When the Spanish-American War ended in 1898, the United States occupied Cuba and other former Spanish territories. The U.S. granted Cuba formal independence in 1902 but retained possession of Guantánamo as a naval station. In 1903, when the United States and Cuba entered into a lease of Guantánamo,[11] independent Cuba had never exercised sovereignty over Guantánamo. *See* Kal Raustiala, *The Geography of Justice*, 73 Fordham L. Rev. 2501, 2537 (2005) ("Raustiala").

As Justice Kennedy commented, "this lease is no ordinary lease." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in judgment). The Lease grants "complete jurisdiction and control" of Guantánamo to the United States. *See* Lease, *supra* note 11. It is indefinite in duration "[s]o long as the United States of America shall not abandon the . . . naval station of Guantánamo."[12] Indeed, the Lease itself constitutes a relinquishment of sovereignty to the United States. In an amendment to the Lease on December 27, 1912, the United States and Cuba agreed:

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[11] Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 ("Lease").

[12] *See* Treaty between the United States of America and Cuba Defining Their Relations, art. III, May 29, 1934, 48 Stat. 1683, 1683, T.S. No. 866.

> The limits of the areas of land and water of Guantánamo which were *ceded in lease* to the United States of America by the agreements of February 16/23 and July 2, 1903, are hereby enlarged . . . .[13]

A "cession" effects "an actual transfer of sovereignty." 1 Georg Schwarzenberger, *A Manual of International Law* 116 (4th ed. 1960); *see also* Joseph Lazar, *"Cession in Lease" of the Guantánamo Bay Naval Station and Cuba's "Ultimate Sovereignty,"* 63 Am. J. Int'l L. 116 (1969). Therefore, a cession in lease conveys sovereign authority, with a reversionary interest withheld in the lessor. *See id.* at 117. This understanding is also consistent with the United States' acknowledgement that Guantánamo is a "territor[y] for which the U.S. is internationally responsible."[14]

In this respect, the Guantánamo lease is like other territorial leases between sovereigns entered into in about the same period. In 1898, for example, Great Britain leased the New Territories (the lands adjacent to Hong Kong) from China for a period of ninety-nine years. That lease, which expired in 1997 and was not renewed, gave

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[13] Amendments to the Agreements of February 16/23 and July 2, 1903, Dec. 27, 1912, U.S.-Cuba, 1912 U.S. Foreign Relations 295-97 (emphasis added).

[14] Treaty for the Prohibition of Nuclear Weapons in Latin America: Its Status and the Status of Additional Protocols I and II, Introductory Note by Carol M. Schwab, Office of Legal Adviser, U.S. Dep't of State, *Treaty for the Prohibition of Nuclear Weapons in Latin America: Its Status and the Status of Additional Protocols I and II*, 28 I.L.M. 1400, 1403-04 (May 2, 1989) ("The list of territories for which the U.S. is internationally responsible [consists of] Puerto Rico, U.S. Virgin Islands, Guantánamo Base, Navassa Island, Seranilla Bank and Bajo Nuevo (Petrel Island).").

Great Britain "sole jurisdiction" in the leased area.[15] Although the lease did not expressly grant Great Britain sovereignty over the New Territories, the international community, including China, recognized Great Britain's exercise of sovereignty during the term of the lease.[16]

Even if Cuba possesses some vestige of sovereignty over Guantánamo, there is no reason to think of sovereignty as an indivisible "atom" that cannot be split. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). American power at Guantánamo has all the incidents of formal sovereignty: plenary jurisdiction to prescribe, plenary jurisdiction to adjudicate, and plenary jurisdiction to enforce.[17] All the United States lacks is Cuba's qualified remainder inter-

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[15] Convention Between China and Great Britain Respecting an Extension of Hong Kong Territory, June 9, 1898, P.R.C.-Gr. Brit., 186 Consol. T.S. 310.

[16] *See, e.g.*, Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong, Sept. 26, 1984, 23 I.L.M. 1366, ¶ 3(1) (recognizing that China would resume the exercise of sovereignty over Hong Kong and the New Territories on July 1, 1997).

[17] *See Restatement (Third) of Foreign Relations Law of the United States* § 206 cmt. b; § 401, § 402 (1987). Jurisdiction to prescribe refers to the authority of the state to make its law applicable in the territory. Jurisdiction to adjudicate refers to the authority of the state to subject persons within the territory to the processes of its courts. Jurisdiction to enforce refers to the authority of the state to compel compliance or punish noncompliance with its laws or regulations. The United States exercises all three incidents of jurisdiction in Guantánamo. *See, e.g., United States v. Lee*, 906 F.2d 117, 118 n.1 (4th Cir. 1990) (finding Guantánamo a "special maritime and territorial jurisdiction" of the United States subject to the provisions of 18 U.S.C. § 7 for the punishment of crimes in such places). Cuba exercises none.

est.[18] Thus, as Justice Kennedy stated in his concurring opinion in *Rasul*, "Guantánamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . . From a practical perspective, the indefinite lease of Guantánamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." 542 U.S. at 487 (Kennedy, J., concurring in judgment).

In sum, the historical writ of habeas corpus reaches the Guantánamo detainees. *Rasul*, 542 U.S. at 481. Accordingly, the Suspension Clause ensures their ability to invoke that writ. *St. Cyr*, 533 U.S. at 301.

C. Guantánamo Detainees Have Fundamental Due Process Rights That Habeas Can Vindicate.

In *Rasul*, the Court held that 28 U.S.C. § 2241 gave federal courts jurisdiction over habeas actions brought by Guantánamo detainees. The Court of Appeals apparently believed that dismissal was appropriate because the Guantánamo detainees have no constitutional rights. *Rasul*, however, did more than construe § 2241 to assign federal courts the ministerial role of dismissing actions brought by Guantánamo detainees. *Rasul* recognized that

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[18] That the lease refers to the "ultimate sovereignty" of Cuba over Guantánamo is of no moment. In using "ultimate" to qualify "sovereignty," the lease acknowledges that the United States has sovereignty over Guantánamo during the life of the lease, and that Cuba has sovereignty thereafter. This is a common usage of "ultimate." *See Black's Law Dictionary* 1522 (6th ed. 1990) (defining "ultimate" to mean "At last, finally, or at the end. The last in the train of progression or sequence tended toward by all that precedes; arrived at as the last result; final."). There otherwise would have been no point in using "ultimate" to modify "sovereignty." *See Raustiala*, *supra* p. 16, at 2540-41.

Guantánamo detainees have rights that habeas can vindicate.

In footnote 15, the Court stated:

> Petitioners' allegations – that although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in [E]xecutive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing – unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States."

Rasul, 542 U.S. at 483 n.15. As authority, the Court cited Justice Kennedy's concurrence in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990), "and cases cited therein." Those cases include the *Insular Cases*.

In his concurrence in *Verdugo-Urquidez*, Justice Kennedy quoted Justice Harlan's comment in *Reid v. Covert* that the *Insular Cases* stand for the proposition "not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place." *Verdugo*, 494 U.S. at 277 (Kennedy, J., concurring) (quoting *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring)). Justice Kennedy likewise stated that the Constitution applies unless "the particular local setting" would make application of a constitutional provision "impracticable and anomalous." *See Verdugo*, 494 U.S. at 278.[19]

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[19] Scholars and Courts of Appeals have recognized that Justice Kennedy's concurring opinion in *Verdugo-Urquidez* limits the reach of the majority opinion, because Justice Kennedy's vote was necessary to make the majority of five justices. *See* A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legis-*

(footnote cont'd)

In citing this authority, the Court in *Rasul* recognized that the Guantánamo detainees have fundamental rights, including "personal liberty," "access to courts of justice," and "due process of law." *See Downes v. Bidwell*, 182 U.S. 244, 282-83 (1901). Indeed, it is difficult to conceive a right more fundamental than the right not to be deprived of personal liberty except in accordance with law. *See* Magna Carta ¶ 39 (June 15, 1215) ("No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed – nor will we go upon or send upon him – save by the lawful judgment of his peers or by the law of the land."); *Groppi v. Leslie*, 404 U.S. 496, 502 (1972); *Hamdi*, 542 U.S. at 529.[20]

Nothing in the *Insular Cases*, *Verdugo-Urquidez*, or *Eisentrager* justifies the bright-line test applied by the panel majority in holding that there can be no constitu-

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lation?, 35 Colum. J. Transnat'l L. 379, 399 (1997); Elizabeth Wilson, *The War on Terrorism and "the Water's Edge": Sovereignty, "Territorial Jurisdiction," and the Reach of the U.S. Constitution in the Guantánamo Detainee Litigation*, 8 U. Pa. J. Const. L. 165, 180 (2006); *Lamont v. Woods*, 948 F.2d 825, 835 n. 1 (2nd Cir. 1991); *United States v. Boynes*, 149 F.3d 208, 212 n. 3 (3rd Cir. 1998); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 624-25 (5th Cir. 2006).

[20] The panel majority erroneously rejected the application of the *Insular Cases* on the ground that, in Guantánamo, Congress has not exercised "its power under Article IV, Section 3 of the Constitution to regulate 'Territory or other Property belonging to the United States.'" *Boumediene v. Bush*, 476 F.3d 981, 992 (D.C. Cir. 2007). In fact, Congress has exercised its powers under the Territory Clause. For example, 18 U.S.C. § 7, defining the "special maritime and territorial jurisdiction" of the United States, covers crimes committed by aliens in Guantánamo. *See United States v. Lee*, 906 F.2d 117 (4th Cir. 1990); *cf. United States v. Sharpnack*, 355 U.S. 286, 288 (1958) (stating that 18 U.S.C. § 7 was enacted under Congress' power under the Territory Clause).

tional rights in the absence of territorial sovereignty or citizenship. Rather, as *Rasul* recognized, the "particular local setting" of Guantánamo entitles the detainees to the protection of fundamental due process rights.

In *Verdugo-Urquidez*, the Court considered the application of the Fourth Amendment's prohibition on unreasonable searches and seizures performed by U.S. agents of a home in Mexico belonging to a Mexican national in U.S. custody. *Verdugo-Urquidez*, 494 U.S. at 262. In a five to four opinion, this Court held that the Fourth Amendment does not require exclusion of evidence from such searches. The Court based its holding on its view that the prohibition on unreasonable searches and seizures could not be applied to searches of property belonging to aliens in "foreign lands" because of the need to "function effectively in the company of sovereign nations," raising the concern that application of U.S. law on searches and seizures would "plunge [the government] into a sea of uncertainty as to what might be considered reasonable in the way of searches and seizures conducted abroad." *Id.* at 274. The Court's implicit concern, conflict between the Constitution and foreign law, has no application to territory, like Guantánamo, where the U.S. exercises "complete jurisdiction and control." *Rasul*, 542 U.S. at 480-81.

Eisentrager also involved government action in a foreign country outside the territorial jurisdiction of the United States, and its holding rests on particular circumstances of that case that this Court has already concluded are not applicable with respect to the Guantánamo detainees. *Rasul*, 542 U.S. at 476.

Recognition of fundamental due process rights for Guantánamo detainees would not conflict with or disrupt the legal systems of any foreign country. But failure to recognize the fundamental rights of Guantánamo detainees would leave Guantánamo a legal black hole – a land without law – where the Executive can rule arbitrarily and absolutely and can exclude the judiciary by unilateral

determinations of who constitutes an enemy combatant. It would create a zone where the government can act with impunity and without regard for domestic or international law, encouraging further lawless conduct by future administrations. Such a result would be "anomalous," to say the least. *See Reid*, 354 U.S. at 75 (Harlan, J., concurring).

D. Guantánamo Detainees Could Enforce The Suspension Clause Even If They Did Not Possess Fundamental Rights.

The panel majority held that the Suspension Clause did not apply to the Guantánamo detainees because, in the majority's view, "the Constitution does not confer rights on aliens without property or presence within the United States." *Boumediene*, 476 F.3d at 991. As Judge Rogers recognized in her dissent, however, the Suspension Clause is a structural limitation on the power of Congress. *See* 476 F.3d at 996-97. Like bills of attainder and ex post facto laws, which also are prohibited in Article I, § 9, the suspension of habeas (except in cases of rebellion or invasion) belongs to a "category of Congressional actions which the Constitution barred." *United States v. Lovett*, 328 U.S. 303, 315 (1946). "Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." *Id.* at 314 (quoting *The Federalist No. 78* (Alexander Hamilton)).

Thus, unlike the Fourth and Fifth Amendments, which secure individual *rights* of "the people" or "persons," the Suspension Clause secures a judicial *remedy* for unjustified Executive detention: "[T]he great object of [the writ] is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment." *See, e.g., Ex parte Watkins*, 28 U.S. 193, 202 (1830). The Executive must show a legal and factual basis for the detention, re-

gardless whether the detainee has any substantive rights. A lack of constitutional rights did not shield Executive detention from judicial scrutiny before 1789, and such a justification does not shield Executive detention from judicial scrutiny today.

The Suspension Clause, then, is an essential element of the separation of powers, protecting the power of the judiciary to inquire into the lawful basis of Executive detention, and precluding Congress from removing that power except in accordance with the terms of the Clause. No "rights" are required to challenge a statute that exceeds such a structural limitation on the powers of Congress.

Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), shows that Guantánamo detainees may enforce structural limitations regardless whether they possess fundamental rights. In *Hamdan*, the Court enforced a structural limitation on the Executive's power to try a Guantánamo detainee for war crimes in disregard of the scheme established by Congress in the Uniform Code of Military Justice. In this case, Guantánamo detainees seek to enforce a structural limitation on Congress' power to suspend the judicial remedy of habeas corpus. The Court should enforce that limitation.[21]

E. *Eisentrager* Does Not Preclude Habeas In Petitioners' Circumstances.

In concluding that habeas does not extend to foreign nationals held at Guantánamo, the panel majority relied

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[21] The Court has enforced structural limitations imposed by other constitutional provisions that do not provide individual rights. In *United States v. Lopez*, 514 U.S. 549 (1995), for example, the Court enforced the limitation on Congress' powers under the Commerce Clause. *See also United States v. Butler*, 297 U.S. 1 (1936) (states' rights challenge).

on the same reading of *Eisentrager* that the D.C. Circuit had applied in *Al Odah*, 321 F.3d 1134. *Rasul*, however, rejected that reading in concluding that construing § 2241 to extend to Guantánamo detainees was consistent with the writ as it existed in 1789. The Court did not suggest that *Eisentrager* presented any obstacle to petitioners' access to the common law writ. Moreover, as the Court noted in *Rasul*, *Eisentrager* is inapposite because of the differences between the Guantánamo detainees and the German prisoners in that case. In concluding that the German prisoners were not entitled to habeas, the Court in *Eisentrager* relied on six factors: the prisoners (1) were enemy aliens; (2) never resided in the United States; (3) were captured outside U.S. territory and held outside the U.S. as prisoners of war; (4) were tried and convicted by military commissions in China, with the permission of the Chinese government; (5) for offenses committed outside of the United States; and (6) were at all times imprisoned outside of the U.S. *See Eisentrager*, 339 U.S. at 777; *see also Rasul*, 542 U.S. at 475-76. In *Rasul*, this Court identified all six factors as "critical" to its conclusion that the prisoners had no "constitutional entitlement to habeas corpus." *Id.* at 476 (emphasis omitted). The Court found *Eisentrager* inapplicable because the Guantánamo detainees "differ from the *Eisentrager* detainees in important respects":

> They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged and convicted of wrongdoing; and for more than two years [now more than five-and-one-half years] they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Id.

Eisentrager does not support the panel majority's conclusion that the common law writ is unavailable to detainees at Guantánamo. To the extent that the Court in *Eisentrager* relied on territorial considerations to distinguish that case from cases such as *In re Yamashita*, 327 U.S. 1 (1946), the Court placed greater weight on the "territorial jurisdiction" of the United States than on its sovereignty. *See Eisentrager*, 339 U.S. at 771 ("[I]t was the alien's presence within its territorial jurisdiction that gave the Judiciary the power to act"). As this Court found in *Rasul*, the Guantánamo detainees are not enemy aliens, and they are within the "territorial jurisdiction" of the United States. *See Rasul*, 542 U.S. at 480.

In his concurring opinion in *Rasul*, Justice Kennedy separately noted that the facts of these cases are "distinguishable from those in *Eisentrager* in two critical ways": (1) Guantánamo "is in every respect a United States territory, and it is one far removed from any hostilities"; and (2) the Guantánamo detainees "are being held indefinitely, and without benefit of any legal proceeding to determine their status." *Id.* at 487-88 (Kennedy, J., concurring in the judgment). Both of these critical distinctions remain true. Justice Kennedy pointed out that "where the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker." *Id.* at 488. When Justice Kennedy wrote those words, the detention had lasted for more than two years; detention of the Guantánamo detainees is approaching its sixth year, creating an even "weaker case of military necessity and much greater alignment with the traditional function of habeas corpus" than existed when the Court decided *Rasul*. *Id.*

F. The MCA Does Not Apply to Pending Habeas Cases.

This Court requires a "clear statement of congressional intent to repeal habeas jurisdiction." *St. Cyr*, 533 U.S. at 298 (citing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102

(1869)). "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." *Id.* at 299. As in the case of the DTA, *see Hamdan*, 126 S. Ct. 2749, Congress has not articulated a "specific and unambiguous statutory directive" to repeal habeas jurisdiction as to cases pending on the date of enactment. The Court therefore need not reach the constitutional issues that such a repeal would present.

MCA § 7(a) is the jurisdiction-stripping provision that applies to Guantánamo detainees. MCA § 7(a) adds a new subsection (e) to 28 U.S.C. § 2241. New subsection (e) consists of two paragraphs (with italicization added):

> (1) No court, justice, or judge shall have jurisdiction to hear or consider *an application for a writ of habeas corpus filed by or on behalf of an alien* detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider *any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien* who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

MCA § 7(b) specifies the effective date for MCA § 7(a). It provides (with pertinent language in italics):

> The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and

> shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of *the detention, transfer, treatment, trial, or conditions of detention of an alien* detained by the United States since September 11, 2001.

MCA § 7(b) thus makes "[t]he amendment made by subsection (a)" applicable to pending cases described in terms substantially identical to those used to describe the "other action[s]" covered by new § 2241(e)(2), without mentioning the habeas actions covered by new § 2241(e)(1).

The D.C. Circuit offered three reasons for construing MCA § 7(b) to apply to pending habeas actions. First, it said, habeas actions are merely a subset of actions challenging "the detention, transfer, treatment, trial, or conditions of confinement of an alien" under MCA § 7(b). *See Boumediene*, 476 F.3d at 987. Second, it pointed out that MCA § 7(b) makes "[t]he amendment made by subsection (a)" applicable to pending cases, and the amendment made by MCA § 7(a) includes the paragraph covering habeas cases. *See id.* at 986. Third, it said that MCA § 7(b) must apply to pending habeas cases because the legislative history shows unmistakably that this is what Congress intended. *See id.*

This reasoning does not meet the requirement of a "specific and unambiguous statutory directive" to repeal habeas jurisdiction as to pending cases. First, MCA § 7(b) does not *mention* habeas actions. To conclude that MCA § 7(b) applies to pending habeas actions, one must infer from § 2241(e)(2) that habeas actions are a subset of the actions it covers. But that construction of § 2241(e)(2) renders § 2241(e)(1) superfluous, violating the cardinal rule that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citation omitted). Construing MCA § 7(b) to apply to pending habeas cases thus de-

pends on an inference that violates a cardinal rule of statutory construction.

Second, the fact that MCA § 7(b) applies to the amendment made by MCA § 7(a) does not compel the conclusion that MCA § 7(b) applies to pending habeas actions. The amendment made by MCA § 7(a) adds a new subsection (e) to § 2241. Although the amendment takes effect on the date of enactment, that says nothing about its application to habeas cases already pending. Once again, the repeal of habeas jurisdiction as to pending cases is merely an inference.

Third, although the goal of statutory construction is to divine congressional intent, a repeal of habeas jurisdiction is such a grave step that "[i]mplications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction." *St. Cyr*, 533 U.S. at 299. Instead, a repeal of habeas requires a "specific and unambiguous *statutory* directive" by Congress. Congress provided no such statutory directive here as to pending habeas. The repeal of habeas jurisdiction in MCA § 7(a) therefore does not apply to pending habeas actions, and the judgment below may be reversed on that ground alone.

As Professor Henry Hart explained:

> Habeas corpus aside, I'd hesitate to say that Congress couldn't effect an unconstitutional withdrawal of jurisdiction – that is, a withdrawal to effectuate unconstitutional purposes – if it really wanted to. But the Court should use every possible resource of construction to avoid the conclusion that it did want to.[22]

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[22] Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1398-99 (1953) (cited in *St. Cyr*, 533 U.S. at 305).

II. THE MCA DOES NOT PROVIDE AN ADEQUATE SUBSTITUTE FOR HABEAS.

A. Congress May Not Eliminate Habeas Without Providing An Adequate Substitute.

Only twice has the Court recognized a procedure to be an adequate substitute for federal habeas. In one instance, the substitute was nothing less than full habeas review. In *Swain v. Pressley*, 430 U.S. 372 (1977), Congress eliminated federal court habeas review of criminal convictions in D.C. Superior Court. In place of federal court habeas review, Congress provided habeas review in D.C. Superior Court. This Court held the habeas substitute adequate because it afforded all of the protections afforded by federal court habeas review, lacking only the life tenure and salary protection of federal judges. *See id.* at 382. The Court also noted that the statute contained a savings clause allowing federal court habeas review if the review in D.C. Superior Court was found to be "inadequate or ineffective." *Id.* at 381.

The only other time this Court has arguably recognized as adequate an alternative to federal court habeas review was in *Hill v. United States*, 368 U.S. 424 (1962). In *Hill*, the Court upheld 28 U.S.C. § 2255, which places review of federal prison sentences in the district court that adjudged the sentence and withdraws habeas jurisdiction from other federal courts. The Court explained that § 2255 "was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined." *Id.* at 427 (footnote omitted). *See also United States v. Hayman*, 342 U.S. 205, 223 (1952) (footnote omitted) ("In a case where the Section 2255 procedure is shown to be 'inadequate or ineffective', the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing. Under such circumstances, we do not reach the constitutional question."); *Sanders v. United States*,

373 U.S. 1, 14 (1963) (stating that if a prisoner were provided with a remedy "less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered").

B. DTA Review Is Not An Adequate Substitute For Habeas.

DTA § 1005(e)(2) defines the scope of the D.C. Circuit's review of final decisions of CSRTs. The limited judicial inquiry specified by DTA § 1005(e)(2) bears no resemblance to the plenary inquiry that a federal habeas court would provide in cases of Executive detentions. Indeed, Congress enacted the DTA precisely to deny the writ to the Guantánamo detainees and replace the writ with a far more limited judicial remedy.[23] "Far from merely adjusting the mechanism for vindicating the habeas right, the DTA imposes a series of hurdles while saddling each Guantánamo detainee with an assortment of handicaps that make the obstacles insurmountable." *Boumediene*, 476 F.3d at 1005 (Rogers, J., dissenting). DTA review is not an adequate substitute for habeas.

1. Scope of review

Habeas review inquires into the lawfulness of an individual's detention; DTA review does not. Instead, DTA review is limited to final decisions of a CSRT that a detainee is properly held as an enemy combatant. The avail-

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[23] *See* 152 Cong. Rec. S10354, S10403 (daily ed. Sept. 28, 2006) (Sen. Cornyn) (stating that the purpose of the DTA was to replace habeas "litigation instigated by *Rasul* . . . with a narrow D.C. Circuit – only review of the . . . CSRT hearings"); 152 Cong. Rec. S10243, S10271 (daily ed. Sept. 27, 2006) (Sen. Kyl) ("The only thing the DTA asks the court to do is check that the record of the CSRT hearings reflect[s] that the military has used its own rules"). MCA § 7(a) further amended § 2241 to deny habeas to foreign nationals detained by the United States as enemy combatants anywhere in the world.

ability of even this limited review under the DTA is contingent, because the Executive is under no obligation either to convene a CSRT to determine the status of a detainee or to produce a "final" decision of a CSRT that it has convened.

As the Court explained in *St. Cyr*, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." 533 U.S. at 301. In such situations, the petitioner is entitled to a searching, plenary review of the factual and legal bases for detention. DTA review, by contrast, is limited to "the information available to the Tribunal." *Bismullah v. Gates*, Nos. 06-1197, 06-1397, __ F.3d __, 2007 WL 2067938, at *1 (D.C. Cir. July 20, 2007).[24] DTA review does not provide for judicial consideration of other evidence, however helpful to the detainee because it is exculpatory or impeaches the evidence on which the government relied. Petitioners in habeas corpus proceedings, by contrast, "are entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of the relevant facts." *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

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[24] As the D.C. Circuit stated:

> [T]he record on review consists of all the information a Tribunal is authorized to obtain and consider, pursuant to the procedures specified by the Secretary of Defense, hereinafter referred to as Government Information and defined by the Secretary of the Navy as "such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant," which includes any information presented to the Tribunal by the detainee or his Personal Representative.

Bismullah, 2007 WL 2067938, at *1.

2. Opportunity to rebut

Habeas gives the prisoner a meaningful opportunity to see and challenge the evidence against him and to submit exculpatory evidence; DTA review does not.

The DTA directs the D.C. Circuit to invalidate a CSRT decision on the ground that the decision was not supported by a "preponderance of the evidence." DTA § 1005(e)(2)(C). In reviewing the decision, however, the court must indulge "a rebuttable presumption in favor of the Government's evidence." *Id.* These statutory elements mirror CSRT regulations requiring a CSRT to "determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant,"[25] applying a rebuttable presumption that the government's evidence is "genuine and accurate," *id.* § G.11, Pet. App. 159.

In practice, a detainee had no opportunity to rebut the presumption in favor of the government's evidence or establish that the CSRT decision was not supported by a preponderance of the evidence. In every CSRT record the government has made public, the government relied on classified evidence to support its allegations.[26] In a majority of cases, the government relied exclusively on classified evidence. *See id.* at 2. Detainees, of course, are not allowed to review classified evidence. Moreover, although the regulations purport to grant the detainee the oppor-

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[25] Gordon England, *Implementation of Combatant Status Review Tribunal Procedures Detained at Guantánamo Bay Naval Base, Cuba*, ("England Mem.") Encl. 1 § B (Jul. 29, 2004), Pet. App. 150.

[26] Mark Denbeaux *et al.*, *No-Hearing Hearings: An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantánamo* ("Denbeaux Report") 37-39, *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

tunity to examine the government's witnesses, England Mem. § H.8, Pet. App. 161, the government never presented a live witness. *See* Denbeaux Report, at 2. A detainee therefore had no meaningful opportunity to contest the factual basis for his enemy combatant designation. DTA review does not cure these defects.

The case of Abdullah Al Kandari, one of the *Al Odah* petitioners herein, illustrates the unfairness that results when detainees are denied access to the government's evidence. The government alleged that Al Kandari's "alias" was found in a list of names on a document saved on a hard drive allegedly "associated with a senior al Qaeda member." Jt. App. 68. Al Kandari denied that he used any aliases and asked his CSRT to tell him what alias the government claimed he had used. *See id.* The CSRT told Al Kandari that his alleged alias was not in the unclassified evidence. *See id.* Al Kandari was not allowed to know the alias, the identity of the "senior al Qaeda member," or the place where the hard drive was allegedly found. Nor did Al Kandari have an opportunity to determine whether his alleged "alias" actually appeared on the hard drive or whether the hard drive was fabricated. *See id.* Given nothing, Al Kandari could not rebut the government's allegation. As Al Kandari told his CSRT panel, "[t]he problem is the secret information, I can't defend myself." *Id.*

Detainees also were unable to present exculpatory evidence. The CSRT procedures nominally allow the opportunity to call witnesses, but that opportunity is subject to the discretion of the CSRT's presiding officer that the witness is "reasonably available." England Mem. § G.9, Pet. App. 158. The CSRTs denied every request for a witness who was not a Guantánamo detainee and denied three quarters of the requests for witnesses who were in Guantánamo. *See* Denbeaux Report at 2-3.

Col. Abraham described the type of record that results from this one-sided process:

> What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence. Statements allegedly made by percipient witnesses lacked detail. Reports presented generalized statements in indirect and passive forms without stating the source of the information or providing a basis for establishing the reliability or the credibility of the source.

Abraham Decl. ¶ 22, Jt. App. 108. DTA review provides no mechanism for correcting these deficiencies in the CSRT process.

3. Access to counsel

Habeas affords petitioners the right to counsel; the CSRT process does not. DTA review cannot cure this defect.

In a habeas hearing, a petitioner would have a right to the assistance of counsel. *See Hamdi*, 542 U.S. at 539 ("[The petitioner] unquestionably has the right to access to counsel in connection with the [habeas corpus] proceedings on remand"). Counsel have the training to assess the government's evidence, investigate the government's allegations, and assist detainees to present a meaningful defense. *Al Odah v. United States*, 346 F. Supp. 2d 1, 7-8 (D.D.C. 2004). The assistance of counsel is especially critical where, as here, the prisoner does not speak the language of the jailer, does not understand the legal system to which he is subject, and cannot investigate the government's allegations because he is held in a prison. *See Al Joudi v. Bush*, 406 F. Supp. 2d 13, 22 (D.D.C. 2005). Without the assistance of counsel, detainees could not create a record for review. *Cf. Adem v. Bush*, 425 F. Supp. 2d 7, 24-25 (D.D.C. 2006) (finding "serious questions" as to whether detainees understood DoD's notice that they could file habeas actions challenging CSRT determination). When counsel belatedly becomes available to detainees at the stage of DTA review, the damage has been done. Counsel cannot supplement the record, and the

scope of their representation is limited to "the pursuit of judicial review to 'determine the validity of any final decision of a [CSRT].'" *Bismullah*, 2007 WL 2067938, at *10 (quoting regulations). *See generally United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2563 (2006) ("representation by counsel 'is critical to the ability of the adversarial system to produce just results'"); *Powell v. Alabama*, 287 U.S. 45, 58-65 (1932).

4. Neutral decision maker

Habeas provides for a searching inquiry by a neutral, independent judge; DTA review does not.

At common law, habeas requires the detainee's custodian to provide a neutral, independent judge with a legal and factual basis for the detention. *See* 1 William Blackstone, *Commentaries on the Laws of England* 132-33 (1765). Thus, an essential element of habeas corpus is the right to a hearing in the first instance before a judge on the factual and legal bases for an individual's detention. *See Swain*, 430 U.S. at 380-81. Under the DTA, by contrast, the detainees are afforded a hearing in the first instance by a CSRT, which is not composed of neutral, independent decision makers. Indeed, CSRT regulations instruct panel members *not* to be neutral but to presume that the government's evidence is "genuine and accurate," England Mem. § G.11, Pet. App. 159, and to bear in mind that detainees have already been determined to be enemy combatants through "multiple levels of review by officers of the Department of Defense," *id.* § B, Pet. App. 150. (According to the government's brief in *Rasul*, both the commander of Southern Command and the Secretary of Defense had personally approved the classification of each of the detainees as enemy combatants. *See* Br. for the Resp'ts, *Rasul v. Bush*, S. Ct. Nos. 03-334 and 03-343, at 6.)

Moreover, CSRT members are not independent. Unlike military judges and panel members in courts-martial under the Uniform Code of Military Justice, CSRT members

have no protection against command influence. *See, e.g.*, 10 U.S.C. § 837 (prohibiting command influence on court-martial judges and panel members); 10 U.S.C. § 949b (prohibiting command influence on military commission judges and panel members). On the rare occasion when a CSRT found a detainee not to be an enemy combatant, its decision was subject to review by higher Department of Defense officials, who are known to have pressed the panel to reconsider its decision and, if the panel stuck to its guns, to reassign the case to a panel that would reach the desired result. *See* Abraham Decl. ¶ 23 and *supra* note 5.[27]

These biased and malleable tribunals are no substitute for the neutral, independent judges who determine, in the first instance, whether a habeas petitioner is unlawfully detained. Nor can DTA review make up for the deficiencies of these tribunals. The DTA contemplates that the D.C. Circuit will perform only an appellate function, reviewing CSRT final decisions, and not redeciding them.

5. Evidence procured by torture or coercion

A habeas court would not accept evidence procured through torture or coercion, *Brown v. Mississippi*, 297 U.S. 278, 287 (1936); the DTA permits such evidence. Putting aside their illegality and reprehensibility, torture and coercion do not work. Statements procured by such

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[27] Detainees subject to such do-overs include Abdul Hamid Al-Ghizzawi (on whose panel Col. Abraham sat) and Anwar Hassan ("Ali"). Both have filed original habeas petitions in this Court. *In re Al-Ghizzawi*, No. 07-M5 (U.S. filed July 31, 2007); *In re Ali*, No. 06-1194 (U.S. filed Mar. 6, 2007). There have even been instances of detainees subjected to multiple do-overs such as Abdullah Mohammad Kahn, who filed a habeas petition in the district court. *Kahn v. Bush*, No. 05-1001 (D.D.C. filed May 18, 2005).

means are inherently and notoriously unreliable because of the "tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain." *Stein v. New York*, 346 U.S. 156, 182 (1953). For good reason, the Court has held that Due Process bars the government from depriving a person of liberty based on statements obtained through torture. *See Rogers v. Richmond*, 365 U.S. 534, 540-45 (1961); *Rochin v. California*, 342 U.S. 165, 172-74 (1952); *Brown*, 297 U.S. at 287. Yet the DTA *expressly* permits the use of evidence obtained through torture or coercion, if the CSRT panel determines it to have probative value. *See* DTA § 1005(b)(1). The DTA does not require the D.C. Circuit to invalidate a final CSRT decision on the ground that the tribunal based its decision in whole or part on evidence obtained by torture, or provide the detainee with any mechanism to show that the government's evidence was obtained by torture.

6. Legal basis for detention

A habeas hearing tests not only the evidence supporting the prisoner's detention, but also the basis of the government's legal claim for detaining the prisoner. In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), for example, the petitioner was allowed to challenge his designation as a prisoner of war as a matter of law, with reference to the law of war. 71 U.S. (4 Wall.) at 131.

By contrast, the DTA does not allow a prisoner to challenge the definition of "enemy combatant" under the CSRT regulations, which use a definition of "enemy combatant" that is more broad than any that has ever been recognized by international law or this Court. Under the CSRT regulations, even an innocent person who has never been an enemy combatant within the meaning of international or U.S. law can be detained, and the D.C. Circuit can do nothing about it under the DTA, because the CSRT regulations allow it. *See infra* p. 43.

7. Remedy

At common law, habeas contemplates but one remedy should the court determine that the detention is unlawful: release. *See Bollman*, 8 U.S. (4 Cranch) at 136 (when detention is determined to be unjustified, a habeas court "can only direct them to be discharged"). Any process that does not contemplate release is not an adequate substitute for habeas.

According to the government, the only remedy the DTA allows the D.C. Circuit to order is a "remand to the agency" – *i.e.*, a new CSRT. Corrected Br. for Resp't Addressing Pending Prelim. Mots. 62-64, *Bismullah* v. *Gates*, No. 06-1197 (D.C. Cir. filed Apr. 10, 2007). Indeed, the CSRT procedures themselves, to which the DTA review is bound, do not mandate release even to a person who is found not to be an enemy combatant. Wolfowitz Order § i, Pet. App. 145. That result not only denies detainees the habeas remedy but effectively immunizes CSRT decisions from review by this Court by creating a closed loop of CSRT decision, DTA review, and CSRT remand. The detainees are consigned to imprisonment unless and until the Executive, in its sole discretion, decides to release them. A scheme that permits judicial involvement but dooms judicial action to futility is patently an inadequate substitute for habeas.

III. PETITIONERS SHOULD FINALLY BE GIVEN A SEARCHING JUDICIAL REVIEW OF THE FACTUAL AND LEGAL BASES FOR THEIR DETENTIONS.

A. The Guantánamo Detainees Are Entitled to Challenge the Factual Basis for Their Detention.

Because it dismissed the Guantánamo detainees' habeas corpus cases under MCA § 7 for lack of jurisdiction, the Court of Appeals never reached the question on which it had granted interlocutory review – whether the District

Court had correctly denied the government's motion to dismiss on the ground that the Guantánamo detainees have no rights under the Constitution. The government argued before the Court of Appeals that even a court with habeas corpus jurisdiction is powerless to review the detention of aliens held at Guantánamo on the ground that the Guantánamo detainees have no rights under the Due Process Clause of the Fifth Amendment, and that there is no right to habeas corpus except to enforce constitutional rights. The government's argument misconstrues the nature of habeas corpus and would render this Court's decision in *Rasul* meaningless.

This Court has already answered the question whether habeas corpus entitles the Guantánamo detainees to judicial review. Even if they had no Fifth Amendment rights, the habeas corpus power of the federal courts does not depend upon the Fifth Amendment right to due process. *See supra* p. 22. So, in *Bollman*, for example, Chief Justice Marshall "fully examined and attentively considered" the evidence on which the prisoners were committed. 8 U.S. (4 Cranch) at 125. Finding the government's basis for detention insufficient, the Court ordered the prisoners discharged without ever mentioning a constitutional right. *Id.* It is the lack of legal and factual justification for the detention, rather than the violation of any rights granted by positive law, that constitutes the heart of habeas corpus review. As this Court held in *Rasul*, the Guantánamo detainees have the same "right to judicial review of the legality of executive detention." *Rasul*, 542 U.S. at 475.

Accordingly, each detainee is entitled, on remand, to a hearing in which the District Court will consider the evidence presented by both the government and the petitioner, exclude any evidence that the court finds was obtained through torture or coercion, and decide whether the government has demonstrated both a legal and factual justification for detention. In cases where the court determines that continued imprisonment of a petitioner is

not lawful, the court should order the petitioner's immediate release. Finally, in view of the extreme delays that petitioners have already suffered in these cases, the District Court should be directed to expedite the habeas hearings. *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (habeas review "must be speedy if it is to be effective"); *see also Preiser v. Rodriguez*, 411 U.S. 475, 495 (1973); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968).

B. The Guantánamo Detainees Are Entitled to Challenge Their Designations as Enemy Combatants.

On remand, the Guantánamo detainees also should be given the opportunity, in a habeas corpus hearing, to challenge the government's designation of them as "enemy combatants" under international law. An enemy combatant during wartime may be detained under United States law because detention of enemy soldiers is "a fundamental incident of waging war" and, as such, is authorized by the law of war and the AUMF. *See Hamdi*, 542 U.S. at 519; *see also Ex parte Quirin*, 317 U.S. 1, 37-38 (1942). The President lacks power to detain as an "enemy combatant" an individual who is not an "enemy combatant" under either head of authority. *Cf. Hamdan*, 126 S. Ct. at 2775 (President had no power to try an "enemy combatant" by military commission when neither law of war nor AUMF authorized commission).

In *Hamdi*, the Court made clear that it "only [found] legislative authority to detain under the AUMF once it [was] sufficiently clear that the individual is, in fact, an enemy combatant." 542 U.S. at 523. The AUMF incorporates the law of war, which the courts apply in cases brought by alleged enemy combatants. *See Hamdi*, 542 U.S. at 519; *Quirin*, 317 U.S. at 37-38; *Ex parte Milligan*, 71 U.S. 2, 131 (1866); *Hamdan*, 126 S. Ct. at 2775. *See also The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appro-

priate jurisdiction."). Therefore, the courts must look to the law of war in order to define "enemy combatant."

The Court defined the scope of the authority to detain enemy combatants during war in *Milligan*. Milligan was a resident of Illinois who had been detained during the Civil War. The government alleged that he had been a part of "a secret political organization, armed to oppose the laws," and that he sought "by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States." *Milligan*, 71 U.S. at 130. Congress had suspended the writ of habeas corpus as to "prisoners of war, spies, or aiders and abettors of the enemy," as well as to those who were "otherwise amenable to military law, or the rules and articles of war . . . ." *See id.* at 6. The Court held that it had jurisdiction to hear Milligan's case and ruled that he was illegally detained. "If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?" *Id.* at 131.

Quirin further defined the contours of the government's authority to detain enemy combatants. In *Quirin*, eight members of the German armed forces, including one American citizen, snuck into the United States during World War II and disguised themselves as civilians with the intent to destroy war facilities in the United States. *See Quirin*, 317 U.S. at 20-22. They were captured and held as prisoners of war, and were tried and convicted by military commission. *See id.* at 22. This Court upheld their detention and conviction, holding that the government had the authority to detain and try enemy combatants under the law of war. *See id.* at 48.

Both *Quirin* and *Milligan* involved individuals who were captured, detained, and tried by military commission in places where the civil courts of the United States were functioning. Both involved allegations by the government that the petitioners were detained as enemy

combatants because they had engaged in hostile acts against the United States. The only principled way to distinguish the cases is explained in *Quirin*:

> [T]he Court [in *Milligan*] was at pains to point out that Milligan ... was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. . . . [T]he Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war . . . .

Id. at 45; *see also Hamdi*, 542 U.S. at 519 (an "enemy combatant" is one who is "part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States").

Further, as the *Hamdi* plurality explained, detention of enemy combatants is limited to "the duration of the particular conflict in which they were captured," "detention may last no longer than active hostilities," and "indefinite detention for the purpose of interrogation is not authorized." *Hamdi*, 542 U.S. at 518-21.

The CSRT process does not use the definition of enemy combatant recognized by the law of war and by this Court. Under the CSRT process "enemy combatant" is defined as:

> an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. *This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.*

England Mem. § B, Pet. App. 150 (emphasis added). The CSRT definition includes, but is not limited to, those who are alleged to have committed a belligerent act *or* directly supported hostilities in aid of enemy armed forces. *See id.* The definition even appears to include those who

merely support "associated forces" with no requirement that such support be "direct," or that such forces be hostile to the United States. The CSRT definition discards important assumptions of the law of war, such as the understanding that there will be an organized enemy force that can be defeated or with whom peace can be made. That definition is broad enough to bring nonbelligerent civilians within its reach.

The legality of the petitioners' detention should be tested against the standard of an "enemy combatant" as recognized by the laws of war, not as unilaterally defined by the U.S. Department of Defense. This is particularly important because the nature of the current "war on terror" requires special considerations not applicable in the same way to more conventional wars in this nation's history. As this Court noted in *Hamdi*, "the national security underpinnings of the 'war on terror,' although crucially important, are broad and malleable." 542 U.S. at 520. The process offered to prisoners of war in the past may not be sufficient in a "war" waged largely against alleged criminal terrorist organizations rather than national governments. "If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [that enemy combatants may be detained for the duration of the relevant conflict] may unravel." *Id.* at 521.

The Guantánamo detainees have been held for almost six years, longer than the United States' involvement in any war in our history other than Vietnam. There is no end in sight of a "war on terror", nor is it clear how it would be ascertained when such a war has come to an end. *See id.* at 520. The petitioners are therefore facing the very real prospect of detention for the remainder of their lives, and not just until the end of hostilities. Such indefinite and effectively permanent detention without meaningful process is not contemplated by the law of war, and is not consistent with the rule of law.

CONCLUSION

As Thomas Paine wrote, "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."[28] The judgment of the D.C. Circuit should be reversed and the case remanded to the District Court for expedited habeas corpus proceedings.

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[28] *In re Yamashita*, 327 U.S. 1, 81 (1946) (Rutledge, J., dissenting) (quoting 2 The Complete Writings of Thomas Paine 588 (Philip Foner ed. 1945)).

Respectfully submitted,

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APPENDIX OF CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL LAW PROVISIONS

U.S. CONST., ART. 1, § 9, CL. 2

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

U.S. CONST., AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 2241

Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e) (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to

have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

MILITARY COMMISSIONS ACT OF 2006, § 7, PUB. L. NO. 109-366, 120 STAT. 2600, 2741-44 (2006)

(a) In General.--Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109-148 (119 Stat. 2742) and the subsection (e) added by added by section 1405(e)(1) of Public Law 109-163 (119 Stat. 3477) and inserting the following new subsection (e):

> "(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> "(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the

United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.".

(b) Effective Date.--The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

DETAINEE TREATMENT ACT OF 2005, § 1005(E), PUB. L. NO. 109-148, 119 STAT. 2680, 2741-43 (2005)

(b) Consideration of Statements Derived With Coercion.--

(1) Assessment.-- The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess--

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

(2) Applicability.-- Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

***

(e) Judicial Review of Detention of Enemy Combatants.--

(1) In general.-- Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider--

"(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba; or

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantánamo Bay, Cuba, who--

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.".

(2) Review of decisions of combatant status review tribunals of propriety of detention.--

(A) In general.--Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) Limitation on claims.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien--

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantánamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) Scope of review.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of--

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) Termination on release from custody.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

(3) Review of final decisions of military commissions.--

(A) In general.--Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) Grant of review.--Review under this paragraph--

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) Limitation on appeals.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien--

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantánamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) Scope of review.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of--

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

(4) Respondent.-- The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

AUTHORIZATION FOR USE OF MILITARY FORCE, PUB. L. NO. 107-40, 115 STAT. 224 (2001)

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-

defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force".

SECTION 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) In General.--That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements.--

(1) Specific statutory authorization.-- Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution. (2) Applicability of other requirements.-- Nothing in this resolution supercedes any requirement of the War Powers Resolution.

LEASE OF LANDS FOR COALING AND NAVAL STATIONS U.S.-CUBA, T.S. NO. 418 (FEB. 23, 1903)

ARTICLE III

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1196

IN THE

Supreme Court of the United States

KHALED A.F. AL ODAH, *et al.*
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT OMAR KHADR SUPPORTING PETITIONERS

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BRIEF FOR RESPONDENT SUPPORTING PETITIONERS[†]

STATEMENT OF THE CASE

Respondent Omar Khadr is one of only three persons to have been charged under the Military Commissions Act of 2006 ("MCA"), and the only person currently facing trial before a military commission whose case is before this Court. Respondent was also a juvenile—15 years old—when he was detained. His case raises important questions about the jurisdiction of military commissions to hear cases against juveniles and to try detainees for the newly-minted "war crimes" set forth in the MCA—and about the availability of the writ of habeas corpus to raise such fundamental jurisdictional questions in federal courts.

Respondent's case was originally joined with that of the Petitioners here. After he was detained, Respondent filed a petition for a writ of habeas corpus in the District Court for the District of Columbia, challenging his detention. His habeas petition was coordinated with the habeas petitions filed by Petitioners in this case, and Respondent was a party to the proceedings below. However, while Respondent's appeal was pending, Respondent was charged and set to face trial before a military commission. This development rendered his situation importantly different from that of the remaining Petitioners in this case.

As a result, when the Court of Appeals rendered the decision below, Respondent did not seek certiorari together with Petitioners. Instead, he filed a separate petition for certiorari, together with another detainee who is also facing trial before a military commission. This petition focused on the particular issues raised by habeas petitioners who seek to challenge the jurisdiction of military commissions, rather than (or in addition to) indefinite detention. Respondent's

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[†] Dennis Edney and Nathan Whitling, members of the bar of Canada and lawyers for Respondent, also contributed to this brief.

petition for certiorari was denied. However, because Respondent was a party to the decision below, this Court's rules permit him to file a brief in this proceeding. *See* Sup. Ct. R. 12.6.

Accordingly, Respondent now submits this brief in support of Petitioners, in order to draw this Court's attention to the potential implications of this case for habeas claims raised by detainees who, unlike Petitioners, have been charged under the MCA. The two classes of detainees—those who have not been charged, and those who have—are in certain respects similarly situated, and share an interest in having this Court reverse the D.C. Circuit's erroneous ruling below and hold that detainees at Guantanamo Bay are entitled to have their habeas petitions reviewed and adjudicated on the merits in United States federal court.

However, there are also respects in which the interests of these two classes of detainees are different. As the Court decides the questions before it, it should be mindful of the fundamental nature of Respondent Khadr's jurisdictional and constitutional challenges to the military commission proceedings against him—including claims against the jurisdiction of the tribunal over juveniles and application of the MCA to conduct that predated the Act, in violation of the *Ex Post Facto* Clause. Those claims, and claims like them, should not be barred at the door of the federal courthouse by a broad ruling precluding habeas corpus review. Respondent urges this Court, in deciding the issues related to detainees who have not been charged, to take care not to limit or jeopardize the potentially distinct habeas claims that may be raised by detainees facing trial before military commissions convened under the MCA.

A. Proceedings Before the District Court

Respondent was taken into custody by United States forces in Afghanistan in July of 2002, when he was 15 years old. In the fall of 2002, he was transferred to the United

States detention facility at Guantanamo Bay, Cuba, where he remains imprisoned to this day.

On July 2, 2004, in the wake of this Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), Respondent's grandmother, acting as his next friend, filed a petition for writ of habeas corpus in the United States District Court for the District of Columbia. This petition challenged Respondent's classification as an "enemy combatant" and his ongoing detention by the United States military. Respondent's case was assigned to Judge Bates. Other Guantanamo detainees filed similar petitions that were assigned to other judges on the same district court. *See* Pet. App. 71.

In response, the Government filed a motion seeking to coordinate resolution of the legal issues common to all these cases. *See* Pet. App. 72. A committee of the D.C. District Court designated Judge Green to coordinate and manage the cases. *See id.* The relevant order and resolution provided that Judge Green would, with the consent of the transferring judges, rule on common procedural and substantive issues, but that the cases themselves would remain before the original assigned judges. *See id.* Further, any judges who did not agree with Judge Green's substantive decisions could resolve the issues in their assigned cases for themselves. *See id.* On September 21, 2004, Respondent's case was transferred to Judge Green for coordination and management.

Shortly thereafter, the Government filed a motion to dismiss in all the detainee cases pending before Judge Green. *See* Pet. App. 73. One judge, Judge Leon, elected to rule on the motion to dismiss in his cases himself. The remaining cases—including Respondent's case—remained before Judge Green for resolution of the motion. *See* Pet. App. 74. On January 31, 2005, Judge Green denied the Government's motion in part. She held that the petitioners had stated valid claims under the Fifth Amendment, and that some petitioners

had stated valid claims under the Third Geneva Convention, but granted the motion as to the petitioners' remaining claims. *See* Pet. App. 126. Both the Government and the petitioners appealed, and their appeals were heard together with an appeal from Judge Leon's cases, in which he had granted the Government's motion to dismiss in its entirety. *See* Pet. App. 2-3. Proceedings before the district court were stayed pending the resolution of these appeals. *See* Pet. App. 59.

B. Respondent's Military Commission Proceedings And Supplemental Habeas Petition

In November of 2005, while Respondent's appeal was pending before the D.C. Circuit, the Government charged Respondent with various crimes, including conspiracy, murder, attempted murder, and aiding the enemy, and referred him for trial before a military commission constituted under authority of the President's Military Order of November 13, 2001, and Military Commission Order Number 1 of August 31, 2005 ("MCO No. 1"). *See* Charges, *United States v. Khadr* (Military Commission Case No. 05-0008); Referral, *United States v. Khadr* (Military Commission Case No. 05-0008, filed Nov. 23, 2005).

On December 19, 2005, after obtaining the consent of the Government and leave of the court, Respondent filed a Supplemental Petition for Writ of Habeas Corpus ("Supplemental Petition") with Judge Bates. [1] This supplemental petition raised numerous challenges to the jurisdiction of the military commission convened to try Respondent. These included, among other things, challenges to the tribunal's exercise of subject matter jurisdiction based on the fact that the crimes charged were not recognized by the traditional law of war; challenges under the *Ex Post*

[1] This petition was filed under Rule 15(d) of the Federal Rules of Civil Procedure, which permits a plaintiff to supplement an already-filed pleading.

Facto Clause based on the fact that the offenses charged were defined after the conduct at issue occurred; and challenges to the exercise of jurisdiction over Respondent's person both as a minor and as a person presumptively entitled to prisoner-of-war status under the Third Geneva Convention (and therefore not amenable to military commission jurisdiction at all). *See* Supplemental Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *O.K. v. Bush, et al.*, No. 1:04CV01136 (D.D.C. filed Dec. 14, 2005) at 16-22, 25-26. This supplemental petition has not been reviewed on the merits or adjudicated by Judge Bates.

Nor did this supplemental petition stay Respondent's military commission proceedings. Those proceedings continued until this Court released its decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), which held that military commissions convened under the authority of MCO No. 1 were illegal. Respondent nonetheless remained in pretrial segregation while the Government sought authorization for newly-constituted military commissions from Congress. In addition, Respondent's charges remained posted on the Department of Defense military commissions website.

In late 2006, Congress passed and the President signed the Military Commissions Act of 2006 ("MCA"), P.L. 109-366, 120 Stat. 2600, which, among other things, authorized the creation of military commissions to try detainees held at Guantanamo Bay. On February 2, 2007, based on this authorization, the Government preferred new military commission charges against Respondent, alleging several offenses made punishable under the MCA. Charge Sheet, *United States v. Khadr*, § III.5.e. ("Charge Sheet"). On April 24, 2007, the charges were referred to a military commission

for trial. *Id.* at § VI.8.c. Proceedings are currently underway.[2]

C. D.C. Circuit Proceedings

Meanwhile, Respondent's habeas petition—together with the coordinated petitions by Petitioners in this case—was proceeding through the D.C. Circuit. To take account of ongoing Supreme Court decisions and congressional enactments, the court heard two oral arguments and received four rounds of briefing in the cases. *See* Pet. App. 3. The last round of briefing concerned the effect of the MCA, which, in addition to establishing the procedures for convening military commissions referenced above, purported to amend the federal habeas statute, 28 U.S.C. § 2241, to strip federal court jurisdiction over any "application for writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." MCA § 7.[3]

In a consolidated brief, the detainees appealing from Judge Green's decision—including Respondent—argued that the review provisions of the Detainee Treatment Act of 2005 ("DTA"), P.L. 109-148, 119 Stat. 2680 (as amended by the MCA), did not provide an adequate substitute for habeas corpus. Among other things, the brief explained that the

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[2] The military commission dismissed the charges against Respondent without prejudice on June 4, 2007, finding that there had been no determination that Respondent was an *unlawful* enemy combatant, a prerequisite for military commission jurisdiction. *See* Order, *United States v. Khadr* (Military Commission June 4, 2007); Disposition of Prosecution Motion for Reconsideration, *United States v. Khadr* (Military Commission June 29, 2007); *see also* MCA § 3, § 948c. The Government has appealed this dismissal. Docketing Notice, *United States v. Khadr*, No. 07-001 (Ct. Mil. Comm'n Rev. July 11, 2007).

[3] Section 7 does not distinguish between habeas claims challenging detention by Executive branch officials and claims challenging the jurisdiction of military tribunals, such as those asserted in Respondent's Supplemental Petition.

DTA would not provide a detainee who had actually been charged with the ability to meaningfully challenge the jurisdiction of the military tribunal. *See* Guantanamo Detainees' Supplemental Brief Addressing the Military Commissions Act of 2006, *Al-Odah, et al. v. United States*, Nos. 05-5064, 05-5095 through 05-5116 (D.C. Cir. filed Nov. 1, 2006).

On February 20, 2007, the Court of Appeals issued its opinion in this case. *See* Pet. App. 22. The Court held that the MCA was intended to strip federal courts of jurisdiction to hear habeas petitions filed by detainees, including in pending cases. It further concluded that this jurisdiction stripping did not violate the Suspension Clause of the Constitution, because the scope of habeas relief protected by that Clause did not extend to aliens without property or presence in the United States, and because such aliens did not have constitutional rights at all, and so were not protected by Suspension Clause. *See id.* In its opinion, the Court of Appeals drew no distinction between detention-related habeas claims and claims relating to the jurisdiction of military commissions. Accordingly, if the Court of Appeals decision is permitted to stand, it will foreclose both habeas petitions challenging indefinite detention, and petitions challenging the jurisdiction and legality of military commissions.

D. Proceedings In This Court

On March 5, 2007, the Petitioners in this case filed their petition for a writ of certiorari. Respondent did not join. Instead, he filed a separate petition for certiorari on February 27, 2007, together with another Guantanamo detainee who had been charged and was facing trial before a military commission. This petition, in addition to discussing general issues related to the right of detainees at Guantanamo Bay to file habeas petitions, addressed issues that specifically related to habeas petitions challenging the jurisdiction of

military commissions to try detainees for offenses under the MCA.

Initially, both petitions were denied. However, on a motion for reconsideration, this Court granted Petitioners' petition for certiorari. As a party to the decision below, Respondent is entitled to file a brief in this proceeding. *See* Sup. Ct. R. 12.6. Respondent now submits this Brief for Respondent Supporting Petitioners, in order to bring to this Court's attention the respects in which the issues raised in this detention-related case may impact habeas petitions that challenge the jurisdiction of military commissions.[4]

SUMMARY OF ARGUMENT

I. Respondent agrees with Petitioners that the D.C. Circuit's decision must be reversed. Contrary to that court's holding, detainees at Guantanamo Bay have a constitutionally protected right to file petitions for a writ of habeas corpus, as well as other rights under the Constitution.

II. If this Court agrees that the right to file habeas petitions extends geographically to Guanatanamo Bay, it

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[4] Respondent has also filed a petition for review of a September 2004 determination by a Combatant Status Review Tribunal ("CSRT") that he is an "enemy combatant" The MCA makes such a determination both a prerequisite for military commission jurisdiction, *see* MCA § 3, § 948d(a), and "dispositive for purposes of jurisdiction for trial by military commission," MCA, § 3, § 948d(c). The MCA also provides that the D.C. Circuit can conduct a review of such a determination, pursuant to review provisions set forth in the Detainee Treatment Act ("DTA"). On May 23, 2007, Respondent petitioned the D.C. Circuit to declare that his CSRT determination was invalid, and also moved on an emergency basis for a stay of military commission proceedings pending resolution of his DTA claim. *See* Petition for Review, *Khadr v. Gates*, No. 07-1156 (D.C. Cir. filed May 23, 2007); Petitioner's Emergency Mot. to Stay Military Comm'n Proceedings and to Exceed Page Limits, *Khadr v. Gates*, No. 07-1156 (D.C. Cir. filed May 23, 2007). The court of appeals denied the stay, stating that it was "without jurisdiction" to grant the requested relief. *Khadr v. Gates*, No. 07-1156 (D.C. Cir. May 30, 2007) (order denying motion for emergency relief).

should confirm the uncontroversial point that the writ is available in principle to challenge not simply indefinite detention, as Petitioners correctly contend, but also the jurisdiction of military commissions. The availability of habeas for this purpose is firmly established in this Court's precedent, and in the writ's history.

III. Should this Court agree that Guanatanamo detainees have the right to file habeas petitions, it may then go on to consider (as Petitioners urge) whether the CSRT review procedures established by the MCA and DTA are an adequate substitute for habeas relief under *Swain v. Pressley*, 430 U.S. 372 (1977). Respondent agrees with Petitioners that these procedures are not an adequate substitute for habeas claims challenging indefinite detention, and therefore that the MCA constitutes an unconstitutional suspension of the writ of habeas corpus.

However, if this Court disagrees, Respondent urges the Court to reserve the separate question whether the procedures established by the MCA and DTA are an adequate substitute for habeas claims challenging the jurisdiction of military tribunals. As is explained below, the analysis of the relevant procedures is importantly different in the case of jurisdiction-related habeas claims, both because it implicates a different set of procedures and because the analysis of those procedures focuses on different considerations. Further, and related, the substantive rights Respondent and others challenging the jurisdiction of military commissions would seek to vindicate are different than the rights underlying habeas petitions that challenge indefinite detention. Because the rights and interests at issue in habeas challenges to military commission jurisdiction are—like those at issue in challenges to indefinite detention—deeply important, this Court should not foreclose such challenges without fully considering the question in a separate proceeding.

ARGUMENT

I. THE D.C. CIRCUIT'S DECISION SHOULD BE REVERSED

Respondent agrees with Petitioners that the D.C. Circuit's decision below was erroneous and should be reversed. As noted above, the court first held that the jurisdiction-stripping provision in Section 7 of the MCA—which purports to suspend the writ of habeas corpus for alien detainees who have been "determined by the United States to have been properly detained as [enemy combatants] or [are] awaiting such determination"—applies to pending cases. MCA § 7; *see* Pet. App. 6-10. The court then held that this purported suspension of the writ of habeas corpus does not violate the Suspension Clause, for two reasons. First, the court held that the Clause only protects the writ of habeas corpus as it existed in 1789, and further concluded that in 1789, the writ was not available to aliens overseas. *See* Pet. App. 10-15. Second, the court held, citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that aliens without property or presence in the United States have no constitutional rights, and so no right to the protection of the Suspension Clause. *See* Pet. App. 15-21. Accordingly, the court concluded that the MCA's jurisdiction-stripping is valid, and that there is no federal jurisdiction over habeas petitions filed by Guantanamo detainees. *See* Pet. App. 21.

As Petitioners explain, this decision is incorrect in multiple respects. Initially, Respondent agrees that Section 7 of the MCA should be interpreted not to apply to pending cases. But even if the statute is read to apply here, Respondent agrees that (as this Court's opinion in *Rasul* made clear) the writ of habeas corpus *was* available to aliens overseas in 1789, that habeas is available to aliens held on non-sovereign U.S. territory, and that *Johnson v. Eisentrager* is not to the contrary. Respondent further agrees that the Suspension Clause restrains Congress's ability to suspend the writ of habeas corpus even if detainees do not have

fundamental rights under the U.S. Constitution, and that in any event, detainees *do* have constitutional rights they can vindicate in habeas proceedings.[5] For all these reasons, as Petitioners argue, the D.C. Circuit's decisions must be reversed.

II. THIS COURT SHOULD CONFIRM THAT THE WRIT OF HABEAS CORPUS MAY BE USED TO CHALLENGE MILITARY COMMISSION JURISDICTION

If this Court agrees that the right to file habeas petitions extends geographically to detainees at Guantanamo Bay, it should confirm that the writ is available substantively not simply to challenge indefinite detention, as Petitioners correctly contend, but also to challenge the jurisdiction of military commissions established to try detainees who have been charged.

This should not be a controversial point. Indeed, last year, in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), this Court reviewed a habeas challenge brought by a Yemeni national, Salim Hamdan, who was being held at Guantanamo Bay and was facing trial before a military commission convened under MCO No. 1. *See id.* at 2759. Hamdan filed a habeas petition alleging that the commission lacked authority to try him for the offense charged, the crime of

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[5] Respondent's case implicates many of the same constitutional protections at issue in Petitioners' case: the protections afforded by the Suspension Clause, for example, and the fundamental rights of access to the courts, personal liberty, and due process of law. However, Respondent's case also implicates constitutional protections and rights not raised by Petitioners' claims, such as the protections of the *Ex Post Facto* Clause. *See* Part III.B.2 *infra*. Should this Court analyze in specific terms particular constitutional protections or rights that might apply to Petitioners, and conclude that Petitioners are not entitled to such protections or rights, it should take care not to foreclose the possibility that other detainees (such as Respondent) may be entitled to other constitutional protections or rights (such as the protections of the *Ex Post Facto* Clause) not implicated by Petitioners' cases.

"conspiracy," an offense that (as Hamdan established) "is not a violation of the law of war." *Id.* This Court concluded that the commission lacked the power to try Hamdan, and four Justices agreed that the offense of conspiracy was not an offense that could be tried by military commission. *Id.* at 2759-60.

There was *no* dispute in *Hamdan* that a habeas petition was an appropriate vehicle to challenge the authority of the military commission to try a prisoner for the offenses charged. [6] Indeed, the Court expressly observed that "Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law." *Id.* at 2772. It further observed that pre-trial consideration of military commission jurisdiction was fully consistent with its precedent, pointing to *Ex parte Quirin*, 317 U.S. 1 (1942), as "compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." *Id.* at 2772 (internal quotation marks omitted). In *Quirin*, 317 U.S. at 25, this Court heard a habeas petition filed by enemy aliens challenging their impending trial before a military commission, and resolved the question whether that commission had "jurisdiction to try the charge preferred against petitioners." Similarly, in *In re Yamashita*, 327 U.S. 1, 8 (1946), this Court considered on habeas "the lawful power of the commission to try the petitioner for the offense charged."

These cases are consistent with long-standing historical practice. While Petitioners emphasize the historic availability of habeas corpus to challenge the Executive's power to detain, the writ has for centuries been used to test

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[6] The availability in principle of habeas for this purpose is a different question than whether the DTA or, now, the MCA—assuming they apply to pending cases—validly strip federal courts of their authority to hear such habeas petitions. *See* Part III *infra*.

and resolve basic jurisdictional questions.[7] In the American colonies and in the early Nineteenth Century United States, in fact, habeas was principally used as a pre-trial means of attacking jurisdiction.[8] And while the actions that sounded in habeas would gradually expand, the fundamental role of habeas corpus in resolving dispositive jurisdictional questions has never been in doubt.[9]

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[7] As a leading historian on habeas corpus has written, "[t]here can be little doubt . . . that habeas corpus in its cum cause form was being used for [testing the capacity of the tribunal] independently of privilege or certiorari by the mid-fifteenth century, and in 1433 there is a statute referring to the use." R.J. Sharpe, *The Law of Habeas Corpus* 5 (2d ed., Oxford Univ. Press 1989); *see also* Edward Jenks, *The Prerogative Writs in English Law*, 32 Yale L.J. 523, 525 (1923). In the early Seventeenth Century, Coke placed special emphasis on the use of the writ by the Kings Bench in overseeing inferior courts and "keep[ing] them within their proper jurisdiction." Sir Edward Coke, 4 Institutes of the Laws of England 1170 (1797 ed.). By the mid-Seventeenth Century, the writ had become so indispensable to reviewing the jurisdiction of executive tribunals that Parliament guaranteed it for that purpose in the Act for the Abolition of the Court of Star Chamber. 1641, 17 Car. 1. c. 10 § 6 (Eng.); *see also* Edward Jenks, *The Story of the* Habeas Corpus, 13 L.Q. Rev. 64, 74 (1902) ("In 1608 the Common Pleas, by its agency, rescued Sir Antony Rooper from the clutches of the Court of High Commission.").

[8] *See, e.g., Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795); *see also* Dallin H. Oaks, *Habeas Corpus in the States 1776-1865*, 32 U. Chi. L. Rev. 243, 258 (1965) ("In the Nineteenth Century, however, most petitions involving criminal commitments preceded conviction. In fact, many were submitted immediately upon the defendant's being arrested and before he was even brought before a judicial officer for formal commitment.").

[9] *See, e.g., Ex parte Mayfield*, 141 U.S. 107, 116 (1891); *Ex parte Yarbrough*, 110 U.S. 651, 653 (1884). In *the Federalist*, Hamilton points to habeas as a means of securing against "[a]rbitrary impeachments [and] arbitrary methods of prosecuting pretended offenses." The Federalist No. 83 (Alexander Hamilton). And in *Swain v. Pressley*, Chief Justice Burger observed that inquiring into "whether a committing court had proper jurisdiction" was part of habeas' common-law core. 430 U.S. 372, 385 (1977) (Burger, C.J., concurring).

Moreover, the writ has always been available—as it was in *Hamdan*, *Quirin*, and *Yamashita*—to resolve the legality of military jurisdiction.[10] Of particular relevance to Respondent's case, habeas has historically been the vehicle through which minors have been removed from military custody. Lawful recruitment into the military has long been an essential prerequisite to military jurisdiction, and habeas has ensured that those too young to lawfully agree to military status do not suffer its consequences.[11] Accordingly, if this

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[10] In the United Kingdom, it was through habeas corpus petitions that the common law courts reviewed whether military courts had lawfully exercised personal jurisdiction over a petitioner. *See The Case of Wolfe Tone*, 27 How. St. Tr. 614 (Irish K.B. 1798). Likewise, both in the context of the Civil War, *Ex parte McCardle*, 74 U.S. (6 Wall.) 506 (1869); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), and during the peak of World War II, *Ex parte Quirin*, 317 U.S. 1 (1942), as in *Hamdan*, this Court entertained pre-trial habeas petitions in order to resolve the legality of military jurisdiction.

[11] This practice dates back at least to 1758, when the Kings Bench heard the habeas petition of a minor who was charged before a court-martial. *Rex v. Parkins*, [1758] 2 Kenyon 295, 96 Eng. Rep. 1188. According to the case report, "[t]he question was, whether [the minor] was to be considered as a soldier?" The Kings Bench decided that because the minor's enlistment had been unlawful, he was not a soldier and thereby ordered him "out of the hands of the military." *Id.* In the United States, habeas has been used for similar purposes. *Commonwealth ex rel. Webster v. Fox*, 7 Pa. 336 (1847), for example, involved factual circumstances nearly identical to *Parkins*, and the court issued a writ of habeas corpus to release a minor "unlawfully enlisted and held without authority of law." This very basic habeas jurisdiction was available even to aliens. In *Commonwealth v. Harrison*, 11 Mass. 63, 66 (1814), a Russian minor enlisted in the military and he was discharged upon a petition for habeas corpus because the military had "no legal claim to the custody or control of him." This application of habeas jurisdiction was routinely applied to release minors from military custody, even from conflict zones, at a time when the enlistment age was as high as 21 and no lower than 18. *See In re McDonald*, 16 F. Cas. 33 (D. Mass. 1866) (No. 8752); *In re Higgins*, 16 Wis. 351 (1863); *Dabb's Case*, 21 How. Pr. 68, 12 Abb. Pr. 113 (1861); *Bamfield v. Abbot*, 2 F. Cas. 577 (D. Mass. 1847) (No. 832); *Commonwealth v. Downes*, 41 Mass. (24 Pick.) 227 (1836); *Commonwealth v. Callan*, 6 Binn. 255 (Pa. 1814).

Court reverses the Court of Appeals and holds that the right to file habeas petitions extends geographically to detainees held at Guantanamo Bay, it should confirm that the same right also is available in principle—as it traditionally has been—to challenge not simply detention, but also the jurisdiction of military commissions to try detainees.

III. THIS COURT SHOULD NOT HOLD OR SUGGEST THAT THE MCA OR DTA PROVIDE AN ADEQUATE SUBSTITUTE FOR HABEAS CHALLENGES TO MILITARY COMMISSION JURISDICTION

If this Court agrees with Petitioners that Guantanamo detainees have a right to file habeas petitions, and concludes that the MCA purports to strip federal courts of jurisdiction to hear such petitions, it may then choose (as Petitioners suggest) to consider whether the MCA effects an unconstitutional suspension of the writ of habeas corpus. The Constitution provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. The MCA contains no finding that the United States is in the midst of an invasion or insurrection, and there is no serious argument to be made in support of such a position. However, in *Swain v. Pressley*, 430 U.S. 372 (1977), this Court held that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Id.* at 381. Accordingly, the central issue regarding the constitutionality of the MCA under the Suspension Clause is whether Congress, in enacting the MCA, provided an adequate and effective substitute for habeas corpus.

Respondent agrees with Petitioners that, with respect to detention-related claims, the MCA and DTA do not provide sufficient alternative procedures. But even if this Court were to disagree with Petitioners and hold that the MCA and DTA

do provide sufficient alternative procedures with respect to detention-related claims, it should *not* extend its holding to jurisdiction-related claims. Instead, it should expressly reserve the question whether the MCA provides sufficient alternative procedures with respect to habeas petitions challenging the jurisdiction of military commissions.

This is so because the analysis of the adequacy of the MCA as a substitute for habeas claims challenging military commission jurisdiction is importantly different in at least two respects than the analysis of the MCA and DTA as a substitute for habeas claims that challenge detention. First, the analysis of alternate procedures at issue is different. Second, and related, the potential issues that can be raised in a habeas petition—the rights ultimately to be vindicated—are also different.

A. The Analysis Of The Alternative Procedures With Respect To Jurisdiction-Related Habeas Claims Will Differ From The Analysis With Respect To Detention-Related Claims

Initially, the analysis of the alternate procedures Congress has provided under the MCA and DTA differs in numerous material respects in the cases of jurisdiction-related and detention-related habeas claims. Analysis of Petitioners' detention-related claims will focus on Section 7 of the MCA and the DTA review of CSRT determinations it incorporates by reference. *See* MCA § 7. Respondent believes Section 7 is also potentially relevant to jurisdiction-related claims, and has, as noted above, filed a DTA challenge to his CSRT determination as provided in Section 7 of the MCA. *See* note 4 *supra*. The Government, however, has disagreed, contending that while the DTA provides that the D.C. Circuit may review a CSRT determination for compliance with the Constitution and laws of the United States, such review is limited to laws that would limit the ability of the Government to detain—not try—Respondent. *See* Opposition to Petitioner's Emergency

Motion to Stay Military Commission Proceedings, *Khadr v. Gates*, No. 07-1156 (D.C. Cir. filed May 29, 2007) at 15-20. Thus, it is far from clear, particularly under the Government's interpretation of the DTA, that Respondent will be able to raise his substantive challenges to military commission jurisdiction in a DTA proceeding in the D.C. Circuit.[12] Any analysis of the adequacy of the MCA as an alternative procedure for raising jurisdiction-related habeas claims will therefore have to consider whether and to what extent Section 7 of the MCA is the relevant alternative procedure at all. That issue is not implicated by detention-related habeas claims.

The MCA also provides a procedure, set forth in Section 3, for post-judgment review of a military commission judgment in the D.C. Circuit. *See* MCA § 3(a)(1), § 950g. This procedure, of course, is not implicated in Petitioners' cases, as they have not been charged and are not facing proceedings before a military commission. Consideration of jurisdiction-related habeas claims, in contrast, will require an analysis of whether these procedures are an adequate substitute for habeas relief, particularly if the Government prevails in its position that Section 7 procedures are unavailable to challenge military commission jurisdiction.

A court will have to consider, for example, whether review under MCA Section 3 is an adequate substitute for habeas relief even thought it does not permit a detainee to present arguments against the exercise of military jurisdiction until *after* military commission proceedings have

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[12] In *Bismullah, et al. v. Gates*, No. 06-1197, 2007 U.S. App. LEXIS 18265 (D.C. Cir. July 30, 2007), the D.C. Circuit made clear that such DTA proceedings involve broader discovery and a less restrictive scope of review than was urged by the Government. However, *Bismullah* said nothing specific about the ability of detainees such as Respondent to present jurisdictional challenges to a federal court before the ordeal of trial by a military tribunal without jurisdiction.

taken place: the MCA only allows the D.C. Circuit to review "final decisions" of military commissions after trial, after approval by the convening authority, and after review by the so-called "Court of Military Commission Review." MCA § 3, § 950g(a). In *Hamdan*, this Court suggested that in order to be meaningful, federal court review of such arguments must take place before trial. *See Hamdan*, 126 S.Ct. at 2772; *see also Hamdan v. Rumsfeld*, 415 F.3d 33 at 36-37 (rejecting the Government's abstention arguments and observing that "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction"). There is thus ample question whether MCA Section 3 can be an adequate substitute for jurisdiction-related habeas claims.

Similarly, a court considering whether the MCA violates the Suspension Clause in the context of jurisdiction-related habeas claims would have to consider whether the procedures set forth in MCA Section 3 permit a detainee to effectively challenge the military commission's personal jurisdiction. The MCA provides that a finding by a CSRT "that a person is an unlawful enemy combatant is dispositive for the purposes of jurisdiction for trial by military commission under this chapter." MCA § 3, § 948d(c). Thus, under the MCA, it appears that a military commission itself cannot consider a challenge to personal jurisdiction based on a claim that a CSRT determination was erroneous. The plain language of the statute also appears to preclude the Court of Appeals from addressing the issue on review of a military commission conviction. Accordingly, a court considering the adequacy of the MCA as a substitute for jurisdiction-based habeas challenges will have to consider whether the other avenues available to review CSRT determinations—the review procedures in Section 7 of the MCA and the DTA—permit a detainee to raise all valid challenges to personal jurisdiction, including (for example) those based on a detainee's status as a juvenile.

In short, analysis of the adequacy of the MCA and DTA procedures as a substitute for jurisdiction-based habeas petitions is a markedly different inquiry than analysis of their adequacy as an alternative to detention-based habeas petitions.

B. The Substantive Challenges At Issue Are Different Than Those Raised By Detention-Related Claims

In addition, the interests to be vindicated by a habeas petition challenging the jurisdiction of a military tribunal differ from those implicated by a detention-based petition. In particular, while Petitioners seek to challenge substantive infirmities in their detentions, Respondent seeks to vindicate his right not to be tried before a tribunal that lacks both subject-matter and personal jurisdiction to try him.

Respondent's jurisdictional claims are described briefly below, so that the Court may consider the substantial arguments that may be raised against the jurisdiction of MCA military tribunals. As the discussion will show, there are serious questions about whether the military tribunal before which Respondent is to be tried actually has jurisdiction to hear his case. And, as suggested above, there are also serious questions about whether the MCA and DTA review provisions would allow for full and meaningful review of Respondent's jurisdictional claims. Given the seriousness of these arguments, Respondent urges this Court not to foreclose federal habeas review of such jurisdictional claims—and certainly not in this case, where the issue has not been squarely presented or addressed.

1. The Military Commission Lacks Jurisdiction Over Respondent Because He Is A Juvenile

The MCA does not expressly grant military commissions personal jurisdiction over minors. Nor did Congress, in enacting the MCA, provide any indication that it intended to abrogate the extensive statutory framework that governs the prosecution of minors in federal custody under the Juvenile

Delinquency Act ("JDA"), 18 U.S.C. §§ 5031, *et. seq.* There is no reason to believe that Congress intended to subject minors such as Respondent to the jurisdiction of MCA military tribunals, rather than the procedures set forth in the JDA—particularly in the face of long-standing military law and policy conferring special status on minors and precluding court-martial jurisdiction over minors.

1. "The age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Roper v. Simmons*, 543 U.S. 551, 574 (2005). Consistent with this understanding, Congress, in the JDA, established specific and carefully considered procedures for the federal detention and prosecution of persons under the age of 18. Most important here, the JDA provides juveniles with a statutory right not to be tried as criminal defendants outside of its terms. *See* JDA, 18 U.S.C. §§ 5031, *et seq.*; *In re Sealed Case*, 893 F.2d 363, 367-68 (D.C. Cir. 1990).

The JDA governs the federal prosecution of juveniles in the military context as well as outside that context. The JDA is routinely invoked when juveniles are taken into federal custody in situations where there is no concurrent state jurisdiction—as is the case when a juvenile is taken into custody on a military base. *See* 18 U.S.C. § 5032(1).[13] Within the military, the JDA is understood as applying to the prosecution of anyone under eighteen who is not a member of U.S. forces and commits a criminal act overseas. *See* Operational Law Handbook, JA 422, 139 (2006). And because the JDA, like the federal habeas statute, 28 U.S.C. §

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[13] *See United States v. R. L. C.*, 503 U.S. 291 (1992) (juvenile held on Indian territory); *United States v. Jose D. L.*, 453 F.3d 1115 (9th Cir. 2006) (alien juvenile caught at border crossing); *United States v. Male Juvenile*, 280 F.3d 1008 (9th Cir. 2002) (juvenile held on Indian territory); *United States v. Juvenile (RRA-A)*, 229 F.3d 737 (9th Cir. 2000) (alien juvenile caught at border crossing); *United States v. Female Juvenile*, 103 F.3d 14 (5th Cir. 1996) (juvenile held on military base); *United States v. Juvenile Male*, 939 F.2d 321 (6th Cir. 1991) (juvenile held on military base).

2241, "draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship." *Id.* In fact, the JDA's provisions are recognized as applying equally to both legal and illegal aliens prosecuted for criminal conduct committed before the age of eighteen.[14]

The MCA does not expressly abrogate the JDA, nor provide any indication that Congress intended to override the specific statutory protections afforded juveniles by the JDA. Accordingly, the best reading of the entire statutory framework is that the JDA has not been repealed by implication, but instead continues to govern in the specific area of prosecution of juveniles. *See Branch v. Smith*, 538 U.S. 254, 273 (2003) ("[A]bsent 'a clearly established congressional intention, repeals by implication are not favored.' An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict', or where the latter act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'") (internal citations omitted). The well-established presumption against repeal by implication applies with special force here, where Congress has not hesitated to specify, clearly and expressly, the preexisting procedures that *are* overridden by the MCA. *See, e.g.*, MCA § 4, 10 U.S.C. § 948b.

2. The exercise of personal jurisdiction over former child soldiers by military commissions is inconsistent not only with the immediate statutory framework, but also with longstanding military law and policy. It is especially unlikely that Congress would extend the military commissions' jurisdiction to minors *sub silentio* given that

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[14] *See United States v. C.M.*, 485 F.3d 492 (9th Cir. 2007); *United States v. Jose D. L.*, 453 F.3d 1115, (9th Cir. 2006); *United States v. Juvenile (RRA-A)*, 229 F.3d 737 (9th Cir. 2000); *United States v. Juvenile Male*, 74 F.3d 526 (4th Cir. 1996); *United States v. Doe*, 862 F.2d 776, 799 (9th Cir. 1988); *United States v. Doe*, 701 F.2d 819 (9th Cir. 1983).

such jurisdiction would be contrary to the treatment of juveniles under other aspects of military law.

Most fundamentally, under military law, courts-martial do not have personal jurisdiction over minors. Though the Uniform Code of Military Justice ("UCMJ") does not specify a minimum age for personal jurisdiction, the United States Court of Appeals for the Armed Forces has long held that a court-martial lacks jurisdiction over minors in most instances. *See United States v. Blanton*, 7 C.M.A. 664 (1957); *United States v. Brown*, 23 C.M.A. 162 (1974). As a general matter, and absent some explicit direction, Congress should not be understood to have adopted a military tribunal system contrary to that well-established cannon of military law. But that is especially true here, where Congress expressly made the UCMJ the model for MCA military commissions, *see* MCA § 3, 10 U.S.C. § 948b(c) ("The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under [the UCMJ]"), and specifically identified those provisions of the UCMJ that it did *not* wish to govern under the MCA, *see, e.g.*, MCA §§ 3, 4(a)(2); 10 U.S.C. §§ 821, 828, 848, 850, 904, 906, 948b(d).

"Where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard, Div. of Loewe's Theaters, Inc. v. Pons*, 434 U.S. 575, 581 (1978); *see also, e.g., Whitfield v. United States*, 543 U.S. 209 (2005). Congress would have known that under the UCJM, courts-martial have no jurisdiction over minors—but that age limit is *not* among the features of the UCJM that Congress singled out as inapplicable to military tribunals under the MCA. Under fifty years of precedent from the nation's highest military court, military trials—whether by court-martial or ad hoc commission—are adult proceedings that presume defendants

had the capacity to take on the special status that subjects them to military jurisdiction, whether as members of the "military establishment" or as "enemy combatants." All indications are that Congress intended to leave that precedent undisturbed, and to delineate the personal jurisdiction of MCA commissions in a manner consistent with well-established military law.[15]

2. The Military Commission Lacks Jurisdiction To Hear the Offenses With Which Respondent Has Been Charged

The military commission before which Respondent faces trial also lacks subject-matter jurisdiction to hear the charges against him. It is undisputed that a military commission can assume jurisdiction only over crimes of war. *See Hamdan*, 126 S. Ct. at 2777-81 (plurality op.) (conspiracy not a war crime, and thus not triable by military commission). At the time Respondent is alleged to have committed the five offenses with which he is charged, not one of them qualified as a crime of war. Like the conspiracy charge at issue in *Hamdan*, none of those offenses "appear[s] in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war." *Id.* at 2781. Nor are the offenses triable by the International Criminal Court under the Rome Statute, which "provides the most comprehensive, definitive and authoritative list of war crimes." Robert Cryer, *International Criminal Law v. State Sovereignty:*

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[15] Military policy accords special status to minors in other respects as well. For instance, minors are included in a specially protected class of detainees (along with religious figures and women) who are accorded special "dignity and respect" and must be housed separately from adult male detainees. *See* First Marine Division, Detainee Handling and Detention Facility SOP §§ 1(c)(3)(a), 2(c)(4) (Oct. 1, 2004). Similarly, United States policy in Afghanistan condemns the use of "child soldiers," conditioning support for the Afghan army on prohibition of the use of child soldiers or combatants. Afghanistan Freedom Support Act of 2002, Pub. L. 107-327, 116 Stat. 2797 (Dec. 4, 2002).

Another Round?, 16 Eur. J. Int'l L. (5th issue) 979, 990 (2005).

Congress may "positively identif[y]" particular offenses as crimes of war, *Hamdan*, 126 S. Ct. at 2749, and the Military Commissions Act purports to make the offenses with which Respondent is charged triable by MCA commissions. But that Act—signed into law in 2006, four years *after* Respondent was taken into custody—cannot be the basis for jurisdiction here: application of the MCA to Respondent's pre-MCA conduct would violate United States (and international-law) prohibitions on *ex post facto* laws.

1. Respondent is charged with five offenses: murder, attempted murder, conspiracy, providing material support for terrorism, and spying in violation of the MCA. Charge Sheet (Apr. 24, 2007). None of the charged offenses was a crime of war or otherwise triable by a military commission when Respondent is alleged to have committed the offenses, sometime before he was taken into custody in 2002.

As noted above, the offenses in question do not appear in the "major treaties on the law of war," *Hamdan*, 126 S. Ct. at 2781, and are not triable by the International Criminal Court as war crimes. *See supra* at 24. Prior to the MCA, no congressional statute purported to define these offenses as crimes of war.[16] As this Court held in *Hamdan*, when an offense is not defined as a war crime by treaty or statute, "the precedent [for trial by military commission] must be plain

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[16] During the relevant time period, the Uniform Code of Military Justice ("UCMJ") did identify spying as an offense triable by military commission. *See* 10 U.S.C. § 906. But Respondent is not charged with the UCMJ offense of spying, which requires, *inter alia*, (a) some "clandestine" action (b) taken during a time of war—requirements that could not be met in Respondent's case. Instead, he is charged with spying under the MCA, which defines the offense more broadly and omits the two key UCMJ requirements noted above. Until passage of the MCA, however, the broader spying offense with which Respondent is actually charged was not a crime of war and was not triable by a military commission.

and unambiguous" before jurisdiction may vest in a military commission. *Id.* at 2780. But here, there is no "plain and unambiguous precedent." To the contrary: prior to the enactment of the MCA in 2006, no international tribunal or American military commission had ever charged an individual with the offenses at issue here. In short, at the time Respondent allegedly committed his offenses, there was no basis for categorizing those offenses as "war crimes" giving rise to military commission jurisdiction.

2. On October 17, 2006—more than four years after Respondent was taken into custody—the President signed into law the MCA, which expands the group of offenses triable as war crimes by military commissions. *Cf. Hamdan*, 126 S. Ct. at 2749 (discussing Congress' constitutional authority to define crimes of war by statute). The charges against Respondent appear to correspond to offenses newly identified as crimes of war by the MCA. But that does not solve the jurisdictional problem here. Instead, it raises a new and serious constitutional problem: any attempt to apply the MCA to Respondent's pre-MCA conduct would violate the Constitution's *Ex Post Facto* Clause, U.S. Const. art. I, § 9, cl. 3.

The *Ex Post Facto* Clause prohibits Congress from enacting criminal laws with certain retroactive effects, *see Stogner v. California*, 539 U.S. 607 (2003)—here, from retroactively subjecting Respondent to the jurisdiction of a military commission and threat of punishment on the basis of offenses that were not crimes of war when they allegedly were committed. Using the MCA to prosecute as war crimes conduct that did not give rise to war-crime liability when it occurred would defeat the central purpose of the *Ex Post Facto* Clause: to ensure that "legislative Acts give fair warning of their effect and permit individuals to rely on their

meaning until explicitly changed," *see Weaver v. Graham*, 450 U.S. 24, 28-29 (1981).[17]

The *Ex Post Facto* Clause operates directly on Congress, prohibiting the *passage* of any *ex post facto* law and thus "restraining arbitrary and potentially vindictive legislation" and "confining the legislature to penal decisions with prospective effect." *See id.* at 29 n.10. Any act in violation of the prohibition against *ex post facto* laws is void, and cannot operate as the basis for jurisdiction. *Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description.").[18]

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[17] The fact that Section 3 of the MCA states that the offenses it lists are "declarative of existing law," MCA § 3, § 950p, does not cure this problem: as discussed above, that statement is false, and Congress cannot avoid *ex post facto* scrutiny of its enactments simply by declaring that they do not violate the *Ex Post Facto* Clause.

[18] The United States is not alone in its treatment of *ex post facto* laws. International law also prohibits charging individuals with "any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." International Covenant on Civil and Political Rights, art. 15(1), Mar. 23, 1976, 999 U.N.T.S. 171 (ratified by U.S. on June 8, 1992) ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), art. 75(4)(c), Dec. 7, 1978, 1125 U.N.T.S. 3 ("No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed.") (recognized as customary international law by the U.S. in W. Hays Parks et al., Unclassified Memorandum for Mr. John H. McNeill, Assistant General Counsel (International), OSD (May 8, 1986) (entitled 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications); *Prosecutor v. Delalić et. al.*, Case No. IT-96-21-T, ICTY Trial Chamber Judgment, ¶ 313 (Nov. 16, 1998) (explaining prohibition on retroactive application of criminal laws

Indeed, even the military commission system invalidated in *Hamdan* recognized that individuals could not be tried before military commissions for offenses that did not exist when they allegedly were committed. MCI No. 2 ¶ 3(A) ("No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question."). Because it is not within the competency of Congress to pass an *ex post facto* law, Respondent may not be tried by a military commission for offenses designated as "war crimes" for the first time on October 17, 2006, four years after Respondent was detained.

3. The Military Commission Lacks Jurisdiction Because Respondent Has Presumptive Prisoner-of-War Status, Which Requires Trial By Court-Martial

Even if a court were to reject both of the preceding arguments, Respondent still would not be subject to the jurisdiction of a military commission. Respondent is entitled to assert that he is a prisoner of war.[19] Unless and until a competent tribunal determines otherwise, that is enough to entitle Respondent to the procedural protections afforded prisoners of war—including the right to be tried by a court-martial.

Every belligerent taken prisoner during armed conflict "must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention. . . . There is no intermediate status; nobody in enemy hands can be outside the law." International Committee of the Red Cross, *Commentary on the Geneva Conventions of 12 August 1949: IV Geneva Convention*

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for acts that an individual reasonably believed to be lawful at the time of their commission).

[19] *See* Department of the Army Field Manual 27-10, The Law of Land Warfare ¶¶ 62, 71(b) (July 1956) ("1956 Army Field Manual 27-10").

Relative to the Protection of Civilian Persons in Time of War p. 51 (Jean S. Pictet ed., 1958).[20] Designation as a prisoner of war is crucial, because prisoners of war held by the United States may only be tried by court-martial. The Geneva Convention III Relative to the Treatment of Prisoners of War ("GPW"), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 102.

It is well-established that when "any doubt arise[s]" as to whether a person who has "fallen into the hands of the enemy" is a prisoner of war, the person must be afforded prisoner-of-war status "until such time as their status has been determined by a competent tribunal." GPW, art. 5(2); *see also Hamdi*, 542 U.S. at 550 (Souter, J. and Ginsburg, J., concurring in part, dissenting in part, and concurring in judgment) (Third Geneva Convention requires "that even in cases of doubt, captives are entitled to be treated as prisoners of war 'until such time as their status has been determined by a competent tribunal'"). Moreover, such doubt arises whenever a detainee claims prisoner-of-war status. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 162 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006), (quoting Army Regulation 190-8, § 1-6(a)) (citing *Hamdi*, 542 U.S. at 550 (Souter, J. and Ginsburg, J., concurring in part, dissenting in part, and concurring in judgment)).

That principal is well-rooted in customary international law as well as the military's governing regulations. *See, e.g.*, Protocol I (imposing a presumption that a person in the hands of an adverse party who claims to be a prisoner of war shall be considered a prisoner of war "until such time as his status has been determined by a competent tribunal.");[21]

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[20] *See also* The Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[21] Although the U.S. has not signed Protocol I, State Department statements regarding this provision show that these principles constitute

United States Central Command Regulation No. 27-13 ¶ 7(a)(2) (Feb. 7, 1995) (regulations governing the U.S. military's Area of Operations that includes Afghanistan and Iraq, instructing that "the protections of the GPW [be applied] . . . to each detainee whose status has not yet been determined by a Tribunal covered under this regulation."); Department of the Army Field Manual 27-10, The Law of Land Warfare ¶ 71(b) (July 1956) (GPW, art. 5 "applies to any person not appearing to be entitled to prisoner-of-war status . . . who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists.").[22]

In short, unless and until the government convenes a competent tribunal to determine whether Respondent is a prisoner of war, it must presume that he has that status and afford him all corresponding procedural protections,

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customary law recognized by the United States. *See* Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to The 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U.J. Int'l L & Pol'y 415, 421-22 (1987) (presented at the Sixth Annual American Red Cross—Washington College of Law Conference on International Humanitarian Law and the 1977 Protocols Additional to the 1949 Geneva Conventions). Speaking for the State Department, Mr. Matheson stated:

> [W]e [the United States] do support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person who has fallen into the power of an adversary is not held as a prisoner of war and is to be tried for an offense arising out of the hostilities, he should have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated.

Id. at 425-26.

[22] The MCA purports to bar detainees from raising claims under the Geneva Conventions. *See* MCA § 3, § 948b(g). As Petitioners explain in their brief, this bar is invalid. But in any event, as discussed, customary international law provides an independent basis for affording full prisoner-of-war status to prisoners who have not had their status reviewed by a competent tribunal.

including the right to be tried by a court-martial rather than a military commission. But without access to habeas, Respondent would have no means of raising issues related to his status and the personal jurisdiction of a military tribunal to try him.

* * * *

In sum, there are, at the least, serious questions as to whether Respondent may be subjected to the jurisdiction of a military commission. The questions raised by Omar Khadr's case are of the most fundamental order, going to the very authority of a tribunal over those brought before it. Resolving such foundational disputes is at the heart of habeas corpus review, and this Court should reverse the decision below and hold that the federal courts remain open to the claims of Respondent and those like him. Even if the Court concludes that the MCA and DTA provide adequate alternate procedures to substitute for habeas in the context of Petitioners' detention-related claims, it should not hold or imply that those procedures are similarly adequate for the markedly different jurisdictional challenges Respondent would bring.

CONCLUSION

For the foregoing reasons, the judgment of the D.C. Circuit should be reversed.

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Nos. 06-1195 and 06-1196

In the Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

KHALED A.F. AL ODAH, NEXT FRIEND OF
FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, removes federal court jurisdiction over habeas petitions filed by aliens detained as enemy combatants at Guantanamo Bay, Cuba.

2. Whether aliens detained as enemy combatants at Guantanamo Bay have rights under the Suspension Clause of Article I, Section 9 of the United States Constitution.

3. Whether, if aliens detained at Guantanamo Bay have such rights, the MCA violates the Suspension Clause.

4. Whether petitioners may challenge the adequacy of the judicial review available under the MCA and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, before they have exhausted such review.

5. Whether petitioners' detention is lawful.

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In the Supreme Court of the United States

No. 06-1195

LAKHDAR BOUMEDIENE, ET AL., PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

No. 06-1196

KHALED A.F. AL ODAH, NEXT FRIEND OF
FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 476 F.3d 981.[1] The opinions of the district

[1] Unless otherwise noted, all references to "Pet.," "Pet. App.," and "Br." are to the petition, appendix, and petitioners' brief in No. 06-1195.

court are reported at 355 F. Supp. 2d 311 (Pet. App. 51a-79a), and 355 F. Supp. 2d 443 (06-1196 Pet. App. 61-127).

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2007. The petitions for a writ of certiorari were filed on March 5, 2007, and granted on June 29, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. In response to the attacks of September 11, 2001, Congress approved the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224. The President ordered the Armed Forces to subdue both the al Qaeda terrorist network and the Taliban regime that harbored it in Afghanistan. Although our troops have removed the Taliban from power, armed combat with al Qaeda and the Taliban remains ongoing. In connection with those conflicts, the United States has seized many hostile persons and detained a small fraction of them as enemy combatants. Approximately 340 of these enemy combatants are being held at the U.S. Naval Base at Guantanamo Bay, Cuba. Each of them was captured abroad and is a foreign national.

2. a. With the exception of two recently arrived detainees, every Guantanamo Bay detainee has received a hearing before a military Combatant Status Review Tribunal (CSRT). Those tribunals were created "to determine, in a fact-based proceeding, whether the individuals detained * * * are properly classified as enemy

combatants and to permit each detainee the opportunity to contest such designation." 06-1196 Pet. App. 147.

During the CSRT proceedings, each detainee received procedural protections modeled on an Army regulation (U.S. Dep't of the Army et al., *Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Nov. 1, 1997) (Army Reg. 190-8)), which specifies procedures for determining the status of detainees under the Geneva Convention. Among other things, the CSRT procedures provided for each detainee to receive notice of the unclassified factual basis for his designation as an enemy combatant, as well as an opportunity to testify, call reasonably available witnesses, and present relevant and reasonably available evidence. 06-1196 Pet. App. 143-144. They also provided that each detainee would receive assistance from a military officer designated as his "personal representative." *Id.* at 141. Another military officer, the recorder of each tribunal, was charged with presenting evidence regarding whether the detainee should be designated as an enemy combatant, including evidence that the detainee should *not* be so designated. *Id.* at 165. Each tribunal consisted of three military officers sworn to render an impartial decision and who were not "involved in the apprehension, detention, interrogation, or previous determination of status of the detainee." *Id.* at 142. And each tribunal decision was subject to mandatory review first by the CSRT Legal Advisor and then by the CSRT Director. *Id.* at 163-164. The CSRT process has led to determinations that 38 now-released detainees were no longer enemy combatants. See *Combatant Status Review Tribunal Summary* (visited Oct. 9, 2007) <http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf> (*CSRT Summary*).

In addition to the CSRT review process, the Department of Defense also conducts an annual administrative examination of whether it is appropriate to release or repatriate an enemy combatant. The 328 administrative reviews conducted in 2006 resulted in determinations that 55 detainees (roughly 17%) should no longer be detained at Guantanamo Bay. See Office of the Asst. Sec'y of Def. (Pub. Affairs), U.S. DoD, *Annual Administrative Review Boards for Enemy Combatants Held at Guantanamo Attributable to Senior Defense Officials* (Mar. 6, 2007) <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902>. Since 2002, about 390 detainees have been transferred or released through this or other processes. See *ibid.* Today, approximately 340 detainees remain at Guantanamo Bay.

b. Each detainee's enemy combatant determination is based on a specific record unique to his case, and most of the CSRT conclusions are based in significant part on classified information. The CSRT decision reports were included in the factual returns to the habeas petitions and are part of the district court record.

3. Habeas corpus petitions have been filed on behalf of numerous Guantanamo Bay detainees. In *Rasul* v. *Bush*, 542 U.S. 466 (2004), this Court held that district courts had jurisdiction under 28 U.S.C. 2241 to consider habeas petitions filed by detainees at Guantanamo Bay. The Court reasoned that the statutory holding of *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), had implicitly rested on the narrow construction of the habeas statute adopted in *Ahrens* v. *Clark*, 335 U.S. 188 (1948), which did not survive the Court's decision in *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973). See *Rasul*, 542 U.S. at 477-479. Accordingly, this Court had no occasion to revisit *Eisentrager*'s constitutional holding and

instead concluded, as a statutory matter, that Section 2241 "confer[red] * * * jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base." *Id.* at 484. The Court emphasized that it had decided "only whether the federal courts have jurisdiction," and not "the merits of petitioners' claims." *Id.* at 485.

4. After the remand in *Rasul*, numerous other Guantanamo Bay detainees filed habeas petitions. Their actions include 13 cases, involving more than 60 detainees, which were coordinated in the district court for limited procedural purposes. Respondents moved to dismiss the claims of each detainee. The district court, acting on eleven of the consolidated cases, granted the motions in part and denied them in part, concluding that Due Process Clause of the Fifth Amendment applies extraterritorially to aliens held at Guantanamo Bay, and that the CSRT procedures are constitutionally deficient. 06-1196 Pet. App. 61-127 (Green, J.). The district court, acting on two other cases, granted the motions to dismiss in full, holding that the petitioners' detention was authorized by the AUMF, and that the Constitution does not protect aliens outside sovereign United States territory, including at Guantanamo Bay. Pet. App. 51a-79a (Leon, J.). Both decisions were appealed.

5. While these appeals were pending, Congress—recognizing that detainee litigation was consuming enormous resources and disrupting the operation of the Guantanamo Bay Naval Base—enacted the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Tit. X, 119 Stat. 2739. Section 1005(e)(1) of that Act amended the federal habeas corpus statute to provide that "no court, justice, or judge shall have jurisdiction" to con-

sider habeas petitions filed by aliens detained at Guantanamo Bay. DTA § 1005(e)(1), 119 Stat. 2742.

Section 1005(e)(2) of the DTA provides that the Court of Appeals for the District of Columbia Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." DTA § 1005(e)(2)(A), 119 Stat. 2742. The DTA specifies that the court of appeals may determine whether a final CSRT decision "was consistent with the standards and procedures specified by the Secretary of Defense," and "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C), 119 Stat. 2742. Section 1005(e)(3) creates a parallel exclusive-review mechanism for Guantanamo Bay detainees seeking to challenge final criminal convictions issued by military commissions. § 1005(e)(3)(A), 119 Stat. 2743; see Military Commission Order No. 1 (DoD Aug. 31, 2005) <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>.

6. Several months later, this Court decided *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006). In *Hamdan*, the Court held that Section 1005(e)(1), the jurisdiction-removing provision of the DTA, does not apply to habeas claims filed before the DTA was enacted. See *id.* at 2762-2769. In reaching that conclusion, the Court observed that the statute made the exclusive-review provisions in Section 1005(e)(2) and (3) of the DTA "expressly * * * applicable to pending cases." *Id.* at 2764 (citing DTA § 1005(h)(2), 119 Stat. 2743). The Court noted the absence of such language regarding Section 1005(e)(1),

and therefore drew a "negative inference" as to Congress' intent to apply Section 1005(e)(1) to pending cases. *Id.* at 2766.

7. In the wake of this Court's decision in *Hamdan*, Congress enacted the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600. Section 7(a) of the MCA, 120 Stat. 2635, amends 28 U.S.C. 2241(e) to provide that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." MCA § 7(a), 120 Stat. 2636. Section 7(a) also eliminates federal court jurisdiction, except as provided by Section 1005(e)(2) and (3) of the DTA, over "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of such an alien. *Ibid.* The MCA provides that these amendments "shall take effect on the date of the enactment of this Act," and that they "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act, which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." § 7(b), 120 Stat. 2636.

8. On February 20, 2007, the court of appeals dismissed these cases for lack of jurisdiction.

a. The court of appeals observed that each of petitioners' pending habeas cases "relates to an 'aspect' of detention and * * * deals with the detention of an 'alien' after September 11, 2001." Pet. App. 6a. The court concluded that the MCA applies to those cases and

eliminates federal court jurisdiction over the petitions. *Id.* at 6a-9a.

The court of appeals further held that the MCA is consistent with the Suspension Clause, U.S. Const. Art. I, § 9, for two independent reasons. First, the court noted that the Suspension Clause "protects the writ 'as it existed in 1789,'" Pet. App. 10a, but "the history of the writ in England prior to the founding" shows that "habeas corpus would not have been available in 1789 to aliens without presence or property in the United States," *id.* at 12a-13a. Second, the court held that, as aliens outside the sovereign territory of the United States, petitioners have no constitutional rights under the Suspension Clause. The court observed that in *Eisentrager*, this Court "rejected the proposition 'that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses.'" *Id.* at 14a (quoting *Eisentrager*, 339 U.S. at 783); see *id.* at 15a (quoting *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), and *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001)).

The court of appeals also held that petitioners' suggestion that this Court's decision in *Rasul* overruled the constitutional holding in *Eisentrager* was mistaken. Pet. App. 13a. The court explained that *Rasul* interpreted only the statutory right to habeas, so it "could not possibly have affected the constitutional holding of *Eisentrager*," *id.* at 15a n.10, in which this Court explicitly held that aliens detained outside the sovereign territory of the United States do not have a constitutionally protected right to the writ, see 339 U.S. at 781.

Having concluded that the MCA eliminates jurisdiction in petitioners' cases, the court vacated the district

courts' decisions and dismissed the cases for want of jurisdiction. Pet. App. 19a-20a.

b. Judge Rogers dissented. She agreed that Congress intended the MCA to withdraw federal jurisdiction over the detainees' claims, but she found the statute to be inconsistent with the Suspension Clause, because "Congress has neither provided an adequate alternative remedy * * * nor invoked the exception to the Clause by making the required findings to suspend the writ." Pet. App. 21a-22a.

SUMMARY OF ARGUMENT

I. The court of appeals correctly concluded that the Military Commissions Act does not violate the Suspension Clause. Petitioners are aliens with no connection to this country who were captured abroad in the course of an ongoing military conflict and who have at all times been detained outside the sovereign territory of the United States. They have had the benefit of a legal proceeding—employing procedures authorized by Congress—to review their status, and they have been adjudged to be enemy combatants. In addition, they have the right to challenge those status determinations before the District of Columbia Circuit and may seek further review in this Court if they do not prevail in the court of appeals. Petitioners, along with the other enemy combatants being held at Guantanamo Bay, enjoy more procedural protections than any other captured enemy combatants in the history of warfare.

The court of appeals properly rejected petitioners' claims that they are entitled to greater procedural protections than those afforded by the military and authorized by Congress. First, as aliens held outside the sovereign territory of the United States, petitioners may

not invoke the protections of our Constitution, including those guaranteed by the Suspension Clause. That conclusion is alone compelled by *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), and its progeny, and there is no basis to upset that longstanding constitutional rule here.

Second, even if petitioners could assert rights under the Suspension Clause, their claims would be unavailing. The baseline for reviewing Suspension Clause claims is the writ that existed in 1789. Because the common-law writ of habeas corpus would not have extended to alien enemy combatants held outside the territory of the United States, either in 1789 or at any later date, petitioners cannot show the deprivation of any interest protected by the Suspension Clause.

Third, even if petitioners could show a historical precedent for habeas corpus in the extraordinary circumstances here, Congress has afforded them a constitutionally adequate substitute for challenging their detention. Although Congress expressly chose to foreclose detainees from challenging their status via habeas, it decided that aliens detained at Guantanamo Bay as enemy combatants should receive administrative hearings before a military tribunal, subject to judicial review in the District of Columbia Circuit. That system builds additional protections upon those that are available even to conventional prisoners of war under the Geneva Convention, and it was designed to track the requirements for due process deemed sufficient for American citizens in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004).

The laws that establish that system—the Military Commissions Act and the Detainee Treatment Act—represent an effort by the political branches to strike an appropriate balance between the need to preserve liberty and the need to accommodate "the weighty and sen-

sitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." *Hamdi*, 542 U.S. at 531 (plurality opinion). And the laws reflect precisely the kind of consultation between the President and Congress that "strengthens the Nation's ability to determine—through democratic means—how best" to confront national security threats during an ongoing military conflict. *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2799 (2006) (Breyer, J., concurring).

II. There is no reason for this Court to pass on the merits of petitioners' detention before the lower court has done so. In any event, if the Court does review the merits of petitioners' detention in this case, it should hold that their detention is lawful. Congress has authorized the President to use "all necessary and appropriate force" against those "organizations" that "he determines" committed the terrorist attacks of September 11, 2001. Al Qaeda is such an organization, and this Court squarely held in *Hamdi* that detention is part and parcel of the force authorized by Congress. See 542 U.S. at 518 (plurality opinion). Petitioners are properly detained because they have been determined by a military tribunal to be "part of or supporting Taliban or al Qaida forces." Pet. App. 81a. Petitioners may challenge that determination under the procedures authorized by Congress, but they have provided no basis for upsetting that determination at this preliminary stage.

ARGUMENT

Four Terms ago, in *Rasul* v. *Bush*, 542 U.S. 466 (2004), a group of Guantanamo Bay detainees—including the Al Odah petitioners here—came to this Court claiming through a habeas corpus action a right to military

review of their enemy combatant designations under a process modeled on Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3322, 75 U.N.T.S. 135, 140 (Geneva Convention or Convention). As their counsel proclaimed at oral argument, their request was modest, and if they were provided such military review, they "would not" be here. Tr. Oral Arg. at 10, *Rasul*, *supra* (No. 03-343).[2] Since then, these same detainees—like the other Guantanamo Bay detainees—have received an opportunity to contest their enemy combatant status before a military tribunal that affords protections *greater* than those outlined by Article 5 of the Geneva Convention, and have been granted by Congress a statutory right to challenge such status determinations in court. The detainees now enjoy greater procedural protections and statutory rights to challenge their wartime detentions than any other captured enemy combatants in the history of war. Yet they claim an entitlement to more. That contention should be rejected, and petitioners should be directed to raise their claims through the unprecedented review procedures established by Congress.

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[2] The *Al Odah* petitioners represented to the Court in *Rasul*, *supra*, that they sought only a military tribunal process to determine the validity of their detention, and "have never sought to have Article III courts make *any* individualized determinations of petitioners' alleged status as enemies or to second-guess military determinations as to which aliens pose a threat to the United States." Al Odah Reply Br. at 13 (No. 03-343); see Tr. Oral Arg. at 9-10, 15, 18-19 (No. 03-343).

I. THE MILITARY COMMISSIONS ACT OF 2006 VALIDLY DIVESTED THE DISTRICT COURT OF JURISDICTION OVER PETITIONERS' HABEAS CORPUS PETITIONS

In the MCA, Congress plainly and unambiguously removed jurisdiction over habeas corpus petitions filed on behalf of aliens held at Guantanamo Bay as enemy combatants, MCA § 7, 120 Stat. 2635, and substituted in its place a review scheme that permits such detainees to challenge their CSRT enemy combatant determinations in a petition to the District of Columbia Circuit.[3] Petitioners contend that they have a constitutional right under the Suspension Clause to pursue relief in habeas corpus that trumps the scheme established by Congress. For several independent reasons, the court of appeals properly rejected that contention. First, as aliens held outside the sovereign territory of the United States, petitioners enjoy no rights under the Suspension Clause. Second, even if they could invoke the Suspension Clause, it would not entitle them to relief because they seek an expansion of the writ well beyond its historic scope. And third, the DTA in any event provides an adequate alternative to any habeas rights petitioners may have.

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[3] Some of the petitioners contend (Br. 10 n.6; Al Odah Br. 26-29; but see El-Banna Br. 29-30) that the MCA does not apply to pending cases. That claim lacks merit. Section 7(a) amends 28 U.S.C. 2241 to eliminate jurisdiction over any petition for a writ of habeas corpus filed by an alien detained as enemy combatant. MCA § 7(a), 120 Stat. 2635. And Section 7(b) provides that Section 7(a) "shall take effect on the date of the enactment of this Act" and "shall apply to all cases, without exception, pending on or after the date of enactment of this Act." MCA § 7(b), 120 Stat. 2636. As the court of appeals observed, the statute "could not be clearer." Pet. App. 7a. "It is almost as if the proponents of these words were slamming their fists on the table shouting 'When we say "all," we mean all—**without exception!**'" *Ibid.*

A. As Aliens Held Outside The Sovereign Territory Of The United States, Petitioners Do Not Enjoy Any Rights Under The Suspension Clause

Petitioners' constitutional claim fails at the outset because, as aliens outside the sovereign territory of the United States, petitioners do not fall within the ambit of the Suspension Clause. See Pet. App. 14a-19a. "[C]onstitutional protections" must be interpreted "in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring). The text and history of the Suspension Clause demonstrate that it does not confer rights on enemy combatants seized by our military and held abroad, and this Court's precedents confirm that such aliens have no constitutional right to petition our courts for a writ of habeas corpus.[4]

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[4] Petitioners argue (El-Banna Br. 16-18) that the Suspension Clause is a structural provision that limits Congress's authority without regard to whether petitioners have constitutional rights. The court of appeals correctly rejected that argument. Pet. App. 17a-19a. Petitioners' theory is inconsistent with the text of the Suspension Clause, which refers to the "Privilege of the Writ of Habeas Corpus." U.S. Const. Art I, § 9, Cl. 2. The term "privilege" is more consistent with the language in several of the Bill of Rights provisions, such as the Fourth Amendment. See, *e.g.*, *id.* Amend. IV (protecting "[t]he right of the people" to be free from unreasonable searches and seizures). In interpreting that provision, this Court rejected the suggestion that it worked as a structural constraint and therefore applied globally. See *Verdugo-Urquidez*, 494 U.S. at 270. But even if the extraterritorial reach of the Suspension Clause does not stand or fall with the extraterritorial reach of the Bill of Rights, it does not assist petitioners. Petitioners' argument is contradicted by this Court's decision in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), where the Court held that overseas military detainees lacked the constitutional right to petition for habeas corpus. See *id.* at 777.

1. Text and history demonstrate that the Suspension Clause has only domestic application

The framers recognized that wartime exigencies might require the suspension of habeas corpus. They therefore authorized suspension of the writ "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art. I, § 9, Cl. 2. Significantly, both of those exigencies—rebellion and invasion—pertain to wartime conditions *within* the United States. Nor can there be any doubt but that the "public safety" referred to in the Clause refers to safety at home rather than abroad. The Suspension Clause does not speak to the application of the writ in the context of military operations abroad. That omission is powerful evidence that the protection afforded by the Suspension Clause does not extend to overseas detentions of aliens in the first place. It would be absurd for Congress to have the power to suspend the writ within the United States but to lack any such authority, regardless of exigency, as to military operations on foreign soil.

The "Rebellion" and "Invasion" language of the Suspension Clause parallels that of the provision authorizing Congress to employ the militia. Congress may "call[] forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," U.S. Const. Art. I, § 8, Cl. 15—all of which occur domestically. See *Authority of the President to Send Militia into a Foreign Country*, 29 Op. Att'y Gen. 322 (1912); cf. *Perpich* v. *DoD*, 496 U.S. 334 (1990).

By contrast, the powers of Congress to "declare War" and create an army and a navy, see U.S. Const. Art. I, § 8, Cls. 11-13, and the power of the President as "C[illegible]nander in Chief of the Army and Navy," *id.* Art. II, § 2, Cl. 1, are not geographically limited. The army

and navy routinely operate beyond our borders, and, when doing so, they are not governed by the same constitutional restrictions that apply domestically. For example, in 1798, Congress enacted a statute authorizing the seizure of French ships on the high seas. See Act of July 9, 1798, ch. 68, 1 Stat. 578. The statute directed that all "French persons and others" aboard the seized ships "be delivered to the custody of the marshal, * * * who shall take charge for their safe keeping," and it provided no avenue for judicial review of such "custody," whether through habeas or otherwise. § 8, 1 Stat. 580. In *Verdugo-Urquidez*, this Court cited that statute's authorization of seizures as evidence that the framers did not understand the Fourth Amendment to "apply to activities of the United States directed against aliens in foreign territory." 494 U.S. at 267. The statute's authorization of "custody" likewise demonstrates that the framers did not understand the Suspension Clause to limit the authority of Congress to order the imprisonment of enemy aliens captured on the high seas.

The founders recognized that the Constitution needed to make allowances for the special circumstances of the military and the possibility of invasion where it did apply. Accordingly, not only does the Suspension Clause allow suspension in cases of invasion or rebellion, but the Fifth Amendment limits its application "in cases arising in the land or naval forces." Equally important, the Constitution makes allowances for military operations abroad by limiting its reach. Then-Representative John Marshall raised both these points in his floor speech on the extradition of Thomas Nash:

> The clause of the Constitution declaring that the trial of all crimes shall be by jury, has never even been construed to extend to the trial of crimes committed

> in the land and naval forces of the United States. Had such a construction prevailed, it would most probably have prostrated the Constitution itself, with the liberties and independence of the nation, before the first disciplined invader who should approach our shores. * * * If, then, this clause does not extend to offences committed in the fleets and armies of the United States, how can it be construed to extend to offences committed in the fleets and armies of Britain or of France, or of the Ottoman or Russian Empires?

10 Annals of Cong. 611-612 (1800), *reprinted in* 18 U.S. (5 Wheat.) 1 App. at 24. Accord *Johnson* v. *Eisentrager*, 339 U.S. 763, 783 (1950) ("Can there be any doubts that our foes would also have been excepted [from the reach of the Fifth Amendment], but for the assumption 'any person' would never be read to include those in arms against us?"); *Ex parte Quirin*, 317 U.S. 1, 41 (1942) (*Quirin*) (concluding that the Fifth and Sixth Amendments did not guarantee rights to enemy combatants tried by military commissions even on the assumption that the military commissions there did not arise in the land forces and observing: "No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms.").

Ultimately, the founders expected that the Congress and President, together, would determine the appropriate process for individuals detained overseas during military operations—just as those political branches together share in important respects responsibility for the national defense and the constitutionally conferred war powers. See *The Federalist No. 26*, at 168 (Alexander Hamilton) (C. Rossiter ed., 1961) ("The idea of restraining the legislative authority in the means of pro-

viding for the national defense is one of those refinements which owe their origin to a zeal for liberty more ardent than enlightened."). There is no evidence that the framers intended such foreign military operations to be governed by the strictures of the Suspension Clause.[5]

2. Eisentrager *confirms that the Suspension Clause does not confer rights on aliens held abroad*

In *Eisentrager*, this Court held that aliens detained as enemies outside the United States are not "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*." 339 U.S. at 777. That constitutional holding is controlling here and should not be overruled.

a. In rejecting a claim that alien prisoners in U.S.-occupied Germany were constitutionally entitled to habeas, the Court in *Eisentrager* emphasized two key facts. First, the petitioners were aliens who lacked any voluntary connection to the United States. As the Court explained, "our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens." 339 U.S. at 769. Accord *Verdugo-*

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[5] Even as to the first territories and possessions acquired by the United States, Congress believed that it was necessary to specify affirmatively that habeas rights would be conferred upon inhabitants thereof. See, *e.g.*, Northwest Territory Ordinance of 1787, Art. II, 1 Stat. 52 (specifying that "inhabitants of the said territory, shall always be entitled to the benefits of the writ of habeas corpus"); Act of Mar. 26, 1804, ch. 38, § 5, 2 Stat. 284 (Louisiana Territory); Act of Mar. 30, 1822, ch. 13, § 10, 3 Stat. 658 (Florida Territory); see also *Downes* v. *Bidwell*, 182 U.S. 244, 279 (1901). That is strong evidence that, in the early days of the United States, it was understood that affirmative congressional action was needed to entitle inhabitants of areas beyond the borders of the continental United States to the privilege of habeas corpus. Cf. *Sere* v. *Pitot*, 10 U.S. (6 Cranch) 332 (1810).

Urquidez, 494 U.S. at 275 (Kennedy, J., concurring) ("The distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory."); 10 Annals of Cong. at 611 (statement of Rep. John Marshall on the extradition of Thomas Nash), *reprinted in* 18 U.S. (5 Wheat) at 23 App. (noting, with respect to the Sixth Amendment, "certainly this clause in the Constitution of the United States cannot be thought obligatory on, and for the benefit of, the whole world").

Second, "at no relevant time" were the petitioners "within any territory over which the United States is sovereign." *Eisentrager*, 339 U.S. at 778. The Court observed that "extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment" at the time of the framers. *Id.* at 784. But "[n]ot one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it." *Ibid.* (citation omitted); see *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens."); *In re Ross*, 140 U.S. 453, 464 (1891).

The Court recognized that extension of the writ to alien enemies held abroad would "hamper the war effort and bring aid and comfort to the enemy." *Eisentrager*, 339 U.S. at 779. Indeed, "[i]t would be difficult to devise

a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Ibid.*

This Court has repeatedly reaffirmed *Eisentrager*'s constitutional holding. "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001). Instead, this Court has declared, aliens "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Verdugo-Urquidez*, 494 U.S. at 271.

Likewise, the courts of appeals have consistently applied those precedents in various contexts. See, *e.g.*, *People's Mojahedin Org. of Iran* v. *United States Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (*People's Mojahedin*) ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise."), cert. denied, 529 U.S. 1104 (2000). And with respect to aliens detained at Guantanamo Bay specifically, the Eleventh Circuit has stated that aliens there "have no First Amendment or Fifth Amendment rights." *Cuban Am. Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1428, cert. denied, 515 U.S. 1142, and 516 U.S. 913 (1995).

b. *Eisentrager* compels the conclusion that petitioner lack rights under the Suspension Clause. It is undisputed that petitioners are aliens who have no voluntary connections to the United States and who were seized abroad. They have not "accepted [any] societal obligations," *Verdugo-Urquidez*, 494 U.S. at 273, and

their only previous "connection" to this country is that they have been part of forces who are hostile to it. In addition, petitioners have at all times been detained outside the United States, and they are currently being held at Guantanamo Bay, Cuba, an area that is not a sovereign territory of the United States. See pp. 33-36, *infra*. Thus, as in *Eisentrager*, "these prisoners at no relevant time were within any territory over which the United States is sovereign." 339 U.S. at 778; cf. *Verdugo-Urquidez*, 494 U.S. at 269 (aliens are not "entitled to Fifth Amendment rights outside the sovereign territory of the United States").

Petitioners note (Br. 17) that the *Eisentrager* petitioners were determined by a military tribunal to have been "actual enemies" of the United States. 339 U.S. at 778. The same is true here. As in *Eisentrager*, each petitioner has had "access to [a] tribunal," *Rasul*, 542 U.S. at 476—*i.e.*, the CSRT—and has been individually determined to be an "actual enem[y]." *Eisentrager*, 339 U.S. at 778. Indeed, the petitioners here have *more* process available to them than the petitioners in *Eisentrager* because they may challenge those tribunal determinations in a United States court. That sets the present juncture of this litigation apart from *Rasul*, where the detainees had been "without benefit of any legal proceeding to determine their status" and therefore could not "show that they were 'of friendly personal disposition' and not enemy aliens." *Rasul*, 542 U.S. at 487-488 (Kennedy, J., concurring in the judgment).[6] As in

[6] *Eisentrager* involved an effort to review the imposition of criminal punishment on enemy detainees, whereas here petitioners are seeking review of the legality of detention only. The review of enemy-combatant detention determinations is even more likely to "hamper the war effort," 339 U.S. at 779, given the much greater number of such deten-

Eisentrager, but unlike *Rasul*, petitioners have "already been subject to procedures establishing their status," *id.* at 488 (Kennedy, J., concurring in the judgment), and so *Eisentrager* fully supports the conclusion that they have no constitutional right to the writ, especially when a statutory substitute is provided.

c. While adopting petitioners' position would require overruling *Eisentrager*'s constitutional holding, petitioners "fail to discuss the doctrine of *stare decisis* or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision." *Randall* v. *Sorrell*, 126 S. Ct. 2479, 2500 (2006) (Alito, J., concurring in part and concurring in the judgment). That is a sufficient basis for declining to overrule a precedent, see *id.* at 2500-2501 (Alito, J.), especially one as longstanding and recently reaffirmed as *Eisentrager*. Moreover, consideration of the relevant factors underscores that there is no basis for overruling *Eisentrager*. As this Court has observed, "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned*

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tions and the fact that they occur throughout the conflict, unlike efforts at punishment which often are delayed until the end of the entire conflict. See *In re Yamashita*, 327 U.S. 1, 12 (1946). Additionally, the courts have traditionally had a greater role in reviewing the imposition of criminal penalties. See, *e.g.*, MCA § 3(a)(1), 120 Stat. 2622 (to be codified at 10 U.S.C. 950g (2006)) (judicial review of military commission proceedings). International law likewise recognizes that criminal sanctions call for more procedural protections than wartime detention determinations. Compare Geneva Convention Art. 5, 6 U.S.T. at 3324, 75 U.N.T.S. at 142 (providing that prisioner of war status is to be "determined by a competent tribunal"), with *id.* Arts. 82-108, 6 U.S.T. at 3382-3400, 75 U.N.T.S. at 200-218 (procedures for imposing criminal punishment upon prisoners of war); cf. Salim Hamdan Amicus Br. 6.

Parenthood v. *Casey*, 505 U.S. 833, 854 (1992). And "[e]ven in constitutional cases," *stare decisis* "carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *United States* v. *IBM*, 517 U.S. 843, 856 (1996) (citation omitted).

Here, all of the traditional *stare decisis* factors counsel strongly against overruling *Eisentrager*. The rule in *Eisentrager* "has in no sense proven 'unworkable,' representing as it does a simple limitation beyond which" the Suspension Clause does not operate. *Casey*, 505 U.S. at 855 (citation omitted). To the contrary, by making the application of constitutional rights turn on the easily administrable test of sovereignty, *Eisentrager* is far more workable than any alternative "*de facto* control" rule. See p. 25, *infra*. Moreover, compelling reliance interests counsel against overruling *Eisentrager*. Cf. *Casey*, 505 U.S. at 855-856. There is perhaps no greater reliance interest than the interest of the Executive in relying on this Court's constitutional decisions in the conduct of military and foreign affairs.

Likewise, "[n]o evolution of legal principle" has undermined the doctrinal foundations of *Eisentrager*. *Casey*, 505 U.S. at 857. Just the opposite is true. Since *Eisentrager*, this Court has repeatedly reaffirmed the proposition "that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas*, 533 U.S. at 693; see *Verdugo-Urquidez*, 494 U.S. at 269. And in *Rasul*, 542 U.S. at 478-479, this Court went out of its way to make clear that it was not upsetting *Eisentrager*'s constitutional holding, and its conclusion that *Eisentrager*'s statutory holding had been

superseded was based on a decision, *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 495 (1973), that did not touch on *Eisentrager*'s constitutional holding.[7] There is, in short, no basis for overruling *Eisentrager*, either expressly or by necessary implication.

3. Indeterminate concepts of "jurisdiction" and "control" do not extend the Suspension Clause beyond United States territory

Petitioners assert (Br. 16; El-Banna Br. 20-25) that *Eisentrager*'s constitutional holding is inapplicable here on the theory that the United States exercises complete control over Guantanamo Bay. That is incorrect. The constitutional holding of *Eisentrager* turned on territorial sovereignty rather than indeterminate notions of control or jurisdiction. That is clear not only from the language of Justice Jackson's opinion, see 339 U.S. at 778, but also from the facts. After all, the military certainly had control over the Landsberg prison in post-war Germany in 1950. See *id.* at 766. And finding *Eisentrager* inapplicable to areas under United States "con-

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[7] In contending (Br. 15-18; Al Odah Br. 24-26) that *Eisentrager* does not govern in the wake of this Court's decision in *Rasul*, petitioners misread *Rasul*. *Rasul* held that the "statutory predicate" for the Court's holding in *Eisentrager* had been overruled by *Braden*, and it therefore rejected the District of Columbia Circuit's broad holding, based on *Eisentrager*, that *statutory* habeas jurisdiction was unavailable to aliens at Guantanamo Bay. See *Rasul*, 542 U.S. at 475, 479. *Rasul* did not, however, cast any doubt on *Eisentrager*'s constitutional holding—or the holdings of subsequent cases relying on that holding—that aliens held abroad do not have a *constitutionally* guaranteed right to habeas corpus. See *id.* at 478. On the contrary, *Rasul* expressly reserved all constitutional questions. See *id.* at 485. Thus, nothing in *Rasul* suggests that the Court implicitly overruled *Eisentrager* or the many other precedents governing the territorial scope of constitutional rights.

trol" would overrule *Eisentrager*'s constitutional holding and extend the Suspension Clause worldwide. For security reasons alone, the United States would not detain captured combatants on any long-term basis at a facility that it did not control.

Indeed, a control or jurisdiction test is also in tension with the basic law of war requiring a captor to remove captured enemy combatants from the field of battle to a safe location away from the hostilities. That principle was recognized at the founding, cf. W. Winthrop, *Military Law and Precedents* 789 n.98 (2d ed. 1920) (Winthrop), and, at least with respect to prisoners of war, it has since been adopted by the Geneva Convention, see Geneva Convention Art. 19, 6 U.S.T. at 3334, 75 U.N.T.S. at 152 ("Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger.").

Moreover, making the application of the Suspension Clause turn on concepts of jurisdiction or control would involve the courts in sensitive foreign-affairs questions by requiring them to determine the level of *de facto* control exercised by the United States in the areas of foreign countries where detainees might be held. During wartime, the extent of control would vary over time and implicate a variety of sensitive foreign policy and military considerations. At other times, judicial determinations about the degree of United States control could complicate diplomatic relationships. Sovereignty, by contrast, offers an administrable bright-line rule that not only is deeply entrenched in this Court's existing precedent but, as explained next, is firmly grounded in the history of habeas corpus.

B. The Suspension Clause Does Not Entitle Petitioners To Any Additional Process Because Habeas Corpus Would Not Have Been Available To Them In 1789

Even assuming that petitioners may invoke any rights under the Suspension Clause, the MCA is consistent with the Suspension Clause because, at common law, the writ of habeas corpus would not have extended to alien enemy combatants detained at Guantanamo Bay. As the court of appeals recognized, the Suspension Clause protects the writ "as it existed in 1789." Pet. App. 10a (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001)).* And in 1789, habeas corpus would not have been available to petitioners, for two independent reasons. First, the common-law writ was unavailable outside the sovereign territory of the Crown, and Guantanamo Bay is not sovereign United States territory. See *Eisentrager*, 339 U.S. at 768 ("We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of

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* Petitioners rely (Br. 15 n.14) on *Felker* v. *Turpin*, 518 U.S. 651, 663-664 (1996), in which the Court "assume[d]," but did not decide, that the Suspension Clause "refers to the writ as it exists today, rather than as it existed in 1789." In their view, "post-1789 development[s]" have given them a right to the issuance of the writ. They identify no such developments, for none have occurred: there is no historical practice, either before or after 1789, of extending habeas to aliens detained as enemy combatants outside of sovereign territory. Petitioners also note (*ibid.*) that the framers were aware of the British prohibition on the practice of offshore detention. That may be true, but the practice has no relevance here, since it involved removing citizens from the country, not detaining aliens who had never even entered the country. See 4 William Blackstone, *Commentaries* *116 (noting that the 1679 Habeas Corpus Act, 31 Car. 2, ch.2, made it unlawful to "send any subject of this realm a prisoner into parts beyond the seas"); see also p. 30, *infra*.

his captivity, has been within its territorial jurisdiction."). Second, the common-law writ was simply not available to aliens detained as enemy combatants.

1. At common law, the writ of habeas corpus was not available outside the sovereign territories of the Crown

At common law, the writ of habeas corpus ran throughout the "dominion[s] of the Crown of England." *Rex* v. *Cowle*, 97 Eng. Rep. 587, 599 (K.B. 1759); see 3 William Blackstone, *Commentaries* *131 (Blackstone) (describing habeas as "running into all parts of the king's dominions"); accord 9 W.S. Holdsworth, *A History of English Law* 124 (1926). The Crown's dominions, in turn, consisted of territories under the Crown's sovereignty, such as England, Wales, and Ireland; the town of Berwick; the islands of Jersey, Guernsey, and Man; and the North American colonies. Although many of those territories exercised substantial legal autonomy from England and thus formed no part of its "kingdom," 1 Blackstone *93, or its "realm," *Cowle*, 97 Eng. Rep. at 598, all were sovereign territories of the Crown. See *Sir Matthew Hale's the Prerogatives of the King* 19 (D.E.C. Yale ed., 1976) (Hale) (defining "dominions" as consisting of territories "such as the king hath in right of the crown of England as parcel thereof *or annexed thereto*" and naming the territories listed above) (emphasis added); 1 Blackstone *94-105 (listing only sovereign territories in describing the Crown's "dominions").[9]

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[9] Hale also describes a second type of "dominions": territories held by the king personally rather than in his capacity as monarch of England. See Hale 19. Scotland fell into this category; its king, James VI, succeeded to the English throne in 1603 as James I. In *Cowle*, Lord Mansfield labels such territories "foreign dominions, which belong to a

Accordingly, when delineating the reach of habeas in *Cowle*, Lord Mansfield listed only sovereign territories of the Crown:[10] "We cannot send a habeas corpus to Scotland or to the electorate: but to Ireland, the Isle of Man, the plantations, and, as since the loss of the Dutchy of Normandy, they have been considered as annexed to the Crown, in some respects, to Guernsey and Jersey, we may; and formerly, it lay to Calais; which was a conquest, and yielded to the Crown of England by the treaty." *Cowle*, 97 Eng. Rep. at 600 (footnote omitted).[11] See 2 R. Chambers, *A Course of Lectures on the English Law Delivered at the University of Oxford, 1767-1773*, at 8 (Thomas M. Curley ed., 1986) ("[A] *habeas corpus ad subjiciendum* might always by common law, and may now by the express words of the Habeas Corpus Act, be directed to any county palatine, the Cinque Ports or any

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prince who succeeds to the throne of England," and makes clear that as to those dominions "this Court has no power to send any writ of any kind." *Cowle*, 97 Eng. Rep. at 599-600. See 1 Blackstone *106 (describing "foreign dominions which may belong to the person of the king by hereditary descent, by purchase, or other acquisition," such as Hanover, as "entirely unconnected with the laws of England").

[10] The island of Minorca, to which Lord Mansfield says the court had "the power" to send the writ but did not do so in practice, *Cowle*, 97 Eng. Rep. at 600, was also a sovereign territory of the Crown. It was conquered from Spain in 1708, and Spain recognized the British claim in the 1713 Treaty of Utrecht. 2 *Historical Dictionary of the British Empire* 749 (J. Olson & R. Shadle eds., 1996).

[11] Petitioners misread *Cowle*'s statement, immediately preceding the text just quoted above, that "[t]here is no doubt as to the power of this Court [to issue habeas]; where the place is under the subjection of the Crown of England." *Cowle*, 97 Eng. Rep. at 599; Br. 11. Once that phrase is placed into context with the passage quoted above, which lists *only* sovereign territories of the Crown, it is clear that by "subjection" Lord Mansfield meant territorial sovereignty, not mere control.

other privileged place within the kingdom of England, as well as to Wales, Berwick, or the Isles of Jersey and Guernsey."). The writ did indeed have an "extraordinary territorial ambit," *Rasul*, 542 U.S. at 482 n.12 (quoting R. Sharpe, *The Law of Habeas Corpus* 188-189 (2d ed. 1989) (Sharpe))—at the time, the sun virtually did not set on Britain's empire—but its reach was not unlimited. And the line describing its reach was drawn at formal sovereignty, not at *de facto* control.

That conclusion is confirmed by the Habeas Corpus Act, 1679, 31 Car. 2, ch. 2 (Eng.) (1679 Act), enacted in response to abuses by the Earl of Clarendon, who was impeached for sending persons "to be imprisoned against law in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law." *Proceedings in Parliament Against Edward Earl of Clarendon, Lord High Chancellor of England, for High Treason, and Other High Crimes and Misdemeanors: 15 and 19 Charles II. A.D. 1663-1667*, *in* 6 *Cobbett's Complete Collection of State Trials* 291, 330 (T.B. Howell ed., 1816). The 1679 Act integrated two originally separate pieces of legislation that were directed at two distinct problems presented by the Clarendon affair.

The first piece of legislation was intended to reinforce the reach of the common-law writ and end a variety of abuses that had made the writ ineffective. Thus, among other things, the Act confirmed that "an *habeas corpus* * * * may be directed and run into any county palatine, the cinque-ports, or other privileged places within the kingdom of *England*, dominion of *Wales*, or town of *Berwick* upon *Tweed*, and the islands of *Jersey* or *Guernsey*; any law or usage to the contrary notwithstanding." 1679 Act § 11. All of those places were sovereign territories of the Crown (even if outside the king-

dom or realm of England). See H. Nutting, *The Most Wholesome Law—The Habeas Corpus Act of 1679*, 65 Am. Hist. Rev. 527, 529-530 (1960); 2 H. Hallam, *The Constitutional History of England* 232-233 (photo. reprint 1989) (5th ed. 1846).

The second piece of legislation was directed at the problem of the transportation of prisoners beyond the reach of habeas. After all, merely confirming the writ's scope was insufficient if one within the territory of the Crown could be sent to territories where "no *Habeas Corpus* can reach him." W. Duker, *A Constitutional History of Habeas Corpus* 53 (1980) (quoting T. Lee *in* 1 A. Grey, *Debates of the House of Commons* 237 (1763)). Thus the Act provided that "no subject of this realm" who is "an inhabitant or resident of this kingdom of *England*, dominion of *Wales*, or town of *Berwick* upon *Tweed*, shall or may be sent prisoner into *Scotland, Ireland, Jersey, Guernsey, Tangier*, or into parts, garrison islands or places beyond the seas, which are or at any time hereafter shall be *within or without the dominions of his Majesty*." 1679 Act § 12 (last emphasis added). That list of places included territories within the Crown's dominions where practical difficulties made it impossible to issue the writ. See *Cowle*, 97 Eng. Rep. at 599-600. Significantly, the list also included territories *outside* the Crown's dominions where the writ simply did not run (*e.g.*, Scotland, see *id.* at 600). The latter category would have included places under the Crown's control but not its sovereign authority.

Petitioners and their many *amici* offer not a single example of common law habeas reaching territories outside the Crown's sovereignty. They make much of the Indian cases (Br. 12; Al Odah Br. 14), but the Indian courts were set up by a charter that explicitly granted

"the like jurisdiction and authority as may be executed by the chief justice and other justices of the court of King's Bench in *England*." *Charter for Erecting a Supreme Court of Judicature at Fort William, in Bengal, Dated 26th March, 1774, in A Collection of Statutes Concerning the Incorporation, Trade, and Commerce of the East India Company* xlv App. (F. Russell ed., 1794); *id.* at l. The Supreme Court of Judicature at Calcutta explicitly drew upon that statutory grant of power in issuing writs of habeas corpus. See *Rex* v. *Mitter*, 1 Indian Dec. (O.S.) 1008 (Calcutta S.C. 1781). Notably, because the statute only granted to the court "the powers of Justices of the * * * King's Bench" and *not* "the general powers of the * * * King's Bench," the Court at Calcutta concluded that while its justices *severally* had the power to issue habeas, it "has not authority to issue the writ" as a court. *Ibid.* *Mitter* demonstrates that the Indian courts would not have had authority to grant the writ in the absence of the statutory grant of power; nor is there any evidence that habeas ran from England to India.

Two cases from the first half of the twentieth century underscore that habeas was limited to the Crown's sovereign territories. In *Rex* v. *Earl of Crewe* [1910] 2 K.B. 576, 622-623 (Eng.) (*Crewe*), Lord Justice Kennedy reasoned that habeas did not run to the Bechuanaland Protectorate (now Botswana) because it was not part of the King's dominions. "'His Majesty's dominions' means regions over and in which His Majesty has and exercises the whole collection or bundle of separable powers * * * which constitute territorial sovereignty." *Id.* at 622. Even though the chiefs of local tribes in Beuchuanaland had "abandoned all rights and jurisdiction" over the land to Britain, the King had "never annexed"

it "to the possessions of the British Crown"; consequently, it "cannot properly be treated as part of [the King's] dominions." *Id.* at 623.

Similarly, *In re Ning Yi-Ching*, 56 T.L.R. 3 (Vacation Ct. 1939) (Eng.), held that habeas did not run to Tientsin, where four Chinese subjects were detained in the British Concession. The court ruled that Tientsin, over which Britain had "acquired a lease of land and had been granted by treaty the right to administer justice to its own subjects," *id.* at 6, was "part of a foreign country within which the King had certain jurisdiction," but had "never been acquired by settlement or otherwise" and thus was not part of the King's dominions. *Id.* at 5.[12]

Petitioners assert (Br. 11) that *Rasul* resolved the availability of the common-law writ outside the sovereign territory of the Crown. That is incorrect. The only question considered in *Rasul* was the scope of the habeas statute, see 542 U.S. at 475, and the Court answered that question by concluding that Guantanamo Bay detainees "are entitled to invoke the federal courts' authority under § 2241." *Id.* at 481. Only after reaching that conclusion—and answering the question presented—did the Court offer the observation that its interpretation of the statute was "consistent with the his-

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[12] Petitioners rely (Br. 11) upon *In re Mwenya*, [1960] 1 Q.B. 241 (Eng.), for the proposition that the reach of habeas did not depend upon territorial sovereignty. But that case dates from 1960—even later than *Crewe* and *Ning Yi-Ching*—and, standing alone, is hardly a reliable guide to English practice 171 years earlier. In addition, the opinions in *Mwenya* repeatedly stressed the petitioner's status as a British subject, *id.* at 300, 302 (Lord Evershed); *id.* at 304, 306 (Romer, L.J.); *id.* at 307, 311 (Sellers, L.J.), and the court's willingness to stretch the writ's traditional territorial limitations could be explained on that ground.

torical reach of the writ." *Ibid.* That discussion was therefore not necessary to the Court's holding.

In discussing the history of habeas corpus, *Rasul* stated that, "[a]t common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control." 542 U.S. at 481-482 (footnotes omitted). That statement is correct, since the "exempt jurisdictions" and the "other dominions" cited were all sovereign territories of the Crown. The Court did not cite any case demonstrating that the 1789 writ would have extended to territories where Britain was *not* sovereign.[13] See *id.* at 502-505 (Scalia, J., dissenting). Moreover, the cases cited by the Court involved British subjects and therefore did not consider the application of the writ to foreign nationals. See *id.* at 503-504; note 12, *supra*. In any event, because it was addressed to the statutory question that the Court resolved in *Rasul*, the Court's brief historical discussion does not control the constitutional issue presented here and therefore does not foreclose a proper understanding of the historical backdrop against which the Suspension Clause was enacted.

2. The United States does not exercise sovereignty over Guantanamo Bay, Cuba

It is beyond dispute that Cuba, not the United States, possesses sovereignty over Guantanamo Bay. See *Rasul*, 542 U.S. at 475 (the United States lacks "ul-

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[13] The Court did cite *Mwenya*, see *Rasul*, 542 U.S. at 482 & n.14, but as explained above, see note 12, *supra*, that case is not evidence of the territorial scope of the writ in 1789.

timate sovereignty" over Guantanamo Bay). The United States operates the naval base at Guantanamo Bay only under the terms of written agreements between it and Cuba. Under those agreements, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba" over the leased area, and "Cuba consents" to United States control over that area, but only "during the period" of the lease. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418 (Lease).[14]

This Court has held that provisions such as these do not effect a transfer of sovereignty. For example, in *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948) (*Vermilya-Brown*), the Supreme Court concluded that a leased military base in Bermuda, over which the United States had "substantially the same" rights as it has over the base in Guantanamo Bay, *id.* at 383, was "beyond the limits of national sovereignty." *Id.* at 390. Though the Court held the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, applicable to the base, it did

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[14] See Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, T.S. No. 426 (Supp. Lease); Treaty on Relations with Cuba, May 29, 1934, U.S.-Cuba, 48 Stat. 1682 (Treaty). The United States is also restricted in how it can use Guantanamo Bay: it may "fit the premises for use as coaling or naval stations only, and for no other purpose." Lease Art. II. Thus, it may not allow civilian settlement at Guantanamo Bay, or establish "commercial" or "industrial" enterprises there, Supp. Lease Art. III, or allow the land to remain idle, see Lease Art. I; Treaty Art. III, 48 Stat. 1683. In addition, the United States lacks the right to exclude vessels "engaged in the Cuban trade" from the waters of the bay. Lease Art. II. The United States does not have the authority to establish a territorial government in Guantanamo Bay, make Guantanamo Bay a State, offer it independence, sell it, or cede it to a third country. Such restrictions are incompatible with the exercise of sovereignty.

so only after discerning a specific congressional intent to apply the statute "on foreign territory." See *Vermilya-Brown*, 335 U.S. at 390. Similarly, in *United States* v. *Spelar*, 338 U.S. 217 (1949), the Supreme Court held that the "foreign country" exception to the Federal Tort Claims Act, 28 U.S.C. 2680(k), applied to a U.S. military base in Newfoundland because the governing lease had "effected no transfer of sovereignty." *Spear*, 338 U.S. at 221-222. The lease terms were "the same" as the ones at issue in *Vermilya-Brown*. See *id.* at 218.

Nothing in *Rasul* upsets those settled principles. In *Rasul*, the Court addressed only the question whether the then-existing habeas statute applied to Guantanamo Bay. See 542 U.S. at 475. In answering that statutory question, the Court considered the extent of the "jurisdiction and control" that the United States exercises there. *Id.* at 480 (quoting Lease Art. III); see *id.* at 487 (Kennedy, J., concurring in the judgment). But as explained above, whatever relevance those concepts have for judging the scope of the habeas *statute*, "jurisdiction and control" did not define the reach of the common law writ. At common law, formal sovereignty was the touchstone, and the King, not the courts, decided whether to extend formal sovereignty to territory over which Britain exercised jurisdiction and control. See *Crewe*, [1910] 2 K.B. at 623 (opinion of Kennedy, L.J.) ("I never heard that you can force a Sovereign to take territory.").

Our own law is in accord with that common-law tradition. As this Court has explained, the "determination of sovereignty over an area is for the legislative and executive departments." *Vermilya-Brown*, 335 U.S. at 380; see *Jones* v. *United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political question."); *Rose* v.

Himely, 8 U.S. (4 Cranch) 241, 272 (1808) (Marshall, C.J.) ("It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting."), overruled in part on other grounds by *Hudson* v. *Guestier*, 10 U.S. (6 Cranch) 281 (1810). If courts were to second-guess the political branches regarding who is sovereign over a particular foreign territory, they would not only undermine the President's "lead role * * * in foreign policy," *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972), but also "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381 (2000); see *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413 (2003).

Here, both political branches have recognized Cuba's ultimate sovereignty over Guantanamo Bay. See Lease Art. III; cf. DTA § 1005(g), 119 Stat. 2743 ("the term 'United States' * * * does not include the United States Naval Station, Guantanamo Bay, Cuba"); *Customs Duties—Goods Brought into United States Naval Station at Guantanamo Bay, Cuba*, 35 Op. Att'y Gen. 536, 539 (1929) (Guantanamo Bay is not a "possession" of the United States). The court of appeals was correct in concluding that the United States does not possess sovereignty over Guantanamo Bay, and that the common law writ of habeas corpus would therefore have been unavailable to aliens detained there. Pet. App. 10a-14a.

3. At common law, the writ of habeas corpus was not available to aliens detained as enemy combatants

In 1789, habeas corpus would have been unavailable to petitioners for an independent reason: the common-law writ did not extend to aliens detained as prisoners of war. "One generally understands by a prisoner of war a person captured during the warlike operations by the naval or military forces of the Crown." *The King* v. *Superintendent of Vine St. Police Station*, [1916] 1 K.B. 268, 274 (Eng.) (*Vine St.*). Petitioners are not "prisoners of war" within the meaning of the Geneva Convention because, among other reasons, al Qaeda is not a party to the Convention, and neither al Qaeda nor the Taliban satisfies the requirements of Article 4(A)(2) of the Convention, such as having a fixed distinctive sign and "conducting their operations in accordance with the laws and customs of war." Art. 4(A)(2)(b) and (d), 6 U.S.T. at 3320, 75 U.N.T.S. at 138. Nevertheless, as confirmed enemy combatants they fall within the common-law understanding of "prisoners of war" as to whom habeas was traditionally unavailable. Indeed, given the greater protections available to prisoners of war, the historic unavailability of habeas to vindicate those protections would apply *a fortiori* to enemy spies and unlawful combatants who did not qualify as prisoners of war. Cf. *Quirin*, 317 U.S. at 31 (spies and "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war").

At common law, prisoners of war did not have to be captured on the battlefield; "real danger to the realm may * * * exist * * * at distances far from where the

actual clash of arms is taking place." *Vine St.*, [1916] 1 K.B. at 278. Nor did it matter where the prisoner was held; even those detained in England had no right to habeas. The "Rights of Prisoners taken in War" were determined by the "Judicial Power" of military officers, not by the civilian courts. M. Hale, *The History of the Common Law of England* 39 (1713).

Thus, in the *Case of Three Spanish Sailors*, 96 Eng. Rep. 775, 775 (C.P. 1779), the court held that habeas corpus did not lie for sailors "taken as prisoners of war on board of a Spanish privateer" and subsequently transported to England. *Ibid.* The court concluded, "[A]lien enemies and prisoners of war * * * [are] not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus." *Id.* at 776.

Similarly, in *Rex* v. *Schiever*, 97 Eng. Rep. 551, 551 (K.B. 1759), the court denied the writ to the "subject of a neutral power, taken on board of an enemy's ship" and transported to Liverpool, even though the Swedish petitioner claimed to have been detained against his will on the French vessel and to have had no hostility to England. The mere fact that he had been on board the French ship was enough for the court to conclude that the petitioner was, "upon his own shewing, clearly a prisoner of war, and lawfully detained as such." *Id.* at 552. See *Furly* v. *Newnham*, 99 Eng. Rep. 269, 269 (K.B. 1780) ("there could be no habeas corpus [ad testificandum] to bring up a prisoner of war").

Prisoners of war lacked an entitlement to habeas because "the Crown in making a man a prisoner of war is acting under the royal prerogative (under which it wages war) and * * * its act, like certain other acts as a belligerent, is not examinable by the Courts." Lord McNair & A.D. Watts, *The Legal Effects of War* 95

(1966). Accordingly, when presented with a petition from a prisoner of war, "a complete answer to the writ will be that the applicant is both in fact and in law a prisoner of war detained by authority of the Crown." Sharpe 116. Thus, in *Schiever*, the court looked no further than the fact that the petitioner had been found aboard an enemy ship. His status as a subject of a neutral power, and his protestations that he had been forced to serve against his will, did not alter his status as a prisoner of war. See 97 Eng. Rep. at 551-552.

Petitioners rely (Br. 12 n.7) on *Lockington's Case*, Brightly 269 (Pa. 1813), and *United States* v. *Williams* (C.C. Va. Dec. 4, 1813), *discussed in* G. Neuman & C. Hobson, *John Marshall and the Enemy Alien*, 9 Green Bag 2d 39, 41, 44-45 (2005) (Neuman & Hobson), for the proposition that courts reached the merits when faced with habeas petitions by alien enemies.[15] But neither case dealt with prisoners of war seized abroad and determined by the military to be combatants. Rather, both cases involved British citizens who had long resided

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[15] "In the primary meaning of the words, * * * an alien enemy is the subject of a foreign state at war with the United States." *Eisentrager*, 339 U.S. at 769 n.2 (quoting *Techt* v. *Hughes*, 128 N.E. 185, 186 (N.Y. 1920) (Cardozo, J.)). However, the category also includes citizens of neutral countries who have engaged in or supported hostilities against this country or associated with those who have. See *Vaughan's Case*, 91 Eng. Rep. 535, 536 (K.B. 1696) ("If * * * certain Dutchmen * * * fight under command of the French King, they are *inimici* to us, and *Gallici subditi*; for the French subjection makes them French subjects in respect of all other nations but their own."); *Miller* v. *United States*, 78 U.S. (11 Wall.) 268, 311 (1871) ("[T]hose must be considered as public enemies, and amenable to the laws of war as such, who, though subjects of a state in amity with the United States, are in the service of a state at war with them, and this not because they are inhabitants of such a state, but because of their hostile acts in the war.").

in the United States and who became enemy aliens solely by operation of law during the war of 1812. See Neuman & Hobson 44-45. Indeed, the court in *Lockington's Case* was emphatic that habeas was *not* available to prisoners of war, even those detained in the United States: "[A] prisoner of war * * * is not entitled to a privilege which never could have been intended for persons of that description. A prisoner of war is subject to the laws of war; he is brought among us by force; and his interests were never, in any manner, blended with those of the people of this country." Brightly at 276 (Tilghman, C.J.); see *id.* at 289 (Yeates, J.) ("I do not view [petitioner] as a prisoner of war, subdued and forcibly brought into the United States.").

C. The DTA Is An Adequate Substitute For Habeas Corpus

Finally, even in contexts to which the Suspension Clause is fully applicable, this Court has held that Congress may withdraw habeas jurisdiction if it provides an "adequate and effective" alternative remedy. *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977); *St. Cyr*, 533 U.S. at 314 n.38 ("Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals."); see *United States* v. *Hayman*, 342 U.S. 205, 223 (1952); cf. *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996) ("[J]udgments about the proper scope of the writ are 'normally for Congress to make.'") (quoting *Lonchar* v. *Thomas*, 517 U.S. 314, 323 (1996)). Importantly, the yardstick for judging the adequacy of the DTA alternative would be the limited and deferential role of habeas in the context of wartime detentions. DTA review is a fully adequate substitute for habeas corpus in this extraordinary wartime context. Thus, even if petitioners could assert rights under the Suspen-

sion Clause, and even if habeas would traditionally have been available to enemy combatants held overseas, the MCA would not violate those rights. Although the court of appeals had no occasion to reach that issue, it constitutes an alternative ground for affirming the judgment.

1. At a minimum, petitioners should be required to exhaust their DTA remedies before challenging the constitutionality of the MCA

As an initial matter, if this Court determines that petitioners have Suspension Clause rights and that habeas would have been available to them at common law, it should decline to rule on the adequacy of the DTA at this time, but should instead require petitioners to exhaust their available DTA remedies. Because petitioners have not exhausted their remedies under the DTA, the exact nature of DTA review remains uncertain. This Court should not attempt to evaluate the adequacy of the DTA until the District of Columbia Circuit has had an opportunity to construe the statute and this Court can examine its operation in a concrete setting. Indeed, important questions remain subject to consideration or elaboration as to the scope of the review available under the DTA and will be fleshed out on a case-by-case basis. See, *e.g.*, *Bismullah* v. *Gates*, No. 06-1197, 2007 WL 2067938 (D.C. Cir. July 20, 2007).[16]

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[16] In *Bismullah*, the court of appeals held that the record on review includes—and the government is obligated to produce—"all the information the [CSRT] is authorized to obtain and consider," whether or not the CSRT actually obtained or considered it in making its decision. 2007 WL 2067938, at *1. The government has filed a petition for rehearing. See Pet. Reh'gs, *Bismullah*, *supra* (D.C. Cir. filed Sept. 7, 2007). On October 3, 2007, the court of appeals panel denied rehearing,

The settled rule is that federal courts will decline to consider a habeas petition in circumstances where other judicial or administrative remedies have not been exhausted. See *Rose* v. *Lundy*, 455 U.S. 509, 515-516 (1982). This requirement is most commonly applied in cases where the available remedies are in state-court proceedings, see 28 U.S.C. 2254(b)(1), but it also applies to federal proceedings, see, *e.g.*, *Hayman*, 342 U.S. at 223, including those conducted by military tribunals, see *Clinton* v. *Goldsmith*, 526 U.S. 529, 537 n.11 (1999); *Noyd* v. *Bond*, 395 U.S. 683, 693-699 (1969); cf. *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975). The comity considerations that underlie the exhaustion requirement are especially pressing here, given that petitioners seek to challenge the concurrent judgment of Congress and the President regarding the conduct of an ongoing war. See *Hamdi*, 542 U.S. at 531 (plurality opinion); *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in the judgment) ("[T]here is a realm of political authority over military affairs where the judicial power may not enter.").

To be sure, in *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006), this Court declined to require exhaustion of the military-commission process before considering a challenge to the system of military commissions unilaterally established by the President. The Court emphasized that, while courts ordinarily "should respect the balance that Congress struck," *id.* at 2770, the military commissions were not established by Congress and did not provide for "independent review," *id.* at 2771. The contrast between this case and *Hamdan*, however, is striking.

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but issued a decision elaborating on its initial decision. See *Bismullah* v. *Gates*, No. 06-1197, 2007 WL 2851702. The government's petition for rehearing en banc remains pending.

Congress enacted the statute at issue here in direct response to *Hamdan*. Moreover, the DTA and the MCA expressly recognize and affirm the CSRT process. See DTA § 1005, 119 Stat. 2740; MCA § 3(a)(1), 120 Stat. 2603 (to be codified at 10 U.S.C. 948d(c) (2006)). Under the DTA and the MCA, petitioners will enjoy "independent review" of the CSRT determinations in the District of Columbia Circuit. Accordingly, this Court should now "respect the balance that Congress struck" and require petitioners to avail themselves of the statutory procedures created by Congress under the traditional rule that a habeas petitioner must first exhaust his remedies before permitting the detainees to challenge the scope of review in this Court. Especially when the pertinent question is the adequacy of a statutory alternative to habeas, it only makes sense to evaluate the question in light of the concrete application of the statute in a particular case.

2. The scope of any habeas review that would exist in these circumstances is very limited

If this Court does reach the merits of petitioners' Suspension Clause claim, the baseline for assessing the adequacy of the DTA must be the scope of the pre-existing habeas remedy. See *Pressley*, 430 U.S. at 381-382 (comparing the scope of the remedy provided with the scope of pre-existing habeas corpus remedy). In this case, the analysis must be made with reference to the historical procedures for identifying and detaining enemies during wartime, as well as with reference to the limited scope of traditional habeas review of military detentions during wartime (where habeas has applied).

a. As explained above, see pp. 37-40, *supra*, there is no history of providing any habeas review to aliens cap-

tured abroad during an armed conflict. Only in recent times have those captured on a foreign battlefield been afforded any process, and that process has been extremely limited and reflected by the procedures outlined in Article 5 of the Geneva Convention and Army Regulation 190-8, which provide, as do the CSRTs, for a military tribunal to determine the status of a detainee. See Army Reg. 190-8, paras. 1-6(e)(3) and (5). Those military procedures call for only a circumscribed review of an individual's status and do not include any mechanism for judicial review.

Even in cases where this Court has used habeas to review *criminal* judgments of military tribunals, the scope of that review has been extraordinarily limited. This Court has held that the habeas review afforded in that context does not examine the guilt or innocence of the defendant, nor does it examine the sufficiency of the evidence. Rather, it is limited to the question whether the military tribunal had jurisdiction. See *In re Yamashita*, 327 U.S. 1, 8 (1946) ("[O]n application for habeas corpus we are not concerned with the guilt or innocence of the petitioners."); *id.* at 23 ("[T]he commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts."); *Quirin*, 317 U.S. at 25 ("We are not here concerned with any question of the guilt or innocence of petitioners."); see also *Eisentrager*, 339 U.S. at 786; *id.* at 797 (Black, J., dissenting) (extent of habeas review "is of most limited scope"); cf. *Hamdi*, 542 U.S. at 535 (plurality opinion) (recognizing that "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting"). See generally *Hiatt* v. *Brown*, 339 U.S. 103, 111 (1950) ("It is well settled

that 'by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court martial.'") (quoting *In re Grimley*, 137 U.S. 147, 150 (1890)); *Burns* v. *Wilson*, 346 U.S. 137, 139 (1953) (plurality opinion) ("[I]n military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases."). So long as the tribunals have "lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts." *Yamashita*, 327 U.S. at 8.

The type of review available under *Yamashita* and *Quirin*—a level of review deemed adequate for an alien enemy within sovereign United States territory who has been convicted by a military commission and sentenced to death—provides the most plausible yardstick for assessing whether the review provided under the DTA affords an adequate and effective substitute remedy for any applicable habeas right. See *Pressley*, 430 U.S. at 381. Petitioners are being detained for non-punitive reasons during the ongoing conflict. See *Hamdi*, 542 U.S. at 518-524 (plurality opinion). Their right to judicial review can certainly be no greater than that traditionally provided to those held for punishment—including death—pursuant to the judgment of a military tribunal.

While this case involves aliens captured and detained outside the United States with no constitutional habeas rights, it is notable that, even as to a United States citizen held as an enemy combatant within the United States, the right of habeas review is highly circumscribed and requires deference to any military tribunal. The plurality in *Hamdi* held that while the citizen petitioner had due process rights (in contrast to petitioners

here), those rights could be satisfied by a straightforward and rudimentary procedure fashioned for wartime detention: "notice of the factual basis for his [enemy combatant] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." 542 U.S. at 533. Within that general framework, the proceedings "may be tailored to alleviate their uncommon potential to burden the Executive." *Ibid.* To that end, "[h]earsay * * * may * * * be accepted," and there may be "a presumption in favor of the Government's evidence." *Id.* at 533-534. And in reviewing the "administrative record developed after" such a proceeding, courts may employ the "'some evidence' * * * standard of review." *Id.* at 537.

The plurality explained that the requirements of due process "could be met by an appropriately authorized and properly constituted military tribunal." *Hamdi*, 542 U.S. at 538. Indeed, the plurality observed, citing Army Reg. 190-8, that "military regulations *already provide for such process* in related instances." *Ibid.* (emphasis added). And even when there was *no* formal administrative factfinding process, *Hamdi* expressly rejected "extensive discovery of various military affairs" in a federal court. *Id.* at 528. Instead, the plurality stated that the "factfinding process [must be] both prudential and incremental." *Id.* at 539. Rather than allow discovery, the Court stated that a habeas petitioner should be allowed simply "to present his own factual case to rebut the Government's return." *Id.* at 538.

b. Petitioners assert (Br. 19-24) that habeas corpus traditionally provided a searching factual review. But with only two exceptions, none of the cases they cite involved the detention of aliens determined by the military to be enemy combatants. Those exceptions are *Schiever*

and the *Case of Three Spanish Sailors*, which petitioners contend (Br. 23) stand for the proposition that prisoners of war could "offer evidence supporting release." Cf. Legal Historians Amici Br. 6. Petitioners misread the cases. Although the courts discussed the factual allegations made by the detainees, they did not attempt to adjudicate the truth of those allegations. Instead, the basis for the decisions was that the detainees' claims were *legally* insufficient. See *Schiever*, 97 Eng. Rep. at 552 ("the Court thought this man, upon his own shewing, clearly a prisoner of war"); *Case of Three Spanish Sailors*, 96 Eng. Rep. at 776 ("these men, upon their own shewing, are alien enemies and prisoners of war"). The cases therefore do not establish that the detainees would have been entitled to an evidentiary hearing in habeas; indeed, they do not even establish that the courts had jurisdiction over claims by aliens held as prisoners of war. See *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 511 (explaining that "'drive-by jurisdictional rulings' * * * should be accorded 'no precedential effect'") (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)).

c. Even outside of the military context, the scope of habeas review of Executive Branch detention decisions is limited. This Court has explained that under traditional habeas review, "pure questions of law" are generally reviewable, but, "other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive." *St. Cyr*, 533 U.S. at 305-306 (footnote omitted); cf. *Herrera* v. *Collins*, 506 U.S. 390, 400 (1993) ("[H]abeas courts sit to ensure that individu-

als are not imprisoned in violation of the Constitution—not to correct errors of fact."); 28 U.S.C. 2254(e).[17]

3. The DTA remedy is adequate and effective

The remedy provided by the DTA and the MCA is neither "inadequate" nor "ineffective" to test the legality of petitioners' detention. *Pressley*, 430 U.S. at 381. Because petitioners challenge the DTA before they have exhausted its procedures, petitioners are in effect making a facial challenge to the validity of the DTA procedures. That challenge should accordingly be analyzed under the searching standard typically reserved for facial challenges, giving every benefit of the doubt to the validity of those procedures in actual cases.

The Defense Department established the CSRT procedures using as a baseline the procedures described by the *Hamdi* plurality—procedures the plurality deemed adequate under the Due Process Clause and described as "already" existing in Army Regulation 190-8. 542 U.S. at 538. Under *Hamdi*, it is sufficient for military

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[17] For example, in the immigration context, this Court has historically approved a very limited scope of habeas review. See *St. Cyr*, 533 U.S. at 314 n.38 (recognizing that "the scope of review on habeas is considerably more limited than on APA-style review"). Until the enactment of the Immigration and Nationality Act, 8 U.S.C. 1001 *et seq.*, in 1952, the sole means by which an alien could test the legality of his or her deportation order was through a habeas corpus action. See, *e.g.*, *United States* v. *Jung Ah Lung*, 124 U.S. 621 (1888); *Ng Fung Ho* v. *White*, 259 U.S. 276 (1922). "In such cases, other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive. However, they did review the Executive's legal determinations." *St. Cyr*, 533 U.S. at 306 (footnote and citation omitted); see *Ekiu* v. *United States*, 142 U.S. 651, 663 (1892) (review was limited to the question whether the immigration inspector was "acting within the jurisdiction conferred upon him").

enemy combatant determinations to provide a citizen with "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* at 533. Thereafter, judicial review of the military determination may use the "some evidence" standard of review. *Id.* at 537. The CSRT process, followed by DTA review in the District of Columbia Circuit, more than satisfies these requirements.

a. The CSRT procedures afford *notice*: the recorder of a tribunal "shall provide the detainee in advance of the proceedings with notice of the unclassified factual basis for the detainees' designation as an enemy combatant." 06-1196 Pet. App. 143; see *Hamdi*, 542 U.S. at 533 (plurality opinion).[18]

The CSRT procedures also afford an *opportunity to rebut* the Government's case: the detainee has a "right to testify or otherwise address the Tribunal in oral or written form, and to introduce relevant documentary evidence," 06-1196 Pet. App. 144; the detainee "shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal," *ibid.*; and the detainee "shall be allowed to attend all proceedings," except as to "matters that would compromise national security if held in the presence of the detainee," 06-1196 Pet. App. 143; see *Hamdi*, 542 U.S. at 534 (plurality opinion).

Finally, the CSRT procedures afford a *neutral decisionmaker*: each CSRT is composed of three military officers, "none of whom was involved in the apprehen-

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[18] Although the CSRT procedures do not allow the detainee to review classified information, neither does Army Regulation 190-8. Compare Army Reg. 190-8, paras. 1-6(e)(3) and (5), with 06-1196 Pet. App. 143, 155.

sion, detention, interrogation, or previous determination of status of the detainee." 06-1196 Pet. App. 142; see *Hamdi*, 542 U.S. at 533 (plurality opinion).

The CSRT procedures provide detainees a process similar to that called for by Article 5 of the Geneva Convention, as implemented by Army Regulation 190-8. The CSRT and Army Regulation 190-8 procedures have the following features in common, among others:

- Tribunals are composed of three commissioned officers plus a non-voting officer who serves as recorder;[19]

- Tribunal members are sworn to faithfully and impartially execute their duties;[20]

- The detainee has the right to attend the open portions of the proceedings;[21]

- An interpreter is provided if necessary;[22]

- The detainee has the right to call relevant witnesses if reasonably available, question witnesses called by the tribunal, and testify or otherwise address the tribunal;[23]

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[19] Compare Army Reg. 190-8, para. 1-6(c), with 06-1196 Pet. App. 142.

[20] Compare Army Reg. 190-8, para. 1-6(e)(1), with 06-1196 Pet. App. 143.

[21] Compare Army Reg. 190-8, para. 1-6(e)(5), with 06-1196 Pet. App. 143.

[22] Compare Army Reg. 190-8, para. 1-6(e)(5), with 06-1196 Pet. App. 143.

[23] Compare Army Reg. 190-8, para. 1-6(e)(6), with 06-1196 Pet. App. 144.

- The detainee may not be forced to testify;[24]

- The tribunals make decisions by majority vote;[25]

- The decision is made based on a preponderance of the evidence;[26]

- The tribunals create a written report of their decision;[27] and

- The tribunal record is reviewed by the Staff Judge Advocate for legal sufficiency.[28]

The CSRT procedures are more detailed than Army Regulation 190-8 and, in several respects, provide greater procedural protections than those required for Article 5 Tribunals. For example:

- The CSRTs contain express qualifications to ensure the tribunal's independence. See 06-1196 Pet. App. 150-151. There are no comparable qualifications for Article 5 Tribunals.

- The CSRTs provide the detainee a personal representative to assist him in preparing his case. See

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[24] Compare Army Reg. 190-8, para. 1-6(e)(8), with 06-1196 Pet. App. 144.

[25] Compare Army Reg. 190-8, para. 1-6(e)(9), with 06-1196 Pet. App. 144.

[26] Compare Army Reg. 190-8, para. 1-6(e)(9), with 06-1196 Pet. App. 144.

[27] Compare Army Reg. 190-8, para. 1-6(e)(10), with 06-1196 Pet. App. 163.

[28] Compare Army Reg. 190-8, para. 1-6(g), with 06-1196 Pet. App. 163-164.

06-1196 Pet. App. 168-172. There is no such requirement in Article 5 Tribunals.

- In CSRTs, the Recorder is obligated to provide to the Tribunal "evidence to suggest that the detainee should *not* be designated as an enemy combatant." See 06-1196 Pet. App. 165 (emphasis added). There is no such requirement in Article 5 Tribunals.

- In CSRTs, the detainee is provided with an unclassified summary of the evidence supporting his detention in advance of the hearing. See 06-1196 Pet. App. 143. There is no such requirement in Article 5 Tribunals.

- CSRTs allow the detainee to introduce relevant documentary evidence. *See* 06-1196 Pet. App. 155. Article 5 Tribunals provide no analogous guarantee.

- Every CSRT decision is automatically reviewed by a higher authority, who may return the record to the tribunal for further proceedings. See 06-1196 Pet. App. 164. There is no counterpart provision for Article 5 Tribunals.

Under the plurality opinion in *Hamdi*, these procedural protections are more than sufficient for a military determination that an American citizen in this country may be held as an enemy combatant. *A fortiori*, they are sufficient for alien enemy combatants captured and detained outside the United States.

b. Likewise, the DTA's judicial review mechanisms more than satisfy the *Hamdi* plurality's statement of the appropriate scope of review of military enemy-combatant determinations. See *Hamdi*, 542 U.S. at 537-538 (plurality opinion). Section 1005(e)(2)(C) of the DTA

specifies the District of Columbia Circuit's "[s]cope of review" of the CSRT's enemy-combatant determination. The court must consider "whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence)." § 1005(e)(2)(C)(i), 119 Stat. 2742. In addition, the court must decide, "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C)(ii), 119 Stat. 2742. The judgment of the District of Columbia Circuit, in turn, is reviewable in this Court. See 28 U.S.C. 1254(1). Thus, the statute allows for ample judicial review both of the procedures used by the CSRTs and of the evidentiary sufficiency of their determinations.

4. Petitioners' objections to the CSRT process lack merit

Petitioners identify various perceived deficiencies in the CSRT procedures. Even if petitioners were correct, their arguments would not establish that *DTA review* is inadequate. Under the DTA, the District of Columbia Circuit must decide, "to the extent the Constitution and laws of the United States are applicable, whether the * * * [CSRT] standards and procedures * * * [are] consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(C)(ii), 119 Stat. 2742. Petitioners can therefore present their arguments to the

District of Columbia Circuit, and if the arguments are meritorious, the District of Columbia Circuit will provide relief. The relief available there would necessarily ensure that the combined effect of the CSRTs and the DTA satisfy the Suspension Clause (to the extent it is applicable). That provides a complete answer to petitioners' objections to the CSRT process. In any event, petitioners' criticisms of the CSRT process are not only premature but also without merit.

a. Petitioners complain (Br. 31-32; Al Odah Br. 35) that CSRTs do not permit them to be represented by counsel. They present no evidence that aliens captured on a foreign battlefield and held as enemy combatants have *ever* been given hearings regarding their enemy combatant status at which they were represented by counsel. To the contrary, the procedures set forth in Army Regulation 190-8—which the *Hamdi* plurality thought sufficient even for citizens detained as enemy combatants—provide no right to counsel.[20] Indeed, even when the criminal punishment of American citizens is at issue, there is generally no right to counsel in administrative proceedings like the CSRTs. See, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S. 539, 569-570 (1974) (prison disciplinary hearing); *Gagnon* v. *Scarpelli*, 411 U.S. 778, 787 (1973) (parole revocation hearing).

Petitioners' alleged right to administrative counsel is even more implausible because the CSRTs afford each detainee a personal representative. That individual is a "military officer, with the appropriate security clear-

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[20] Although the Geneva Convention provides right to counsel when a prisoner of war is subjected to a criminal trial, see Geneva Convention, Art. 99, 6 U.S.T. at 3392, 75 U.N.T.S. at 210; *id.* Art. 105, 6 U.S.T. at 3396, 75 U.N.T.S. at 214, it provides no right to counsel in an Article 5 tribunal to determine a detainee's status.

ance" assigned to the detainee "for the purpose of assisting the detainee" in the CSRT process. 06-1196 Pet. App. 141. The personal representative may attend the entire CSRT proceeding, even where classified information is at issue. *Id.* at 143. The personal representative fulfills some of the most important functions of counsel: he is required to "explain the nature of the CSRT process to the detainee, explain his opportunity to present evidence and assist the detainee in collecting relevant and reasonably available information and in preparing and presenting information to the Tribunal." *Id.* at 168. Finally, the personal representative may "comment upon classified information" that bears upon the detainee's status. *Id.* at 170.

b. Petitioners also object (Al Odah Br. 33-34; El-Banna Br. 33-38) that they were not given access to classified information that, in most cases, formed part of the basis for the government's determination that they were enemy combatants. In effect, petitioners contend that the armed forces cannot legally capture al Qaeda terrorists on a foreign battlefield, and then detain them abroad as enemy combatants, without giving them access to classified information about our sources and methods of intelligence against al Qaeda. Petitioners cite no authority for that startling proposition, which is inconsistent with the conduct of every armed conflict in this country's history; inconsistent with Army Regulation 190-8, which specifically permits a tribunal to hold proceedings closed to the detainee; and inconsistent with *Hamdi*, which recognized that, even where the liberty of a citizen is at issue, the danger that "discovery into military operations" might "intrude on the sensitive secrets of national defense" is a consideration "properly taken

into account in our due process analysis." 542 U.S. at 532 (plurality opinion).

c. Further, petitioners claim (Br. 27-29; Al Odah Br. 33) that the CSRT procedures precluded them from submitting rebuttal evidence. That contention ignores the provisions of those procedures that allow the detainee to testify, to seek the testimony of reasonably available witnesses, and to seek and obtain other reasonably available evidence. 06-1196 Pet. App. 144. Detainees are also free to present claims in their DTA proceedings that any particular exclusion of evidence was inconsistent with the CSRT's standards and procedures or with applicable law. See DTA § 1005(e)(2)(C), 119 Stat. 2742.

More importantly, petitioners' claim (Al Odah Br. 35) that DTA counsel is precluded from "supplement[ing] the record" fails to account for the fact that counsel in cases brought on behalf of detainees have actively participated in submitting material for review by the Department of Defense in considering whether to reopen CSRT proceedings.[30] In one recent case, a new CSRT was ordered in response to counsel's submission of new evidence bearing on a detainee's status. See Respondent's Motion to Remand, *Al Ginco* v. *Gates*, No. 07-1090 (D.C. Cir. filed Sept. 13, 2007).

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[30] Under instructions issued by the Department of Defense Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC), upon the receipt of new evidence that "was not previously presented to the detainee's CSRT" and that is "material to the factual question of whether the detainee" is an enemy combatant, the Deputy Secretary of Defense "will direct that a CSRT convene to reconsider the basis of the detainee's [enemy combatant] status in light of the new information." See *OARDEC Instruction 5421.1, Procedure for Review of "New Evidence" Relating to Enemy Combatant (EC) Status* paras. 4(a)(1) and (2), 5(b) (May 7, 2007) <http://www.defenselink.mil/news/May2007/New%20Evidence%20Instruction.pdf>.

d. Petitioners assert (Br. 29-30; Al Odah Br. 36; El-Banna Br. 42-45) that the CSRT decisionmaker is not "neutral." But CSRT members cannot have been involved "in the apprehension, detention, interrogation, or previous determination of status" of the detainees and must swear an oath to discharge their duties faithfully and impartially. 06-1196 Pet. App. 142. That is more protective than Army Regulation 190-8, which includes no standard for neutrality. Furthermore, far from being a rubber stamp, the CSRT process has led to favorable determinations for 38 detainees. See *CSRT Summary*.

In petitioners' view, the CSRTs cannot fairly adjudicate individual cases because their members are military officers, and their superiors—the President and the Secretary of Defense—have stated that the detainees are enemy combatants. That argument ignores not only the dozens of cases in which favorable determinations were made for detainees but also the fact that the CSRT officers have been given orders, by the Deputy Secretary of Defense and the Secretary of the Navy, to make a "neutral" and independent evaluation of the status of each detainee. 06-1196 Pet. App. 142. They can therefore be expected to act as neutral decisionmakers by faithfully carrying out the role assigned to them by their superiors. Cf. *Yamashita*, 327 U.S. at 5 (noting that Army officers, in defending accused war criminal before military commission, "demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged"). Moreover, petitioners' reasoning would preclude the use of *any* military tribunal to adjudicate enemy-combatant status, because all potential panelists would be subordinates of the President and the Secretary of Defense. Petitioners' theory is thus inconsistent with *Hamdi*'s recognition

that, even for citizens detained in the United States, a "military tribunal" can satisfy the due process requirement of a "neutral decisionmaker." 542 U.S. at 537-538 (plurality opinion).

e. Finally, petitioners argue (Al Odah Br. 37) that the DTA is inadequate because a "habeas court would not accept evidence procured through torture or coercion," whereas the "DTA permits such evidence." But the CSRT procedures require tribunals to assess whether the evidence is "relevant and helpful" and whether hearsay evidence is "reliab[le]." 06-1196 Pet. App. 158. Those rules permit the tribunals to reject unreliable evidence based on any concerns regarding coercion that may have arisen in the proceedings before them. To the extent the rules are deemed insufficient in any concrete situation to ensure that determinations are not based on coerced testimony, the District of Columbia Circuit can say so on DTA review in a case that actually presents such an issue.

4. Petitioners' objections to the scope of DTA review lack merit

a. Petitioners contend (Br. 29; Al Odah Br. 31-32) that they are entitled to "plenary" factual review of the basis for their detention. That is not the law. That is not what habeas has ever provided in the context of military detentions during wartime, and that is not what this Court found necessary for citizens detained in the United States. Instead, this Court has endorsed very limited, if any, habeas review of the factual findings of an Executive Branch tribunal. See *Hamdi*, 542 U.S. at 537 (plurality opinion) ("some evidence" standard); *St. Cyr*, 533 U.S. at 306 (same); *Yamashita*, 327 U.S. at 8 (no factual review at all). The DTA review standard is

more rigorous than either of those standards, as the court of appeals is authorized to determine whether the CSRT permissibly applied the requirement that its decision be "supported by a preponderance of the evidence." DTA § 1005(e)(2)(C)(i), 119 Stat. 2742.

b. Petitioners also suggest (Al Odah Br. 38) that the DTA is inadequate because they cannot challenge the "[l]egal basis for detention." That ignores the express statutory requirement that the court of appeals consider "whether the use of [the CSRT's] standards and procedures * * * is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(C)(ii), 119 Stat. 2742. That provision allows a petitioner to argue that the CSRT standards and procedures—including the definition of an enemy combatant, 06-1196 Pet. App. 150—is inconsistent with the AUMF.

c. Petitioners contend (Br. 31; El-Banna Br. 45) that the CSRT process is not sufficiently speedy. There is no reason to accept that contention: the CSRTs were completed years ago. The first DTA actions were filed just over a year ago, and the District of Columbia Circuit has begun to outline the procedures governing its review, see *Bismullah*, 2007 WL 2067938, and moved to implement those procedures in many of the cases filed before it.[31] In addition, while petitioners are of course free to raise whatever appropriate legal challenges they like to existing procedures, the volume and nature of challenges that the detainees have made here also have had

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[31] The government filed a petition for rehearing en banc in *Bismullah* and requested expedited consideration of the petition so that it could determine what steps would be appropriate in the event that the District of Columbia Circuit does not reconsider its decision, including seeking review in this Court while these consolidated cases are pending before the Court. See note 16, *supra*.

an impact on the process. Moreover, in light of the lack of historical precedent for the use of habeas in this context, novel legal questions would (and did, pre-DTA) arise in habeas litigation as well. Indeed, it is unclear why habeas would have any comparative advantage in terms of relative speediness over DTA review.

d. Finally, petitioners argue (Br. 30; Al Odah Br. 39) that the DTA is deficient because the court of appeals lacks express authority to grant release. This argument overlooks the backdrop against which the DTA was enacted. When a CSRT has determined that a detainee is no longer an enemy combatant, the government has taken on itself to transfer the detainee out of Guantanamo Bay and United States custody. Thus far, every Guantanamo Bay detainee who has been determined no longer to be an enemy combatant has been released. See Notice of Transfer at 3, *Kiyemba* v. *Bush*, No. 05-5487 (D.C. Cir. filed Nov. 21, 2006).

In addition, contrary to petitioners' assumption, the result of a successful habeas petition generally is not immediate release; instead, it is often a remand for further proceedings. See, *e.g.*, *Chessman* v. *Teets*, 354 U.S. 156, 165-166 (1956); *Mahler* v. *Eby*, 264 U.S. 32 (1924). In the criminal context, for example, habeas courts frequently order a retrial with correct procedures. See *Hilton* v. *Braunskill*, 481 U.S. 770, 775 (1987). Likewise, this Court did not order the petitioner in *Hamdi* released, even though the military had offered him no process at all to test the validity of his detention. Rather, the Court remanded to allow the application of appropriate procedures. See 542 U.S. at 539 (plurality opinion).

Ordering immediate release rather than a remand would be particularly inappropriate in this context,

given the primary role of the Executive in determining when military detention of the enemy is necessary and the sensitive diplomatic concerns raised by the transfer of aliens out of Guantanamo Bay to other countries. Moreover, the merits argument put forward by the petitioners—that the CSRTs misapplied the AUMF and violated procedural due process—would plainly call for remand rather than outright release, since the detainees might well be determined to be enemy combatants even under "correct" procedures and a different interpretation of the AUMF. In any event, petitioners may direct to the District of Columbia Circuit any arguments about the appropriate relief in the case (if any) in which such a detainee is not released.[32]

II. PETITIONERS' DETENTION IS LAWFUL

Petitioners further contend that their detention is unlawful because Congress did not authorize the detentions, and the detentions violate the Fifth Amendment. Those arguments have not been considered by the court of appeals. However this Court resolves the other issues in this case, this challenge should be addressed in the first instance by either the court of appeals under the DTA or the district court and the court of appeals in habeas. Either way, this Court could consider the issue after it has been fully litigated below.

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[32] If this Court concludes that the DTA affords an adequate substitute for any habeas corpus rights that petitioners might have, it could assume the applicability of the Suspension Clause without deciding the threshold question whether (or to what extent) Guantanamo Bay detainees enjoy any Suspension Clause rights. See *Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669, 2677 (2006) ("Because we conclude that [petitioners] are not in any event entitled to relief on their claims, we find it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights.").

There is no reason for the Court to act as a court of first view, rather than review, on these issues.

A. The AUMF Authorizes The Detention Of Enemy Combatants As Defined By The CSRT Process

Petitioners argue (Br. 33-44) that the AUMF does not authorize their detention. That argument rests on a misreading of the AUMF, is directly contradicted by this Court's construction of the AUMF in *Hamdi*, and misunderstands the law of armed conflict.

1. The AUMF authorizes the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks" of September 11, 2001, "or harbored such organizations or persons." AUMF § 2(a), 115 Stat. 224. In *Hamdi*, this Court held that the AUMF "clearly and unmistakably" authorized the detention of a citizen enemy combatant captured on the battlefield in Afghanistan. 542 U.S. at 519 (plurality opinion). The Court explained that "[t]here can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for [the September 11] attacks, are individuals Congress sought to target in passing the AUMF." *Id.* at 518. The same goes for individuals who are associates of al Qaeda itself.

One element of the use of force is the detention of those forces determined to be enemies. See *Hamdi*, 542 U.S. at 518 (plurality opinion) ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'") (quoting *Quirin*, 317 U.S. at 28, 30). The CSRT defini-

tion of "enemy combatant" allows the detention of any "individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." Pet. App. 81a. That definition reflects a reasonable implementation of the President's responsibility to "determine[]" the object of the use of force authorized by the AUMF.

2. Petitioners make several challenges to the definition of "enemy combatant," but none withstands scrutiny. First, petitioners argue (Br. 35-36) that the AUMF requires a specific nexus between each petitioner and the September 11 attacks. That argument finds no support in the text of the AUMF and is foreclosed by *Hamdi*, where this Court held that the AUMF authorized the detention of an individual who had associated with the Taliban but had no direct connection to September 11. 542 U.S. at 518 (plurality opinion).

Second, petitioners contend (Br. 37 n.34) that the AUMF imposes territorial limits on the battlefield and precludes the detention of persons found in friendly nations. But the language of the AUMF imposes no geographic limits on the President's authority to use force. Moreover, nothing in the law of armed conflict prevents a party to a conflict from taking custody of and capturing enemy combatants captured on the territory of a cooperating state. See, *e.g.*, *Miller* v. *United States*, 78 U.S. (11 Wall.) 268, 311 (1871). Indeed, in *Quirin*, this Court upheld the detention of enemy combatants apprehended within the United States. See *Hamdi*, 542 U.S. at 518 (plurality opinion) (discussing *Quirin*). And Hamdi himself was held in the United States. *Id.* at 510.

Third, petitioners assert that "support" for al Qaeda or the Taliban is not sufficient to authorize detention; instead, to be properly detained, an individual must "take a direct part in hostilities." Br. 39 (citations omitted). In support of that claim, they rely on *Hamdi*, which upheld the President's authority to detain individuals who were "part of or supporting forces hostile to the United States" and who had themselves "engaged in an armed conflict against the United States." 542 U.S. at 516 (plurality opinion). Nothing in *Hamdi* even remotely suggests, however, that the AUMF encompasses *only* those individuals.

Nor does the law of armed conflict suggest such an implied limitation. To the contrary, the laws of war—including the Geneva Convention—have long permitted the detention of members or supporters of hostile forces. See, *e.g.*, Winthrop 789 ("class of persons" subject to detention includes "civil persons * * * in immediate connection with an army, such as clerks, telegraphists, aeronauts, teamsters, laborers, messengers, guides, scouts, and men employed on transports and military railways"); Adjutant Gen.'s Off., War Dep't, *General Orders No. 100, Instructions for the Government of Armies of the United States in the Field*, 7 (1863) (Art. 15) ("Military necessity * * * allows of the capturing" of "every armed enemy" and, in addition, "every enemy of importance to the hostile government, or of peculiar danger to the captor."); J. Baker & H. Crocker, *The Laws of Land Warfare Concerning the Rights and Duties of Belligerents as Existing on August 1, 1914*, at 35 (1919) ("Persons belonging to the auxiliary departments of an army * * * such as commissariat employees, military police, guides, balloonists, messengers, and telegraphists * * * are still liable to

capture."); Geneva Convention Art. 4(A)(4), 6 U.S.T. at 3320, 75 U.N.T.S. at 138 (prisoners of war include "[p]ersons who accompany the armed forces without actually being members thereof, such as * * * war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces"); *id.* Art. 33, 6 U.S.T. at 3344, 75 U.N.T.S. at 162 (permitting the retention of "medical personnel and chaplains").

Thus, the laws of war allow for detention not only of uniformed members of an armed force, but also of those persons supporting the enemy. See *Eisentrager*, 339 U.S. at 765 (noting petitioners' allegation that "their employment * * * was by civilian agencies of the German Government" but concluding that their "exact affiliation is * * * for our purposes immaterial"); *Miller*, 78 U.S. (11 Wall.) at 312 ("[N]o recognized usage of nations excludes from the category of enemies those who act with, or aid or abet and give comfort to enemies, whether foreign or domestic."). That rule has always been sensible; today, it is essential. Congress has authorized a war against an international terrorist organization with no uniformed soldiers, and the detention of its members and supporters is a critical component of any such war.

Petitioners cite (Br. 39-41) certain rules of engagement governing the targeting of civilians in war zones for violent attack. But the capture and detention of enemy combatants is a fundamental incident of warfare. Thus, as petitioners concede (Br. 41 n.41), the military may clearly detain an enemy soldier even in circumstances where the use of deadly force might not be appropriate because, for example, he has surrendered. Likewise, if a member or supporter of al Qaeda is not

brandishing a weapon, the rules of engagement might preclude the use of lethal force against that person, but they do not bar his detention as an enemy.

Ultimately, much of petitioners' argument rests on the flawed premise (Br. 39) that they are "civilians." But a member or supporter of an entity engaged in armed conflict against the United States is not, in any relevant sense, a "civilian." Al Qaeda is unquestionably such an entity—as recognized by Congress, see AUMF § 2(a), 115 Stat. 224; the President, see *Military Order of Nov. 13, 2001*, 3 C.F.R. 918 (2001); America's allies, see, *e.g.*, Statement of Lord Robertson, NATO Sec'y Gen. (Oct. 2, 2001) <http://www.nato.int/docu/speech/2001/s011002a.htm> (describing the September 11 attack as an "armed attack" under Article 5 of the North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246); and al Qaeda itself, see, *e.g.*, World Islamic Front, *Jihad Against Jews and Crusaders* (Feb. 23, 1998) <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>. The AUMF plainly authorizes petitioners' detentions.

3. Finally, even apart from the AUMF, petitioners' detention is independently justified by the President's constitutional authority. By its terms, Article II of the Constitution vests "[t]he executive Power" of the United States in the President, whom it designates as the "Commander in Chief of the Army and Navy of the Unites States." U.S. Const. Art. II, §§ 1, 2. Construing those provisions, this Court has long held that the President, as Commander in Chief, "is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy." *Fleming* v. *Page*, 50 U.S. (9

How.) 603, 615 (1850); see, *e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 668, 670 (1863); *Hirota* v. *MacArthur*, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say."). In adopting the AUMF, Congress itself recognized that "the President has authority *under the Constitution* to take action to deter and prevent acts of international terrorism." AUMF Preamble, 115 Stat. 224 (emphasis added).

As in *Hamdi*, see 542 U.S. at 518 (plurality opinion), however, there is no need here for the Court to decide the President's ability to act without congressional backing. The AUMF clearly authorizes these detentions and therefore this is a circumstance where the President acts pursuant to his own long-recognized authority and congressional authorization and so "his authority is at its maximum." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (*Youngstown*). His actions are "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily on any who might attack it." *Id.* at 637 (Jackson, J., concurring). Petitioners have not come close to meeting that burden here.

B. Petitioners' Detention Does Not Violate The Due Process Clause

Petitioners contend (Br. 44-49) that their detention violates the Fifth Amendment. That contention fails for two independent reasons. First, as aliens captured and held outside the sovereign territory of the United

States, petitioners have no due process or other constitutional rights. Second, petitioners have been afforded a level of process that would be sufficient in the extraordinary circumstances of this case even if the Fifth Amendment were applicable.

1. It is well established that the Fifth Amendment, including its Due Process Clause, does not apply to aliens who have no presence in any territory over which the United States is sovereign. See *Eisentrager*, 339 U.S. at 784-785. In *Verdugo-Urquidez*, the Court stated that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States" in "emphatic" terms. 494 U.S. at 269; see *id.* at 275 (Kennedy, J., concurring); *Zadvydas*, 533 U.S. at 693 (The "Fifth Amendment's protections do not extend to aliens outside the territorial boundaries" of the United States.). *Eisentrager* and its progeny make clear that the applicability of the Fifth Amendment to aliens turns on whether the United States is sovereign, not whether it merely exercises control, over the territory at issue. See *Verdugo-Urquidez*, 494 U.S. at 269 (aliens are not "entitled to Fifth Amendment rights outside the *sovereign* territory of the United States" (emphasis added)). Accordingly, for the same reason that there is no constitutional right to habeas here, the Fifth Amendment also does not protect petitioners. See pp. 15-25, *supra*.

As discussed above, nothing in *Rasul* upset the constitutional holding of *Eisentrager*. Petitioners nonetheless point (Br. 45) to a single footnote in *Rasul*, which states: "Petitioners' allegations * * * unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3)." *Rasul*, 542 U.S. at 483 n.15. That footnote, however,

cannot possibly be read as an implicit repudiation of the substantive holdings in *Eisentrager*, *Verdugo-Urquidez*, and their numerous predecessors and progeny. Such a reading would be inconsistent with the repeated assurances throughout *Rasul* that habeas jurisdiction was the "only" question raised in or resolved by the Court. Moreover, footnote 15 is appended to a paragraph focused entirely on the question of statutory jurisdiction under 28 U.S.C. 2241, and to a sentence describing what "[p]etitioners contend" for jurisdictional purposes. *Id.* at 483. To say that these allegations are sufficient for *jurisdictional* purposes, a reading of footnote 15 strongly suggested by context, establishes only that they are not "wholly insubstantial" or "frivolous" on the merits. See, *e.g.*, *Steel Co.*, 523 U.S. at 89; *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946). On the other hand, to construe footnote 15 as implicitly overruling the *substantive* Fifth Amendment holding of *Eisentrager*, thereby jettisoning decades of settled law in a single ambiguous sentence (and all in an opinion that went to length to distinguish as outmoded, but not to overrule, the statutory holding of *Eisentrager*), would be implausible in the extreme. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.") (quoting *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)).

Petitioners also claim support (Br. 44-50) from the *Insular Cases*; the splintered opinion in *Reid* v. *Covert*, 354 U.S. 1 (1957); and Justice Kennedy's concurring opinion in *Verdugo-Urquidez*. Petitioners misread each of those opinions. The *Insular Cases* do not support petitioners' claim to Fifth Amendment protection because those cases addressed whether certain constitutional

and federal statutory provisions were applicable in territories that had been ceded to the United States and over which the United States therefore was sovereign. See, *e.g.*, *Balzac* v. *Porto Rico*, 258 U.S. 298 (1922); Treaty of Peace, Dec. 10, 1898, U.S.-Spain, Art. II, 30 Stat. 1754 (Spain "cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies"). As discussed, Guantanamo Bay is Cuban—not United States—territory. In any event, to the extent the *Insular Cases* could be applied, they suggest that any Fifth Amendment analysis of petitioners' detention would have to take into account the unique circumstances of their overseas detention.[33]

Petitioners' reliance on *Reid* is also misplaced. Petitioners in *Reid* were United States citizen spouses of members of the military tried by courts-martial for crimes committed on United States military bases overseas. The Court addressed the question whether these spouses could invoke the Fifth and Sixth Amendments. A plurality of the Court concluded that "citizens abroad" are generally protected by the Bill of Rights. See 354 U.S. at 5-6. The narrower controlling opinions agreed with respect to the Fifth and Sixth Amendments but, even as to the rights of citizens, cautioned against wholesale extraterritorial application of the Constitution. See *id.* at 75 (Harlan, J., concurring in the judgment). Moreover, in *Verdugo-Urquidez*, a majority of the Court specifically rejected the proposition that *Reid* has any bearing on the constitutional rights of aliens. See 494 U.S. at 270. In reaffirming *Eisentrager*'s "emphatic" rejection of extraterritorial application of the

[33] Petitioner El-Banna (Br. 21) cites additional cases that are equally inapplicable because they address constitutional rights of aliens located *within* the United States.

Fifth Amendment to aliens, the Court specifically limited *Reid* to the proposition that "*citizens* stationed abroad could invoke the protection of the Fifth and Sixth Amendments." *Id.* at 269-270 (emphasis added).

Petitioners further err in claiming support from Justice Kennedy's concurrence in *Verdugo-Urquidez*. In that case, Justice Kennedy joined in full a majority opinion that expressly reaffirmed the "emphatic" Fifth Amendment holding of *Eisentrager*. 494 U.S. at 269. The opinion of the Court authored by the Chief Justice in *Verdugo-Urquidez* was just that: an opinion for the Court. Justice Kennedy's concurrence in that majority opinion obviously informs his own concurring opinion. In any event, even on its own terms, his *Verdugo-Urquidez* concurrence does not help petitioners here. In that opinion, Justice Kennedy observed that *Eisentrager*, and not *Reid*, governs "extraterritorial application of the Constitution" where the "person claiming its protection is * * * an alien." *Id.* at 275. Moreover, citing the controlling concurrence in *Reid*, he stressed that even citizens do not necessarily enjoy the full measure of constitutional rights abroad, and, citing the *Insular Cases*, he stressed that Congress need not "implement all constitutional guarantees" even "in its territories." *Id.* at 277-278. Finally, he noted the unexceptional proposition that the Fifth Amendment would apply to aliens wherever apprehended during a domestic criminal trial in an Article III court. See *id.* at 278.[34]

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[34] Petitioners contend (El-Banna Br. 48-49) that they also wish to assert claims under Article 3 of the Geneva Convention, 6 U.S.T. at 3318, 75 U.N.T.S. at 136. That provision governs the treatment of detainees; it does not confer any right to release, let alone a right that would be privately enforceable in a habeas action. See *Hamdan*, 126 S. Ct. at 2794, *Eisentrager*, 339 U.S. at 789 n.14. In addition, several

2. Even if the Fifth Amendment had some limited application to aliens held at Guantanamo Bay, the CSRT process and judicial review available under the DTA would readily satisfy any due process requirements for detaining such aliens as enemy combatants. Assuming that such aliens have any due process rights at all, those rights are plainly less extensive than those of American citizens in this country. See *Eisentrager*, 339 U.S. at 769; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 586-587 (1952) ("War, of course, is the most usual occasion" for distinguishing between the rights of aliens and citizens.). As explained above, see pp. 49-52, *supra*, the CSRTs exceed the due process requirements that the *Hamdi* plurality said would be constitutionally sufficient even for American citizens held in this country. *A fortiori*, they are constitutionally sufficient for alien enemy combatants held overseas.

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amici suggest that petitioners' detention violates the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95th Cong., 2d Sess. (1978), 999 U.N.T.S. 171 (ICCPR). But this Court has held that the ICCPR does not "create obligations enforceable in the federal courts," *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 735 (2004), and in any event the ICCPR applies only within the "territory" of member nations. Art. 2.1, S. Exec. Doc. E at 24, 999 U.N.T.S. at 173. That limitation was drafted precisely to foreclose application of the ICCPR to areas such as "leased territories," where a signatory country would be acting "outside its territory," although perhaps "technically within its jurisdiction for certain purposes." *Summary Record of the 138th Meeting*, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 138th mtg. at 10, U.N. Doc. E/CN.4/SR.138 (1950). Since becoming a party to the ICCPR, the United States has consistently interpreted the treaty in this manner. See *Summary Record of the 1405th Meeting*, U.N. ESCOR Hum. Rts. Comm., 53d Sess., 1504th mtg. at 3, 6-7 (paras. 7, 20), U.N. Doc. CCPR/C/SR.1405 (1995).

C. Petitioners' Selective Reliance On Foreign Law Is Unavailing

Finally, petitioners rely (Br. 49-50) on the procedures that Israeli courts have held must be provided to suspected terrorists. Those procedures are not relevant in construing either the Suspension Clause or the Due Process Clause, because, *inter alia*, the history of our Constitution is unique and the role of the courts in Israel is very different from the role of the courts under our Constitution. For example, the Israeli Supreme Court has the power to order the Prime Minister to dismiss members of his cabinet upon mere accusations of misconduct. See H.C. 3094/93, *Movement for Quality Gov't in Israel* v. *Israel*, 47(5) P.D. 404.

In a legal system such as Israel's, it is perhaps not surprising that the courts engage in a level of superintendence of ongoing military operations that would be unthinkable in our country. For example, Israeli courts have reviewed the quantity of supplies that the army allows to reach forces it is besieging, see H.C. 3451/02, *Almandi* v. *Minister of Def.*, 56(3) P.D. 30. In the United States, by contrast, Congress is vested with the power to declare war, see U.S. Const. Art. I, § 8, Cl. 11, and the President is the Commander in Chief of the armed forces, see *id.* Art. II, § 2, Cl. 1. See *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1998) (noting the reluctance of the courts "to intrude on the authority of the Executive in military and national security affairs"); *Youngstown*, 343 U.S. at 587 (acknowledging "broad powers in military commanders engaged in day-to-day fighting in a theater of war").

In any event, even if recent foreign law were an appropriate benchmark for evaluating the scope of the Suspension Clause, the procedures used by Israel for

detentions, whether within its sovereign territory or within the occupied territories—which are connected to Israel's sovereign territory—are hardly an appropriate, much less controlling, comparison for evaluating the detention of enemy combatants captured by the military on another continent, and held overseas in a country that the United States does not occupy and uses only under the terms of a lease that reserves sovereignty to the lessor—Cuba.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2007

57283

MOTION FILED
DEC 21 2007 12PP (51)

Nos. 06-1195 and 06-1196

In the Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

KHALED A.F. AL ODAH, NEXT FRIEND OF
FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR RESPONDENTS

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Rules 25.5 and 25.6 of the Rules of this Court, the Solicitor General, on behalf of respondents George W. Bush, *et al.*, does not oppose petitioners' motion for leave to file a supplemental brief but respectfully moves for leave to file a supplemental brief responding to petitioners' brief and to certain additional topics raised by petitioners' counsel at oral argument.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

DECEMBER 2007

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Respondents submit this supplemental brief in response to petitioners' supplemental brief addressing *Liversidge* v. *Anderson*, [1942] App. Cas. 206 (H.L. 1941) (U.K.), and *Greene* v. *Secretary of State for Home Affairs*, [1942] App. Cas. 284 (H.L. 1941) (U.K.).[1] As

[1] These cases were discussed in a treatise relied upon by both parties. See Robert J. Sharpe, *The Law of Habeas Corpus* 100-106 (2d ed. 1989) (Sharpe). In addition, as petitioners note (Supp. Br. 1 n.1),

explained at oral argument, those cases demonstrate that the common-law rule that a habeas petitioner was not permitted to controvert the facts as set forth in the return would have applied to executive detentions during wartime. See Tr. 46:2-21. In 1789, that principle would have prevented detainees in petitioners' circumstances from using habeas corpus to raise fact-based challenges to the military determination that they were enemy combatants. That common law rule, together with the geographic limits on the writ and the historical unavailability of habeas to "prisoners of war,"[2] would have precluded petitioners from obtaining anything like the review they receive under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Tit. X, 119 Stat. 2739. See Gov't Br. 37-40, 46-47 (citing additional authorities); see also *Schiever's Case*, 96 Eng. Rep. 1249 (K.B. 1759) (per curiam).

1. Petitioners contend (Supp. Br. 1) that *Liversidge* and *Greene* are inapplicable for two reasons: they "relied squarely on unique emergency legislation passed by Parliament," and they are no longer considered good law in the United Kingdom. Neither of those arguments undermines the relevance of those decisions to this case.

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petitioners' amici relied on the *dissenting* opinion in the *Liversidge* case.

[2] Post-1789 British cases underscore that the British courts did not view prisoners of war as a specialized class, but used the phrase generically to refer to enemy combatants. Indeed, the "prisoner of war" label was even extended to a non-combatant German national who had been resident in England for 25 years. See, *e.g.*, *The King* v. *Superintendent of Vine St. Police Station*, 1 K.B. 268, 278 (1916) (Eng.) (If the executive "represents to this Court that it has become necessary to restrain the liberty of an alien enemy within the kingdom, and treat him as a prisoner of war, he must be regarded for the purposes of a writ of habeas corpus as a prisoner of war.").

As indicated at oral argument, see Tr. 46:4-13, both *Liversidge* and *Greene* involved persons detained under Section 18B of the Defence (General) Regulations, 1939, S.R. & O. 1939/927 (U.K.) (as amended by Order in Council Amending the Defence (General) Regulations, 1939, S.R. & O. 1939/1681 (U.K.)) which implemented the Emergency Powers (Defence) Act, 1939, 2 & 3 Geo. VI, ch. 62 (U.K.). That provision permitted the Secretary of State to detain individuals if he "has reasonable cause to believe any person to be of hostile origin or associations * * * and that by reason thereof it is necessary to exercise control over him." *Liversidge*, [1941] App. Cas. at 213. To be sure, the principal question before the Law Lords was one of interpreting that regulation. But the regulation could plausibly (indeed, more naturally) have been read to call for an objective inquiry into whether there was reasonable cause to believe that the detainee was "of hostile origin" and that his detention was necessary, which would have opened the way for a factual inquiry, or construed to call for a completely subjective inquiry that would have foreclosed factual review. Over a strong dissent from Lord Atkin suggesting they were distorting the plain meaning of text, see *id.* at 225-247, the majority held that the regulation required only an inquiry into whether the Secretary, in good faith, subjectively believed that detention was appropriate, see *id.* at 219-220. Under that interpretation, the court engaged in no factual review at all. And in *Greene*, the House of Lords applied that interpretation to affirm the denial of a writ of habeas corpus to a person detained under the regulation, without the need for detaining authorities even to submit a supporting affidavit. [1941] App. Cas. at 290-296.

Liversidge and *Greene* are relevant to the scope of habeas for at least two reasons, notwithstanding that they involved a special statutory detention authority. First, if petitioners were correct in their claim that common law habeas courts would have engaged in factual review of executive detention in 1789, it is hard to imagine that the Law Lords would have strained to interpret the regulation to foreclose any meaningful factual review. To the contrary, these cases illustrate that as late as 1941, British courts did not and would not engage in a fact-intensive review of detention authority exercised pursuant to a statute, even a statute that (as Lord Atkin believed) could have been read to call for such review.[3] Indeed, the Law Lords' attitude toward the prospect of such factual review is reflected in the fact that more than one of the Law Lords invoked Lord Finlay's statement in a World War I-era case, *Rex ex rel. Zadig* v. *Halliday*, [1917] App. Cas. 260 (H.L. 1917) (U.K.), that "no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a court of law." *Liversidge*, [1941] App. Cas. at 259-260 (Lord Wright) (quoting *Halliday*, [1917] App. Cas. at 269); *id.* at 281 (Lord Romer).

Second, some of the Law Lords in the majority did discuss the history of the writ in Britain. None of that discussion suggested that there would have been factual review of military detention of enemy combatants. To

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[3] As Professor Sharpe noted: "There was something more involved than the question of how a familiar phrase should be interpreted in law. At stake was the issue of the appropriateness of judicial interference with the executive in time of war." Sharpe 103; see *id.* at 99 ("On the surface, this is very much a matter of statutory interpretation, but underneath, very much a matter of judicial attitude.").

the contrary, that discussion reaffirms that the common-law rule against controverting the return was not modified until the habeas statute of 1816, and that there are no cases sanctioning a factual inquiry into the military detention of enemies at any time up to and including 1941. Significantly, petitioners have identified no case in which British courts engaged in factual review of wartime detention.

Nor is it relevant (Supp. Br. 2-3 & n.2) that subsequent courts have embraced Lord Atkin's dissenting views as to the construction of the regulation. Indeed, to the extent those decisions criticize the majority's strained construction of the regulation, they only underscore the lengths to which the majority went to avoid factual review. In any event, those later decisions hardly speak to state of factual review in 1941, let alone 1789. In fact, as late as 1989, Professor Sharpe suggested that Commonwealth courts were still following the majority reasoning in *Liversidge* and *Greene*. Robert J. Sharpe, *The Law of Habeas Corpus* 106 (2d ed. 1989) (Sharpe). But whatever the exact nature and timing of later developments, the salient point is that as late as 1941 there was no appetite in the British courts on habeas (as in *Greene*, for example) to engage in a fact-intensive review of wartime detention by the executive. Although petitioners have suggested that deference to factual determinations was limited to post-conviction review of criminal trials, see, *e.g.*, 06-1195 Reply Br. 11, and would not extend to executive detention without trial, Professor Sharpe, after reviewing *Liversidge* and *Greene*, aptly summarized the British practice as giving the executive's decision to detain in wartime "the same respect accorded to the record of a superior court. It was said that habeas corpus merely required the produc-

tion of the immediate legal cause for the prisoner's detention, and that if the order were regular on its face, the application had to be refused." Sharpe 102 (footnote omitted).

2. At oral argument, counsel for petitioners raised several additional topics that warrant a brief response.

a. Petitioners have relied on the Indian cases for the proposition that habeas would have been available to non-citizens outside of sovereign territory. Tr. 12:15-24. As explained in the brief for respondents (at 30-31), those cases were based on a *statutory* grant of jurisdiction to courts sitting in India, and they therefore do not demonstrate the territorial scope of the *common-law* writ. That point is underscored by an act of 1781 that restricted the availability of the writ to the indigenous residents, apparently because some exercises of the writ over local residents had caused friction. See East India Company Act, 1781, 21 Geo. III, ch. 70 (U.K.); Paul Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Context, and American Implications* 75-77 (University of Va. L. Sch. Pub. L. & Legal Theory Working Paper Series No. 72, 2007) <http://law.bepress.com/cgi/viewcontent.cgi?article=1118&context=uvalwps>.[4] That statute illustrates both the statutory nature of the writ in India and the fact that, at the time of the founding, the writ did not apply to aliens in the same way that it applied to citizens.

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[4] Section 2 of the East India Company Act made an order of the governor general a complete defense to any action—including a habeas action—while Section 3 of that act provided that "with respect to such order or orders of the said governor general and council as do or shall extend to any *British* subject or subjects, the said court shall have and retain as full and competent jurisdiction as if this act had never been made."

b. Petitioners also invoked the 1777 statute suspending the writ of habeas corpus during the American Revolution, suggesting that the statute demonstrates that the writ must have extended to the colonies and to the high seas. Tr. 25:18-25; Habeas Corpus Suspension Act, 1777, 17 Geo. III, ch. 9 (U.K.). But, of course, the colonies were regarded by Britain as sovereign territory. More importantly, the statute began by noting that "*many persons have been seized*" in connection with the "*rebellion and war*," and that "such persons have been, or may be brought into this kingdom, and into other parts of his Majesty's dominions, and it may be inconvenient in many such cases to proceed forthwith to the trial of such criminals." *Id.* § 1. The latter clause displays a recognition that the "inconvenien[ce]" caused by the availability of the writ would arise not when prisoners were captured on the high seas, but only when they were brought into the sovereign territory of the realm. In other words, the statute underscores that the writ ran within "his Majesty's dominions," and not elsewhere.

c. Finally, petitioners discussed the case of Murat Kurnaz, a detainee who was transferred to the custody of the Federal Republic of Germany. Tr. 75:6-76:11. According to petitioners, Kurnaz was "released by the government because of the fact that" he had a lawyer, who was able to gather evidence "that would not have been allowed in" in proceedings conducted under the DTA. But contrary to petitioners' suggestion, detainees may be (and are) represented by counsel in DTA proceedings, and DTA counsel may investigate or gather information in connection with those proceedings.[5] More

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[5] To be sure, as would be true in a habeas proceeding, attorney access to classified matters could be restricted in appropriate circum-

over, the DTA does not preclude the introduction of new evidence. If a detainee discovers new evidence that is material to the question whether he is an enemy combatant, he can ask that the evidence be considered by a new CSRT, see Gov't Br. 56 & n.30, and the decision of that CSRT (if adverse to the detainee) can then be reviewed in the District of Columbia Circuit under the DTA.

* * * * *

For the foregoing reasons, as well as for the reasons stated in our principal brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 2007

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stances. But there is no inherent reason why attorneys would have greater access to highly sensitive classified matters in a habeas proceeding than they would in a court proceeding under the DTA. Indeed, the piece of information that purportedly led to the attorney investigation in the Kurnaz case was presented to Kurnaz in the unclassified summary of the evidence at the CSRT hearing, and that summary (all agree) is a part of the record on review in a DTA proceeding before the District of Columbia Circuit.

No. 06-1196

In the Supreme Court of the United States

KHALED A.F. AL ODAH, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS AL ODAH, ET AL.

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INTRODUCTION

The government asks for a "bright-line" rule limiting the reach of habeas corpus to formally sovereign U.S. territory in the case of foreign nationals. Br. 25. Granting the government's plea would enable the creation of zones outside the protection of U.S. and foreign law where the Executive can do as it pleases with its captives, free from restraint or review to ensure fair process. Such unchecked Executive power is unprecedented, unsupported by case law and inconsistent with first principles of constitutional government.

The government claims that Guantánamo detainees "enjoy more procedural protections than any other captured enemy combatants in the history of warfare." Br. 9. However, until the enactment of the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, alleged "enemy combatants" held within U.S. territorial jurisdiction were entitled to bring habeas actions challenging their detention. *Rasul* v. *Bush*, 542 U.S. 466 (2004). Now, the government claims, as a result of this legislation, it may hold these individuals indefinitely, if not permanently, and may do so on the basis of hearings (i) conducted years after capture and thousands of miles from the place of capture, (ii) by military tribunals directed to assume the truth of the government's allegations, in proceedings that (iii) do not afford them counsel or any meaningful opportunity to rebut the government's allegations, and that (iv) permit the tribunals to affirm their "enemy combatant" designations based on evidence that is secret, hearsay, and procured by torture. The tribunals' decisions are subject only to the limited judicial review provided by the DTA, and the decision to release a detainee is purely a matter of Executive grace.

After six years of stonewalling, it is time for the government to justify petitioners' detentions. If in proper habeas proceedings petitioners are determined to be properly detained, the government will prevail. If not, peti-

tioners should be released. Regardless of the outcome, habeas review in the district court is long overdue "to consider . . . the merits of petitioners' claims." *Rasul*, 542 U.S. at 485.

ARGUMENT

I. The Suspension Clause Applies In Guantánamo, A Land Under Exclusive U.S. Territorial Jurisdiction.

A. Under *Rasul*, habeas extends to places within exclusive U.S. territorial jurisdiction.

As this Court recognized in *Rasul*, habeas historically has extended to places within the exclusive territorial jurisdiction of the United States. 542 U.S. at 481-82. The question, therefore, is not whether the U.S. is formally sovereign in Guantánamo, see Br. 29, 35, but whether Guantánamo is territory over which the U.S. has "complete jurisdiction and control," *Rasul*, 542 U.S. at 480-81.

The government seeks a "bright-line" test based on formal sovereignty (which itself is an amorphous concept). Br. 25. But a significant concern in the cases cited by the government was whether applying U.S. law might conflict with local law or custom. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 273-75 (1990); *id.* at 277-78 (Kennedy, J., concurring); *United States* v. *Spelar*, 338 U.S. 217, 221 (1949).[1] A test based on formal sovereignty

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[1] *Spelar* and *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948), do not support the proposition that the U.S. is not sovereign in Guantánamo. In *Vermilya-Brown*, the Court held that the Fair Labor Standards Act applied to leased territory in the Crown Colony of Bermuda. The Court simply assumed, without deciding, that the territory remained under the sovereignty of the United Kingdom. See 335 U.S. at 380 (proceeding on the "postulate" that U.S. lacked sovereignty). In *Spelar*, the Court, proceeding on the same assumption, addressed the application

(footnote cont'd)

not only is arbitrary but would allow the Executive to create and perpetuate "law-free" zones – legal black holes – in places like Guantánamo. By contrast, recognizing habeas jurisdiction in places under exclusive U.S. territorial jurisdiction and law would prevent the creation of such zones while also avoiding conflicts with foreign law.

"From a practical perspective," Guantánamo "belongs to the United States," *Rasul*, 542 U.S. at 477 (Kennedy, J., concurring in the judgment), not simply because the U.S. has exclusive possession and control, see Br. 24-25, but because U.S. law is the only law that can apply. Guantánamo is not subject to the laws of any other country, and it is not subject to an occupation government under the law of war. The Guantánamo detainees have been removed from the sovereign territory of any other country whose laws could protect them. With only U.S. law available, "[w]ho can judge but this court?" *Rex* v. *Cowle*, 97 Eng. Rep. 587, 599 (K.B. 1759).

The government cites *Rex* v. *Earl of Crewe*, [1910] 2 K.B. 576 (Eng.), in which the King's Bench denied a writ of habeas corpus to a Bechuanaland national detained pursuant to a special order issued by the High Commissioner in Britain's Bechuanaland Protectorate under authority conferred by legislation. Br. 31. The government's reliance on *Crewe* is misplaced. The King's Bench did not base its decision on the proposition that habeas does not

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of foreign law as a basis for liability against the U.S. under the Federal Tort Claims Act. See 338 U.S. at 221. Both cases involved leases that, unlike the Guantánamo lease, generally left foreign law in effect within the leased territories. See *Vermilya-Brown*, 335 U.S. at 382 n.4; *Spelar*, 338 U.S. at 218. Neither case involved a leased territory like Guantánamo, in which U.S. law is the only governing law.

extend outside of sovereign territory.[2] Rather, the court based its decision on the merits that English law, unlike the U.S. Constitution, allowed the legislature to establish a law-free zone. As Lord Judge Farwell observed, "I fail to see how any Court can say that the Legislature . . . has not jurisdiction to set up a despotism in any of the dominions of the Crown, or, indeed, in the United Kingdom itself . . . ." *Creuse*, 2 K.B. at 616. Under the U.S. Constitution, there is no authority for the United States to set up a "despotism" in any territory under its exclusive jurisdiction. The Suspension Clause is designed to prevent just that.[3]

B. Guantánamo is within exclusive U.S. territorial jurisdiction.

The U.S. does not have merely *de facto* jurisdiction over Guantánamo, as the government implies. See Br. 23, 25, 29. The jurisdiction exercised by the U.S. is *de jure* and exclusive under the Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, T.S. No. 418 (Feb. 23, 1903) ("Lease"). As exclusive jurisdiction is the most that is required for habeas jurisdiction, the question of whether Guantánamo is sovereign U.S. territory need not be ad-

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[2] "[T]he mere fact of the country not having been annexed, and being extra-territorial, would not prevent the issue . . . of a writ of habeas corpus to run in a country governed by a system of laws created under the powers of [an Act of Parliament]." *Creuse*, 2 K.B. at 608 (op. of Williams, L.J.).

[3] The government asserts (Br. 15) that the Suspension Clause is limited to formally sovereign U.S. territory because only in such territory, the government argues, could "rebellion or invasion" occur. The government's premise is incorrect. The Clause permits suspension in cases of "rebellion or invasion" because such events are likely to disrupt the government's ability to maintain order and adjudicate crimes. Such events are possible anywhere within U.S. territorial jurisdiction.

dressed.[1] Any limits on the power of the U.S. to cede Guantánamo or offer it independence, or to conduct activities not authorized by the Lease, are irrelevant to the availability of habeas to individuals imprisoned there because formal sovereignty is not the key.

The parties have cited many U.S. and historical cases on the question of the territorial reach of habeas corpus and the Constitution. In the end, however, whether Guantánamo is more like Mexico (*Verdugo*), occupied Germany (*Eisentrager*), the Channel Islands (*Overton*), or Berwick upon Tweed (*Coule*), is beside the point. The government has failed to articulate any rationale for a test based on formal sovereignty. The reach of habeas corpus to territories within exclusive U.S. jurisdiction is consistent with all of the case law and with the imperative of preventing the creation of law-free zones.

U.S. control over Landsberg Prison in occupied Germany following World War II was entirely different from the exclusive, *de jure* territorial jurisdiction exercised by the U.S. over Guantánamo today. The *Eisentrager* petitioners were held in territory only temporarily under the control of an occupation government, an exigent form of government justified by the law of war. *Johnson* v. *Eisen-*

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[1] The government does not address petitioners' argument that Cuba's sovereignty is qualified by the use of the term "ultimate." See Al Odah Br. at 19 n.18. The government also does not address the implications of the reference to the Lease in the 1912 amendment as a "cession," or the government's own description of Guantánamo as a "territory for which the U.S. is internationally responsible." See *id.* at 16-17. The Lease, moreover, provides that the U.S. may exercise the power of eminent domain. Art. III, Al Odah Br. a9. That power is "an attribute of sovereignty." *Miss. & Rum River Boom Co.* v. *Patterson*, 98 U.S. 403, 406 (1878), and is "inseparable from sovereignty." *United States* v. *Carmack*, 329 U.S. 230, 238 (1946).

trager, 339 U.S. 763, 784 (1950). Moreover, unlike the military commissions in *Eisentrager*, CSRTs are not contemplated or governed by international law and are not sufficient under international or U.S. law to justify detention without meaningful judicial review in territory under the exclusive, and effectively permanent jurisdiction of the United States.

Verdugo likewise does not establish a bright-line test based on sovereignty. Rather, its holding was based on the practical concern of conflict with foreign law governing the reasonableness of a search by U.S. agents in Mexico. See *Verdugo-Urquidez*, 494 U.S. at 273-75. Petitioners, on the other hand, are within the territorial jurisdiction of U.S. and are therefore not "without presence or property in the United States." Br. 8. *In re Yamashita*, 327 U.S. 1 (1946), *Sommersett* v. *Stewart*, 20 How. St. Tr. 1, 79-82 (K.B. 1772), and *Case of the Hottentot Venus*, 104 Eng. Rep. 344 (K.B. 1810), all demonstrate that voluntary presence in the country is not a prerequisite for habeas jurisdiction, even for foreign nationals.[5]

In re Ning Yi-Ching, 56 T.L.R. 3 (Vacation Ct. 1939) (Eng.), cited by the government, Br. 32, is also inapposite. That case involved a habeas action brought on behalf of Chinese nationals held by British authorities in Tientsin, a territory in China where the British held some administrative jurisdiction over their own citizens, but had no authority under the treaty to try Chinese nationals. See 56 T.L.R. at 5. At the time, Chinese nationals were under the jurisdiction of the Chinese courts, which in turn were under the control of the Japanese occupation government.

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[5] The government faults petitioners for not addressing principles of *stare decisis*, but the government misunderstands petitioners' arguments. *Eisentrager* has no application to Guantánamo, and this Court need not decide whether to overrule it in this case. See *Rasul*, 542 U.S. at 475-76.

See *id.* Unlike U.S. jurisdiction in Guantánamo, British jurisdiction in Tientsin was not exclusive, and the administration of justice over foreign nationals resided in the courts of the foreign sovereign. See *id.*

In short, the government has cited no case in which a foreign national detained within the exclusive territorial jurisdiction of the government was denied habeas corpus solely because the detention was outside formally sovereign territory. Such a rule would shred the principles of justice and the system of checks and balances that define our constitutional order.

C. The question is not whether prisoners of war may be detained, but whether petitioners are prisoners of war.

The government claims that habeas jurisdiction does not extend to prisoners of war. That claim begs the question presented here: Whether petitioners have a right to a habeas hearing to determine whether they *are* prisoners of war. Before a person may be held as a prisoner of war ineligible for habeas, the government must first properly establish that the person *is* a prisoner of war. *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 538 (2004) (plurality opinion); *id.* at 549-50 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment). In other settings – as when a captive wears the uniform or bears the insignia of a foreign foe – an elaborate hearing is not needed to determine whether the captive is a prisoner of war. Here, petitioners have alleged that they are *not* prisoners of war or alien enemies, and it is not self-evident that they are. Petitioners are entitled to a habeas proceeding to contest the allegations against them, and the Suspension Clause precludes Congress or

the Executive from stripping the courts of jurisdiction to decide that question.[6]

The government wants to have it both ways, claiming its rights under the law of war while avoiding its obligations. Either the detainees are prisoners of war, entitled to the protections of the law of war, or they are civilians, entitled to be released unless some other basis for continued detention can be established. See *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866). Whichever result obtains, the question is within the province of the courts. In *Milligan*, for example, which the government simply ignores, the Court rejected the government's assertion that the petitioner was a prisoner of war not entitled to habeas corpus and made clear that only a person subject to the law of war can be held without trial. "If he cannot enjoy the immunities attaching to the character of a prisoner of

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[6] The government argues that the Guantánamo detainees are alien enemies. Br. 26, 45, 72. But alien enemies by definition are citizens of enemy states, and the Guantánamo detainees are nationals of U.S. allies. See 50 U.S.C. § 21. See also *Ludecke* v. *Watkins*, 335 U.S. 160, 172 n.17 (1948) (The question "as to whether the person restrained is in fact an alien enemy . . . may also be reviewed by the courts."). *Vaughan's Case*, 91 Eng. Rep. 535 (K.B. 1689), cited by the government, Br. 13 n.15, does not stand for the proposition that nationals of neutral countries who associate themselves with the enemy thereby become alien enemies subject to detention without trial. That case merely held that a citizen of an ally of the United Kingdom may be tried for treason for adhering to the King's enemies. The prisoner was given the right to a trial by jury to decide the truth of the allegations against him. *Miller* v. *United States*, 78 U.S. (11 Wall.) 268 (1871), also cited by the government, Br. 63, 65, involved seizure of enemy property, and is even further off point.

war, how can he be subject to their pains and penalties?" See *id.*[7]

Contrary to the government's suggestion, Br. 44-47, courts affirming the detention of prisoners of war historically have not simply deferred to the government's declaration that the petitioners were prisoners of war. In *The King* v. *Schiever*, 97 Eng. Rep. 551 (K.B. 1759), for example, the King's Bench found on the petitioner's own affidavit that he was lawfully detained as a prisoner of war, having served aboard a French privateer. Likewise, in *Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779), the court acknowledged its power to issue a writ of habeas corpus to inquire into the lawfulness of the detention of an alien, but found on the petitioners' own allegations that they were both prisoners of war and alien enemies. In *Lockington's Case*, Brightly 269 (Pa. 1813), also, the court did not deny the writ because the petitioner was held as an alien enemy, but on the merits because he was shown actually to be an alien enemy subject to detention under the Alien Enemy Act.

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[7] The government cites *The King* v. *Superintendent of Vine St. Police Station*, [1916] 1 K.B. 268 (Eng.), for the proposition that any person seized during warlike operations is a prisoner of war subject to detention. Br. 37-38. *Vine Street*, however, merely held that detention of an alien enemy is lawful, and it has no application to nationals of an allied country. *Vine St.*, 1 K.B. at 276 (Op. of Bailhache, J.) ("I desire with all the emphasis I can command to state expressly that I am not dealing with the case of British subjects or with aliens the subjects of neutral countries, and I trust that nothing in this judgment will be considered as having any bearing whatever upon any class of person other than alien enemies"). The court preserved the right of the petitioner to contest his status as an alien enemy. *Id.* at 277 (Op. of Low, J.) ("The first question we have to determine is whether the applicant is an alien enemy.").

D. The Suspension Clause is an enforceable restraint on Congress' power and does not depend on personal rights.

Only in a footnote does the government address petitioners' argument that the Suspension Clause is an enforceable restraint on the power of Congress to deprive the Judiciary of its power to review the legality of the detentions of those in federal custody. See Br. 14 n.4. The government argues that the reference to the "privilege" of the writ of habeas corpus signifies that habeas is analogous to rights described in the Bill of Rights. But the reference in the Suspension Clause to the "privilege" of the writ of habeas corpus presupposes the existence of the power to issue the writ. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807); *INS* v. *St. Cyr*, 533 U.S. 289, 304 n.24 (2001) ("the Clause was intended to preclude any possibility that 'the privilege itself would be lost' by either the action or inaction of Congress"). This Court has held in case after case, starting with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that any statute contrary to the Constitution is void. A constitutional violation need not be predicated on the existence of a personal right. Al Odah Br. 23-24.

The Suspension Clause also is fundamental to the separation of powers. In the DTA and MCA, Congress has conferred on the Executive the power to deprive the courts of habeas jurisdiction by unilaterally designating a person as an "enemy combatant." The jurisdiction of the courts under the DTA and MCA turns on that Executive determination alone, and the Executive thus holds the keys to the courthouse door. The potential for abuse of such power is the very reason that the Founders saw fit to prohibit the suspension of habeas corpus except in cases of rebellion or invasion when the public safety requires it.

II. The CSRT And DTA Are Not An Adequate Or Effective Substitute For Habeas Corpus.

A. The CSRT and DTA regime was not intended to substitute for habeas corpus.

The government argues that the CSRTs and DTA review are an adequate substitute for habeas corpus. But the government argued in the D.C. Circuit that the DTA was *intended* to "displace traditional habeas review." See Resp't's Pet. for Reh'g and Suggestion for Reh'g En Banc, *Bismullah* v. *Gates*, Nos. 06-1197 & 1397, at 10 (D.C. Cir. filed Sept. 7, 2007). The DTA, moreover, does not address the legality of detention or afford the remedy available by writ of habeas corpus – release. Indeed, the *Bismullah* panel has indicated that there is no limitation on the government's power to re-do CSRTs until it gets the result it wants, regardless of any deficiencies in their procedures. See *Bismullah* v. *Gates*, --- F.3d ---, 2007 WL 2851702, at *3 & n.5 (D.C. Cir. 2007) (denial of panel rehearing). The government argues that it has released every detainee determined by a CSRT not to be an enemy combatant, Br. 60, but the releases – and the determinations of combatant status – were purely a matter of Executive grace. No Guantánamo detainee has ever been released as a result of any judicial process.[8]

The government argues that habeas review "requires deference to any military tribunal" (Br. 45), but the cases it cites are inapposite. All of them address habeas review

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[8] The government's assertion that it has released every detainee determined not to be an enemy combatant by a CSRT is also incomplete. Many detainees who were determined not to be enemy combatants were not released, but were subjected to subsequent CSRTs, sometimes multiple times, until they were determined to be enemy combatants. See Al Odah Br. at 5 n.6; see also *Bismullah*, 2007 WL 2851702, at *3 & n.5.

of criminal convictions in military trials where substantial due process had already been afforded. See *In re Yamashita*, 327 U.S. 1; *Ex parte Quirin*, 317 U.S. 1 (1942); *Hiatt* v. *Brown*, 339 U.S. 103 (1950); *In re Grimley*, 137 U.S. 147 (1890); *Burns* v. *Wilson*, 346 U.S. 137 (1953). For example, the petitioner in *Yamashita*, the commanding general of Japanese forces in the Philippines during World War II, was indisputably an enemy alien and an enemy combatant. See 327 U.S. at 15-16, 20. He was tried and convicted by a military commission, a type of court authorized by the law of war and recognized by the Articles of War, applying standards generally equivalent to courts-martial practices in place at the time. See *id.* at 13-14. He was allowed to see and rebut the evidence against him, to examine witnesses (two-hundred-and-eighty-six of them), and to have assistance of counsel (six attorneys). See *id.* at 5, 7. His trial lasted for over a month. Even after all of that process, this Court carefully analyzed the legal issues involved, including issues of international law, deferring to the trial court only as to factual findings, as it typically does in criminal cases. See *id.* at 23.

Likewise, in *Quirin*, this Court addressed criminal convictions of German saboteurs who were tried before a properly constituted military commission. This Court's review of the military commission proceedings in *Quirin* and *Yamashita* was consistent with its deferential review of criminal convictions where the accused has already received a full and fair trial before a court. See, e.g., *Herrera* v. *Collins*, 506 U.S. 390 (1993).

Conversely, the Guantánamo detainees are not enemy aliens, and they deny that they are enemy combatants.[3]

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[3] Indeed, the detainees include individauls captured in Azerbaijan, Bosnia, Egypt, the Gambia, Georgia, Indonesia, Iran, Kenya, Mauritania, Mexico, Somalia, Thailand, Turkey, United Arab Emirates, and Zambia.

They have had no opportunity to see or rebut the principal evidence against them, which is classified. The government has not called a single witness at a CSRT hearing, so the Guantánamo detainees have not had the opportunity to examine the witnesses against them. Nor did they have the assistance of counsel. Not one of the petitioners has been convicted or even charged with any crime. The CSRT procedures employed are entitled to no deference at all.[10]

The government quotes *St. Cyr*, 533 U.S. 289, for the proposition that "other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive." Br. 47 (quoting *St. Cyr*, 533 U.S. at 306). The government's selective use of language obscures the fact that the Court in *St. Cyr* was referring to deportation orders, not detention orders. See 533 U.S. at 305-06.

This Court has never approved a departure from habeas corpus as substantial as the DTA. In *Hill* v. *United States*, 368 U.S. 424 (1962), this Court approved a substitute that was "exactly commensurate" with habeas. See *Hill*, 368 U.S. at 427; see also *Swain* v. *Pressley*, 430 U.S. 372, 382 (1977). If the Court were to approve of the CSRTs and DTA review as a substitute for habeas, it would be difficult to imagine any process within the con-

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[10] *Burns* v. *Wilson*, *Hiatt* v. *Brown*, and *In re Grimley*, cited by the government (Br. 44-45), all involved habeas review of sentences of confinement following trial by court-martial, and reflect only the unremarkable propositions that (i) courts-martial, as courts of the United States, are entitled to deference in factual findings, and (ii) a habeas court is limited "to determin[ing] whether the military have given fair consideration to each of [the petitioner's] claims." *Burns*, 346 U.S. at 144 (plurality opinion). Petitioners, on the other hand, have received no factual hearing before any court of the United States.

trol of the Executive, or any rudimentary standard of judicial review, that would not pass as an adequate substitute. The door would be open for future administrations to chip away or even eliminate the historic protection of liberty under law. As this Court has recognized:

> This nation . . . has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate.

Milligan, 71 U.S. at 125.

B. After nearly six years in prison, petitioners need not "exhaust" other remedies.

Petitioners in *Al Odah* have tried since May 2002 to have their cases heard in court. They have been to this Court in *Rasul*, and they prevailed in the district court on the government's motion to dismiss. Their habeas cases were pending on the government's interlocutory appeal to the D.C. Circuit when Congress enacted the DTA and MCA. The government now argues for even further delay, claiming that petitioners must exhaust their remedies under the DTA – remedies that did not even exist for the first four years of their detention and that do not contemplate the availability of a judicial order requiring release. All of the petitioners have had DTA petitions pending for at least four months. Other detainees have had DTA petitions pending since January 2006 – nearly two years – and the D.C. Circuit has ruled only on preliminary procedural motions. See *Bismullah* v. *Gates*, 501 F.3d 178 (D.C. Cir. 2007). The government has sought rehearing of that decision *en banc* and has indicated that it may even seek to appeal to this Court. Br. 59 n.31.

Furthermore, in denying rehearing, the *Bismullah* panel concluded that the government can avoid review of defects in the initial CSRTs, including the government's failure to collect and maintain required evidence relating to the detainees' designations as enemy combatants, simply by re-doing the CSRTs, potentially under a new set of rules, and with an even more limited record, at the government's sole discretion. See *supra* at 11. The government has indicated that it is considering conducting new CSRTs in multiple DTA cases, which will lead to considerable further delay. See Resp't's Mot. To Stay Order To File Revised Certified Index of Record as Defined in *Bismullah* and To Stay Briefing Schedule, *Chaman* v. *Gates*, No. 07-1101, at 8 (D.C. Cir. filed Oct. 11, 2007).

Exhaustion of remedies is a prudential requirement, not a jurisdictional requirement. See *Dretke* v. *Haley*, 541 U.S. 386, 392-93 (2004). Even if petitioners were required to exhaust their remedies under the DTA, the correct action for this Court to take would be to reverse and remand the D.C. Circuit's decision with instructions to stay the petitions until petitioners' DTA review is complete. See *Gusik* v. *Schilder*, 340 U.S. 128, 134 (1950). But petitioners are not required to exhaust their DTA remedies. The CSRTs are beyond repair, and DTA review is inadequate and ineffective. There is no requirement to exhaust an inadequate remedy. *Wilwording* v. *Swenson*, 404 U.S. 249, 250 (1971); see also *Boumediene* v. *Bush*, 127 S. Ct. 1480, 1480-81 (2006) (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting from denial of certiorari).

III. Petitioners' Detention Is Unlawful.

The court of appeals erroneously dismissed petitioners' habeas cases for lack of jurisdiction without reaching the question on which it had granted interlocutory review. The government argues that this Court should not reach the merits of this case either but should remand to the D.C. Circuit if the Court finds that jurisdiction exists. The Court should decline the government's invitation for fur-

ther delay. Such a ruling would put this case right back to where it was three years ago after this Court decided *Rasul*, and would virtually guarantee at least another year before petitioners could even commence review of their detentions in the district court. The D.C. Circuit has already decided, erroneously, that detainees in Guantánamo do not have constitutional rights, and this Court has the benefit of the D.C. Circuit's treatment of that issue. The merits of the case are encompassed within the questions presented on which this Court granted certiorari, and have been fully briefed. They are ripe for decision. This Court should reverse and remand for prompt habeas corpus hearings in the district court.

A. Due Process entitles petitioners to habeas review of the lawfulness of their detention.

Even if the detainees had no rights under the Due Process Clause of the Constitution, as the government argues, habeas corpus would still afford them a plenary review of the lawfulness of their detentions. Only a detention justified by domestic or international law can survive habeas review. Al Odah Br. 23-24, 40.

But petitioners are also entitled to habeas review of their detention as a matter of due process. See *Rasul*, 542 U.S. at 483 n.15 ("Petitioners' allegations . . . unquestionably describe 'custody in violation of the Constitution or laws and treaties of the United States."). The government contends that footnote 15 did not recognize that the petitioners have constitutional rights, Br. 68-69, but footnote 15 was necessary to overcome the D.C. Circuit's alternative rationale in *Al Odah* v. *United States*, 321 F.3d 1134 (D.C. Cir. 2003), for affirming the district court's dismissal of petitioners' habeas actions: that the detainees had no rights protected by the Constitution or laws of the United States, *id.* at 1134. The government suggested that the Court could not reverse the D.C. Circuit without rejecting that alternative rationale. See Br. for Resp'ts.

Rasul v. *Bush*, Nos. 03-334 & 343, at 11, 16-17, 19-20. That is exactly what footnote 15 accomplished.

B. The AUMF does not authorize detentions beyond those allowed by the law of war.

The Authorization for Use of Military Force ("AUMF") does not authorize detentions that are unsupported by the law of war. See *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2775 (2006). Indeed, the AUMF references the War Powers Act, which incorporates the United States' treaty obligations under the law of war. AUMF § 2(b). Any "inherent" constitutional authority the Executive may have to detain prisoners is likewise bound by the law of war. See *Milligan*, 71 U.S. at 131; cf. *Hamdan*, 126 S. Ct. at 2774-75.

This Court has made clear that civilians who are not associated with the military arm of an enemy government are not subject to detention under the law of war, even if they have committed hostile acts. *Milligan*, 71 U.S. at 131; *Quirin*, 317 U.S. at 45. As this Court held in *Milligan*, only alien enemies and those who are proven to have directly supported the military arm of a hostile government may be subject to military detention under the law of war. All others must be released or criminally charged, at least when they are detained within exclusive U.S. territorial jurisdiction.

CONCLUSION

The Court should reverse the court of appeals' decision and remand with instructions that the district court conduct expedited proceedings "to consider . . . the merits of petitioners' claims." *Rasul*, 542 U.S. at 485.

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No. 06-1196

FILED
NOV 1 1 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

KHALED A. F. AL ODAH, ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTRODUCTION

The Government's brief builds its case in an unreal universe. In that universe, the Government has established a fair and perfect system of detentions "designed to track the requirements for due process deemed sufficient for American citizens in *Hamdi v. Rumsfeld*" and "to strike an appropriate balance" between liberty and security, thereby granting the Guantanamo detainees "more procedural protections than any other captured enemy combatants in the history of warfare."[1] Nothing in this tale remotely resembles the actual facts before the Court.

The Government says its CSRT procedures provided petitioners "an opportunity to testify, call reasonably available witnesses, and present relevant and reasonably available evidence."[2] It neglects to mention that the CSRTs denied every request by a detainee for a witness who was not already at Guantanamo, three-quarters of the requests for witnesses who were there, and the great majority of the requests to present other evidence.[3]

The Government says the CSRT procedures allowed detainees "to question those witnesses called by the Tribunal."[4] It neglects to mention that

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[1] Brief for the Respondents ("Gov. Br.") at 9-12.

[2] *Id.* at 3.

[3] *See* Mark Denbeaux *et al.*, Seton Hall University School of Law, *No Hearing Hearings: An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantánamo* at 2-3, 28-31 (2006), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf ("Denbeaux Report").

[4] Gov. Br. at 49.

detainees were never in fact given the opportunity to question witnesses called by the tribunals, because the tribunals never called witnesses. Thus, no detainee ever had an opportunity to confront his accuser.[5]

The Government says that CSRT panel members were not only neutral, but had been ordered to be "neutral" by their superiors in the Department of Defense.[6] It neglects to mention that the panel members were not given the institutional protections of independence afforded to members of courts-martial and military commissions.[7] No mention is made of the undisputed fact that superiors in the Department of Defense, while purportedly ordering the CSRT panels to be neutral, also were ordering CSRTs to be done over when they reached a conclusion that a detainee was not an enemy combatant. No mention is made of the declaration by Colonel Abraham disclosing that the information supporting the determinations that detainees were enemy combatants was unreliable, and that the panels were under constant pressure from superiors to confirm the military's pre-announced determinations that detainees were enemy combatants.[8]

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[5] Denbeaux Report at 21.

[6] Gov. Br. at 57.

[7] *See, e.g.*, 10 U.S.C. § 837 (prohibiting command influence on court-martial judges); 10 U.S.C. § 949b (prohibiting command influence on military commission judges).

[8] Since petitioners' brief was filed, another declaration has been submitted in another case corroborating Colonel

The Government quotes the CSRT procedures saying that a "detainee may not be forced to testify."[9] But it later acknowledges that a detainee, even if not forced to testify before the CSRT, could be imprisoned indefinitely on the basis of statements extracted from him or others through coercion, so long as the CSRT panels considered the coerced statements "relevant and helpful."[10]

And the Government says the detainees were given notice – "notice of the *unclassified* factual basis" for their detention.[11] At the same time, the Government now acknowledges that "most of the CSRT conclusions are based in significant part on

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Abraham's revelations. Declaration of William J. Teesdale, *Hamad v. Gates*, No. 07-1098 (D.C. Cir. Oct. 4, 2007).

[9] Gov. Br. at 51.

[10] *Id.* at 58. As pointed out in petitioners' opening brief, under the CSRT procedures that were applied to these petitioners, CSRT panels were not even required to attempt to determine whether the evidence used to support an enemy-combatant determination was derived from torture or coercion. In that regard, the Government misleads the Court when it says the petitioner had the benefit of "procedures authorized by Congress." Gov. Br. at 9, 43. Every petitioner's CSRT was conducted between September and December 2004, more than a year *before* the DTA was enacted on December 30, 2005. *See* App. 73. Those CSRTs were conducted pursuant to procedures created unilaterally by the Department of Defense as a matter of internal Department "management" and announced by Deputy Secretary Paul Wolfowitz on July 7, 2004. App. 141-46. Congress had no involvement in developing the procedures employed in petitioners' CSRTs. Indeed, when Congress enacted the DTA it found those CSRT procedures defective, and it required changes for *future* CSRTs. DTA §§ 1005(a)(2) & (b).

[11] Gov. Br. at 3 (emphasis added).

classified information" – that is, on information which the detainees were never allowed to know and so could not rebut or explain.[12] This acknowledgement alone suffices to reveal the fiction of the whole facade of fair procedure. No amount or form of process can enable an accused to respond to unknown accusations.

The standards set forth by the plurality in *Hamdi* for challenging an enemy-combatant determination are basic and straightforward: the detainee "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). The hearings afforded these petitioners and the other detainees at Guantanamo – put in place just nine days after the Court announced its decision in *Hamdi* – met none of those requirements. Petitioners have never had the opportunity to confront and rebut the accusations against them, and the appellate review to which they are limited under the Detainee Treatment Act ("DTA") would deprive them of that opportunity forever. That is the reality. The facts do matter.

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[12] *Id.* at 4 (emphasis added).

I. PETITIONERS' RIGHT TO HABEAS CORPUS, RECOGNIZED BY THIS COURT IN *RASUL*, IS PROTECTED BY THE SUSPENSION CLAUSE.

A. The Suspension Clause Protects Petitioners' Statutory Right to Habeas Corpus.

The Government contends that this Court's decision in *Rasul*[13] that petitioners at Guantanamo have the right to petition for the writ of habeas corpus was based only on Section 2241 of the habeas statute. Even if that were all *Rasul* relied on, it would be enough.

The Court in *Rasul* was interpreting the scope of a statute that has remained virtually unchanged since the beginning of our Republic. As the Court has recognized, Section 2241 "descends directly" from the language of Section 14 of the Judiciary Act of 1789. *INS v. St. Cyr*, 533 U.S. 289, 305 n.25 (2001). The language of Section 2241 of the habeas statute that was interpreted by this Court in *Rasul* is the same in all material respects as the language of Section 14 of the original Judiciary Act, extending habeas to all "prisoners" who are "in custody, under or by colour of the authority of the United States."[14] That language does not restrict the privilege of the writ to citizens, or make any distinction between citizens and aliens.

This Court's decision in *Rasul* that petitioners at Guantanamo are entitled to petition for the writ under Section 2241 is necessarily a decision that

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[13] *Rasul v. Bush*, 544 U.S. 466 (2004).

[14] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82 (the "Judiciary Act").

they would have been entitled to petition for the writ under Section 14 of the 1789 Act. Petitioners' right to the writ, therefore, does not result from some recent expansion of the habeas statute. Rather, it falls within the "historical core" of the writ "as a means of reviewing the legality of Executive detention" and would have been available to petitioners since "the formative years of our Government." *St. Cyr*, 533 U.S. at 301.

Petitioners' right to the writ is therefore protected by the Suspension Clause. Section 14 of the Judiciary Act has long been considered a reflection of what the Framers intended to protect through the Suspension Clause. Because the Judiciary Act was enacted by many of the constitutional framers, it has been characterized as "a contemporaneous exposition of the constitution." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821); *see, e.g., Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (The Judiciary Act "was passed by the first congress of the United States, sitting under a constitution which had declared 'that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it.' Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity . . . "); *Capital Traction Co. v. Hof*, 174 U.S. 1, 9-10 (1899) ("The judiciary act of September 24, 1789, c. 20, drawn by Senator (afterwards Chief Justice) Ellsworth, and passed – within six months after the organization of the government under the constitution, and on the day

before the first ten amendments were proposed to the legislatures of the states – by the first congress, in which were many eminent men who had been members of the convention which formed the constitution, has always been considered as a contemporaneous exposition of the highest authority."); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) ("That act [the Judiciary Act], which has continued in force ever since . . . was passed by the first congress assembled under the constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning.").

In summary, the statutory right to habeas corpus to which this Court found petitioners entitled in *Rasul* arises directly from Section 14 of the Judiciary Act of 1789. It is the right to habeas corpus contemplated by the Constitution and is protected by the Suspension Clause.

B. As *Rasul* Holds, the Common Law Writ Would Have Extended to Petitioners Detained at Guantanamo.

The Government spends numerous pages of its brief arguing that habeas at common law did not extend outside the sovereign territory of the crown. In not a single one of the cases the Government cites, however, did the availability of habeas turn on the existence of formal sovereignty over a territory. Whether or not a territory was within the crown's sovereignty was never the issue. As this Court found in *Rasul*, the issue was whether the sovereign

exercised control over the place where the writ sought would run.[15]

There is no doubt of that here. The United States exercises exclusive custodial control over the petitioners, and it exercises complete jurisdiction and

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[15] The scope of the writ at common law, as under the federal habeas statute, is all inclusive, applying to any prisoner in government custody. The Government has cited neither a case nor a statute limiting that scope and restricting the reach of habeas to sovereign territories. As the Court in *Rasul* pointed out, the cases made clear that availability of the writ turned not on formal sovereignty but rather on power and control. The statutory treatment of habeas also indicates that the writ reached beyond sovereign territory. For example, the British Suspension Act of 1777 (which was extended five times until 1783) suspended habeas corpus during the American Revolution explicitly and exclusively for prisoners captured "out of the realm" or "on the High Seas." This suspension makes sense only if one assumes that the writ was otherwise available to persons taken outside the realm, including on the high seas where many sailors had been illegally impressed only to be released on habeas corpus. 17 Geo. 3., c.9; 18 Geo. 3, c.1; 19 Geo. 3, c.1; 20 Geo. 3, c.5; 21 Geo. 3, c.2; 22 Geo. 3, c.1 (end date Jan. 1, 1783).

The Government contends that the passage of statutes by Congress granting habeas jurisdiction for inhabitants of the newly acquired Northwest Territories, Louisiana and Florida, indicates that they would not otherwise have been entitled to habeas at common law. Gov. Br. at 18 n.5. But, if that were so, then the enactment by Congress of Section 14 of the First Judiciary Act of 1789, conferring the right of habeas corpus on prisoners in U.S. custody, would indicate that even citizens within the continental United States also would not have been entitled to habeas corpus at common law. The enactments indicate not that the writ was unavailable at common law, but only that "the power to award the writ by any of the courts of the United States, must be given by written law." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807).

control over Guantanamo. Because it does so, this Court found in *Rasul* that Guantanamo is not "extraterritorial," but is within the "territorial jurisdiction" of the United States.[16] The writ would have extended to petitioners there at common law.

To hold otherwise and restrict the reach of the writ to areas of formal sovereignty – something decided by the political branches, divorced from actual control over a territory – would enable the political branches to insulate their actions from judicial scrutiny and to deprive persons of their liberty without sufficient cause.[17] That would be antithetical to the "historical core [function of] the writ of habeas corpus . . . as a means of reviewing the legality of Executive detention." *St. Cyr*, 533 U.S. at 301, *quoted in Rasul*, 542 U.S. at 474.

The Government praises an inflexible rule turning on formal sovereignty as "more easily administrable," but that is a disingenuous[18]

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[16] *Rasul*, 542 U.S. at 480.

[17] The Government asserts that formal sovereignty is something decided solely by the political branches of government. Gov. Br. at 35-36. The Framers, however, designed the Suspension Clause as a limitation on the power of the political branches. The Government's theory would enable the political branches to avoid that constitutional limit; by declining to accept formal sovereignty over an area, the political branches could effectively suspend the writ of habeas corpus in the area without meeting the requirements of the Suspension Clause.

[18] The modern-day notion of sovereignty in U.S. domestic and international law bears no relationship to the complex British conception of sovereignty which the Government itself argues (Gov. Br. at 27-32) measured the reach of common law habeas. *See generally* Halliday & White, *The Suspension*

euphemism for a rule allowing the Executive to move the line of habeas jurisdiction around to suit its pleasure. What would make the rule "easily administrable" would also make it the perfect tool for manipulation and injustice, giving officials *carte blanche* to step across the line to avoid the law. The whole purpose of the writ at common law was to prevent the Government from doing just that.

Indeed, as the Government points out in its brief, the Habeas Corpus Act of 1679 was enacted in England in response to abuses by the Earl of Clarendon who was impeached for sending persons "to be imprisoned . . . in remote islands . . . thereby to prevent them from the benefit of the law."[19] It is extraordinary that the Government cites this statute as justification for doing exactly the same thing as the Earl of Clarendon – sending persons to "remote islands . . . thereby to prevent them from the benefit of the law." Its attempt to do so is contrary to the purpose of the writ and to the rule of law it was designed to protect.

Clause: English Text, Imperial Contexts, and American Implications, 94 Va. L. Rev. (forthcoming May 2008), *available at* http://law.bepress.com/uvalwps/uva_publiclaw/art72. Halliday and White also demonstrate that the Government's view of the reach of the common-law writ is wrong.

[19] Gov. Br. at 29.

C. Habeas Has Always Been Available to Test Whether Persons in Military Custody Are Who the Military Says They Are.

The Government asserts that habeas was unavailable at common law to aliens detained as enemy combatants. That assertion is wrong; it confuses two separate issues.

Prisoners whom the military has lawful authority to detain during war time – whether alien enemies or prisoners of war – do not normally have the right to release through habeas corpus. But whether, as a factual matter, any individual petitioner for the writ is an alien enemy or prisoner of war – whether, *in fact*, he or she comes within the category of persons who may be detained – is a question that always could be examined through habeas. That was so both under the common law and throughout our history.

The Government cites the *Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779), and *Rex v. Schiever*, 97 Eng. Rep. 551 (K.B. 1959), to support its argument that habeas was not available to persons detained as prisoners of war. Those cases demonstrate just the opposite. In both cases, the Court *exercised* habeas jurisdiction to examine the facts and, after doing so, denied relief *on the merits* because the facts showed that the petitioners were prisoners of war who could lawfully be detained during a war and were therefore not entitled to release.

The federal courts have likewise always exercised habeas jurisdiction to examine the facts and the legal authority offered to support military custody over a

petitioner.[20] For example, although the Alien Enemies Act of 1798 gives the President unreviewable discretion to decide whether to detain or deport alien enemies, the courts have always exercised jurisdiction to determine whether a petitioner is in fact an alien enemy. *See Ludecke v. Watkins*, 335 U.S. 160, 171 n.17 (1948) ("[W]hether the person restrained is in fact an alien enemy . . . may also be reviewed by the courts.").[21]

Indeed, this Court long ago rejected the argument the Government makes here. In *Ex parte Milligan*, 71 U.S. 2 (1866), the Government claimed that the petitioner had conspired against the United States and aided the enemy. It argued that it had unreviewable authority to detain someone as a prisoner of war, and that Milligan was "excluded from the privileges of the [habeas] statute" because he was a prisoner of war.[22] This Court rejected that argument, fully considered the facts regarding Milligan's status and the military's authority to hold him as a prisoner of war and, concluding he was not, ordered his release.[23]

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[20] *See infra* notes 52-53, at 26-27.

[21] *See, e.g., Citizens Protective League v. Clark*, 155 F.2d 290, 294 (D.C. Cir. 1946) ("[w]hether the individual involved is or is not an alien enemy, is admitted by the Attorney General to be open to judicial determination"); *United States ex rel. Hack v. Clark*, 159 F.2d 552, 554 (7th Cir. 1947); *Minotto v. Bradley*, 252 F. 600, 602 (D. Ill. 1918); *Ex parte Fronklin*, 253 F. 984, 984 (D. Miss. 1918).

[22] 71 U.S. at 6, 131.

[23] *Id.* at 107, 131.

Nevertheless, for the past six years the Government has argued that it has the unreviewable authority to apprehend anyone anywhere in the world and to detain that person indefinitely simply by applying the label "enemy combatant." That assertion is at odds not only with the common law and the historic precedents of our nation, but also with the Court's decisions three and a half years ago in *Rasul* and *Hamdi*. In both cases, the Court rejected the contention that it should simply defer to the Government's determination of whom it could detain, and confirmed the detainees' right to obtain determinations of the legality of their detentions. As the plurality stated in *Hamdi*, "the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government." 542 U.S. at 535-36.

D. Neither the Text Nor the History of the Suspension Clause Indicates That It Applies Only Domestically.

The Government argues that the circumstances justifying a suspension of the writ of habeas corpus are purely domestic, so the scope of the writ must also be purely domestic.[24] But that argument is a non sequitur. Even if "rebellion" and "invasion" are purely domestic – and that is far from clear – it does not follow that the scope of the writ is domestic. The

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[24] Gov. Br. at 15-18.

conditions justifying the suspension power do not define the underlying reach of the writ.[25]

The necessary consequences of the Government's argument show its speciousness. The argument would set a continental boundary to the protection of the Suspension Clause without regard to the citizenship of the habeas petitioner, thereby allowing Congress to deny a habeas forum to individuals in the position of the U.S. petitioners in *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), and *Reid v. Covert*, 354 U.S. 1 (1957). But the Government itself quietly shuns this result and limits its claim to the proposition that "aliens outside the sovereign territory of the United States . . . do not fall within the ambit of the Suspension Clause."[26] Its silence regarding the logical upshot of this argument is thunderous.

The Government also argues that the Constitution never contemplated that the courts would intrude on the President's authority to detain persons in wartime, and that doing so would unconstitutionally restrain the executive and legislative authority in providing for the national defense.[27] These are essentially the same arguments the Government made to this Court four years ago

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[25] The conditions justifying suspension of the writ are those that have the greatest chance of impinging on the ability of the U.S. courts to function, and may well normally be domestic. On the other hand, the purpose of the writ is to relieve individuals from erroneous detention, and the writ reaches to all areas within the sovereign's control.

[26] Gov. Br. at 14; *see also id.* at 18-22, 26 n.8.

[27] *See* Gov. Br. at 16-18.

and the Court rejected.[28] As the Court recognized in *Rasul*, the petitioners seek judicial review only of their claims that they are innocent civilians detained by mistake, and *Rasul* held that they are entitled to such review. It "recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace."[29]

The Court made the same point in *Hamdi*, stating that "unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role . . . serving as an important judicial check on the Executive's discretion in the realm of detentions."[30] As the Court stated:

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war . . . it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.[31]

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[28] *See* Brief for the Respondents at 42-43, *Rasul v. Bush* and *Al Odah v. United States*, Nos. 03-334 and 03-343 (U.S. Mar. 3, 2004).

[29] *Rasul*, 542 U.S. at 474.

[30] *Hamdi*, 542 U.S. at 536.

[31] *Id.* at 535. As Justice Scalia explained: "Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war

E. The Government Cannot Rely on *Eisentrager* to Escape the Law.

The Government contends that *Eisentrager* established that aliens outside U.S. sovereign territory are not protected by the Constitution and that the Government was entitled to rely on that "longstanding constitutional rule" in designing its detention policies.[32] The Government is wrong on both counts.

Eisentrager[33] did not establish a blanket exemption from the Constitution for the Government in dealing with aliens outside U.S. sovereign territory. The Court held in that case that admitted alien enemies who had been charged, tried and convicted of violating the laws of war by a duly authorized military commission, and who at no time had been within the territorial jurisdiction of the United States, were not entitled to challenge their convictions in the federal courts through the writ of habeas corpus.[34] That decision provides no

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and, in a manner that accords with democratic principles, to accommodate it." *Id.* at 579 (Scalia, J., dissenting).

[32] Gov. Br. at 10; *see also id.* at 18-20, 22-24.

[33] *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

[34] *See Rasul*, 542 U.S. at 475-76; *see also id.* at 487-88 (Kennedy, J., concurring). Unlike petitioners here, the petitioners in *Eisentrager* did not allege that they were innocent or that they had been deprived of a fair trial by the military commission that convicted them. Their constitutional claim was that, under Articles I and III and the Fifth Amendment, the military commission lacked jurisdiction to try them. This Court rejected that claim. *See Eisentrager*, 339 U.S. at 785. Because the *Eisentrager* petitioners did not challenge the fairness of the trial they had received, *Eisentrager* had no

authorization for the Government to ignore the Constitution in its dealings with aliens abroad. Indeed, what the Government is claiming – in effect, that it relied on *Eisentrager* to create a law-free zone in Guantanamo where it could disregard the Constitution, laws, and treaties of the United States – is offensive to the rule of law. The Government "may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring). It can never have a valid reliance interest to act beyond the law.

However the Government may have viewed *Eisentrager* before *Rasul* was decided, it simply is impossible to view that decision after *Rasul* as granting the Government broad authority to ignore the Constitution and U.S. law at Guantanamo. *Rasul* made clear that the Guantanamo petitioners "differ from the *Eisentrager* detainees in important respects" which the Court described as "critical" to the "question of the prisoners' *constitutional* entitlement to habeas corpus."[35] It also found that, unlike China where the *Eisentrager* petitioners were tried and the prison in Germany where they were confined, Guantanamo is not "extraterritorial," but is within the "territorial jurisdiction" of the United States.[36]

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occasion to address whether the protections of the Due Process Clause applied to them.

[35] *Rasul*, 542 U.S. at 476.

[36] *Id.* at 480.

II. THE DTA DOES NOT PROVIDE AN ADEQUATE SUBSTITUTE FOR HABEAS.

A. The Government Deprived Petitioners of an Essential Protection at the Onset of Their Captivity and Has Denied Them a Meaningful Process Since.

The Government argues that the process it has provided the detainees should be considered sufficient because it was modeled after Army Regulation 190-8, which it says the plurality in *Hamdi* suggested would be adequate for testing the detention of an American citizen as an enemy combatant.[37] But the Government makes the wrong comparison. The question is not whether the procedures it implemented are comparable to the Regulation 190-8 procedures, but whether they are equivalent to the habeas review to which these petitioners are entitled to test the legality of their detentions. *See Swain v. Pressley*, 430 U.S. 372, 381, 384 (1977).

The plurality in *Hamdi* did indicate that there was a "*possibility* that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal."[38] To be sufficient, however, the procedures applied by any such tribunal must meet the core "standards" the Court "articulated" in *Hamdi* – that is, they must provide a detainee with "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual

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[37] Gov. Br. at 52.

[38] *Hamdi*, 542 U.S. at 538 (emphasis added).

assertions before a neutral decisionmaker."[39] As pointed out in detail in petitioners' opening brief, neither the CSRT process nor the limited review allowed under the DTA meets those standards.[40] Significantly, the Government makes no serious attempt to establish that they do.

The 190-8 hearings are simply not comparable.[41] They are held promptly in the field after capture whenever there is any doubt about a prisoner's status. They work precisely because they are held close to the time and place of capture. Witnesses with knowledge of the circumstances surrounding the capture are available then and there; they are not available months or years later, thousands of miles away in a place like Guantanamo. Moreover, the military panels reviewing the captures promptly in the field as part of 190-8 hearings are not prejudiced by decisions already made about a detainee's status by superiors in the chain of command. Command influence is not an issue because people at the top have not prejudged the result.

The Government simply disregarded Army Regulation 190-8 for the people it shipped to Guantanamo.[42] By doing so, it denied petitioners a

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[39] *Id.* at 533.

[40] Brief for Petitioners *El Banna et al.* at 13, 26-49.

[41] *See* Brief Amicus Curiae of Retired Military Officers in Support of Petitioners at 9-13 (U.S. Aug. 24, 2007) (discussing the "fundamental differences between CSRTs and hearings under Regulation 190-8").

[42] Reportedly, the military wanted to hold those hearings and officials in the White House vetoed them. Jane Mayer, *The*

critical procedural protection at the outset when it could have been effective to prevent their erroneous detentions.[43]

As the plurality in *Hamdi* emphasized, "[i]t is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"[44]

Hidden Power, THE NEW YORKER, July 3, 2006, at 53. Instead, as an interrogator at the Kandahar Air Base in early 2002 has explained, "every Arab we encountered was in for a long-term stay and an eventual trip to Cuba." *See* Chris Mackey and Greg Miller, *The Interrogators* 85 (2004).

[43] Army Regulation 190-8 and its predecessors have played a critical role as the nature of warfare has changed. Through the Korean Conflict, there was normally little difficulty identifying one's enemies; they wore uniforms. Beginning with the Vietnam War, however, it became more difficult. Many of the enemy dressed like civilians and, as a result, identification became difficult and the danger of mistakes became greater. Army Regulation 190-8 and its predecessors, requiring hearings to be held promptly in the field whenever there is any doubt about a prisoner's status, are critical for dealing with that problem. The military's adherence to those regulations in every conflict since Vietnam (until the conflict in Afghanistan) is probably a primary reason why habeas cases have not been filed on behalf of persons detained in those other conflicts. Had the Government complied with its regulations and held those hearings here, it is likely that many of the petitioners would have been released soon after their initial detentions and never shipped to Guantanamo, and that many of these cases would never have been filed. Of course, the 190-8 hearings were never designed for reviewing the status of persons taken into custody thousands of miles from any battlefield, in places like Bosnia and the Gambia, to be held indefinitely in a conflict without end.

[44] *Hamdi*, 542 U.S. at 533 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)).

What is required at the onset of a detention, and what works then, is not what is required and works years later and thousands of miles away.

B. Petitioners Are Not Required to Exhaust the Inadequate DTA Remedy.

The Government argues that it is premature for this Court to decide whether the DTA provides an adequate substitute for habeas before the petitioners have exhausted the DTA process in the Court of Appeals.[45] The Government may be correct that "the exact nature of DTA review remains uncertain."[46] After all, almost two years after that statute went into effect, not a single hearing on the merits has yet been held in any of the cases filed under the DTA. One thing is certain, however: the DTA review process is not commensurate with habeas and is inadequate.

Petitioners pointed out the inadequacies of the DTA process in detail in their opening brief.[47] Most importantly, the DTA process provides limited appellate review of a record that is both replete with evidence obtained through torture and coercion and that, at the same time, is inherently incomplete because it was developed under a process that deprived the detainees of counsel and of the opportunity to confront the allegations against them and to present evidence of their innocence. Rather than correct the inadequacies of the underlying CSRT process, the limited DTA review perpetuates

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[45] Gov. Br. at 41-43.

[46] *Id.*

[47] Brief for Petitioners *El-Banna et al.* at 13, 26-49.

them. Under the DTA, the Court of Appeals is not allowed to take new evidence, it has no way of knowing what portions of the Government's evidence were obtained through torture and coercion, and the detainees continue to be deprived of the opportunity to confront and rebut the key accusations against them and to introduce evidence establishing their innocence. A standard of review based on the preponderance of the evidence is inadequate in these circumstances where the record is so tainted and one-sided.

Those inadequacies cannot be fixed by any amount of DTA review. They are inherent in the DTA review process itself. Petitioners are clearly not required to exhaust inadequate remedies. *See Marino v. Ragen*, 332 U.S. 561, 570 (1947) (Rutledge, J., concurring).

Significantly, the Government's brief fails even to address these inadequacies. The Government's complete silence regarding the realities of the DTA review process is both remarkable and telling.[48]

Since petitioners filed their opening brief, the inadequacy of the DTA process has become even more apparent. The Government recently disclosed that it has lost or destroyed the materials that the D.C. Circuit ruled are indispensable to the record on review. The D.C. Circuit ruled in *Bismullah v. Gates*,

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[48] Rather, the Government attempts to avoid those issues by arguing that petitioners should "exhaust" the remedies before the Court of Appeals or, alternatively, that the inadequacies in the DTA process are irrelevant because habeas courts would also simply defer to the Government's decisions on who is properly detained.

501 F.3d 178, 192 (D.C. Cir. 2007), that the record on review is the "Government Information" from which the CSRT "Recorders" – that is, the military officers designated to assist the CSRTs – were supposed to select inculpatory and exculpatory evidence about petitioners to present to the CSRTs. As the D.C. Circuit later explained: "Whether the Recorder . . . [presented] all exculpatory Government Information, as required by the DoD Regulations, and whether the preponderance of the evidence supported the conclusion of the Tribunal, cannot be ascertained without consideration of all the Government Information." *Bismullah v. Gates*, _ F.3d _, 2007 WL 2851702, at *1 (D.C. Cir. Oct. 3, 2007).[49]

On September 27, 2007, the Government revealed that "the reality is that there is no readily accessible compilation of the record as defined in *Bismullah* for completed CSRTs," and "it is impossible to recreate with any precision the information that was reviewed by the Recorders in performing their duties." Omnibus Motion to Stay Orders to File Certified Index of Record at 29-30, *Hamad v. Gates*, No. 07-1098 (D.C. Cir. Sept. 27, 2007). In other words, the Government does not have the record the D.C. Circuit considers necessary for review. It has

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[49] Although the D.C. Circuit suggested that the Government could convene new CSRTs whose determinations would be reviewable on the basis of a new and presumably complete record, *Bismullah*, 2007 WL 2851702, at *3, that suggestion would not cure the irretrievable loss to petitioners of exculpatory evidence in the original record and only invites an endless cycle of CSRTs and DTA reviews with no prospect of petitioners' release even if the Government has no factual or legal basis to support their detentions.

been lost or destroyed, or never compiled in the first place. For this independent reason, DTA review in the Court of Appeals would be fruitless.

There is yet another reason why the Government's "exhaustion" argument should be rejected. It is now three and a half years since this Court held in *Rasul* that petitioners are entitled to challenge the legality of their detention by habeas corpus, which is supposed to provide a "swift and imperative remedy in all cases of illegal restraint or confinement." *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 490 (1973). Now, nearly six years into petitioners' incarceration at Guantanamo – what the Government has the audacity to refer to as "this preliminary stage"[50] – it is both erroneous and offensive for the Government to contend that it is premature for this Court to rule on petitioners' claim that Congress unconstitutionally deprived them of their right to habeas.

C. A Habeas Court Would Not Have Deferred to the Executive's Determination, But Would Have Conducted a Plenary Examination into the Legal and Factual Basis for the Detention.

The Government argues, in effect, that the inadequacies in the DTA process do not matter because the petitioners would not have received anything more in habeas; it says that the scope of review in habeas would also have been extraordinarily limited and deferential to the Executive's decision to detain. That is simply wrong.

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[50] Gov. Br. at 11.

In cases of Executive detention imposed without trial, habeas courts traditionally would have conducted a searching review into both the scope of the Executive's legal authority to detain and the factual basis for the detention. Deference to the government's judgments about the scope of its detention powers was entirely unknown in traditional habeas cases.[51] Similarly, habeas courts would not defer to the government's assertions of the facts, but would undertake independent investigation of the facts offered to support detention imposed without trial. *See, e.g., Bollman*, 8 U.S. at 125 (declining to defer to the magistrate's assertion that the facts justified detaining the petitioners, who were suspected of treason, and holding five days of hearings, during which the Court "fully examined and attentively considered" the relevant evidence).

The same was true in the military context. Habeas courts did not shy away from examining the justification for military custody, but traditionally undertook independent fact-finding in a wide variety

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[51] *See, e.g., In re Jung Ah Lung*, 25 F. 141, 143 (D. Cal. 1885) ("to require the court in its investigation to be governed by the decision of an executive officer, acting under instructions from the head of the department in Washington, would be an anomaly wholly without precedent, if not a flagrant absurdity"); *In re Irons*, 13 F. Cas. 98 (C.C.N.D.N.Y. 1863) (refusing to defer to determination of board of enrollment revising petitioner's draft status); *Ex parte Randolph*, 20 F. Cas. 242 (C.C.D. Va. 1833) (taking new evidence and reaching own conclusions notwithstanding executive official's previous fact-finding on same subject).

of circumstances to determine whether petitioners were properly within the custody of the military.[52]

Moreover, the courts consistently held that, absent a valid suspension of the writ, Congress could not make the military's determination of the legality of its custody over someone "final" or "conclusive," and thereby preclude judicial review of the issues.[53]

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[52] *See, e.g., In re Egan*, 8 F. Cas. 367 (C.C.N.D.N.Y. 1866) (ordering release of prisoner because court-martial had lacked the power to try civilian for murder); *McCall's Case*, 15 F. Cas. 1225, 1231 (E.D. Pa. 1863) ("Whether a man is lawfully in military service must always be a judicial question. It is peculiarly a question for decision under a habeas corpus."); *United States ex rel. Turner v. Wright*, 28 F. Cas. 798, 798-99 (C.C.W.D. Pa. 1862) (discharging prisoner alleged to be a deserter after finding his enlistment to have been illegal); *Bamfield v. Abbot*, 2 F. Cas. 577, 577 (D. Mass. 1847) (court could not "doubt that it [was its] duty to inquire into the cause of detention" of enlistee in armed forces); *Ex parte Bennett*, 3 F. Cas. 204 (C.C.D.C. 1825) (examining witnesses anew at habeas corpus hearing); *Shorner's Case*, 22 F. Cas. 8 (D. Pa. 1812) (holding enlistment of minor invalid for lack of parental consent); 12 U.S. Op. Atty. Gen. 258, 266-67 (Oct. 4, 1867) ("[I]t may well be doubted whether such power, conferred upon a merely ministerial officer, can be held to oust judicial inquiry, upon *habeas corpus*, of the legality of the enlistment.").

[53] *United States v. Augenblick*, 393 U.S. 348, 349-50 (1969) (holding that a statute declaring that military review of court-martial convictions is "'final and conclusive' and 'binding upon all . . . courts . . . of the United States'" could not be construed to preclude judicial review through habeas); *In re McDonald*, 16 F. Cas. 33, 35-36 (D. Mass. 1866) ("It is argued for the respondent that the courts have no jurisdiction of this question, because congress has established a sufficient tribunal in the secretary of war, who must be presumed to have exclusive authority," but Congress "could not lawfully do so excepting under the circumstances pointed out by the constitution" for suspending

The Government contends that this Court's decisions in *Yamashita* and *Quirin* support its argument, and that the "type of review available" in those cases "provides the most plausible yardstick" for the review available to petitioners in habeas.[54] But those cases are inapposite; they involved petitions filed to challenge trials by military tribunals where the petitioners were granted all the due process rights the detainees have been denied here – the right to confront and rebut the factual evidence against them, to cross-examine their accusers, to call witnesses and present evidence and to be represented by counsel. In *Yamashita*, the tribunal heard testimony from 286 witnesses who gave over 3,000 pages of testimony.[55] Likewise, in *Quirin*, the tribunal heard extensive evidence from both the prosecution and defense counsel.[56]

Deference to the findings by the military tribunals was appropriate in those cases because the

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habeas.); *Antrim's Case*, 1 F. Cas. 1062, 1067 (E.D. Pa. 1863) (although "a military tribunal may often have occasion to consider" whether a person is under military rule, a law making such a decision final "in such a sense as to preclude altogether judicial cognizance elsewhere of the question . . . would confer a judicial power not warranted by the constitution"); *United States v. Anderson*, 24 F. Cas. 813, 814 (C.C.D. Tenn. 1812) (holding that Congress could not give the military final authority to determine the legality of its custody over military personnel because "Congress could not pass a law vesting the war department with a power which would in effect suspend the writ of habeas corpus").

[54] Gov. Br. at 45.

[55] *See In re Yamashita*, 327 U.S. 1, 5 (1946).

[56] *See Ex Parte Quirin*, 317 U.S. 1, 23 (1942).

petitioners had been afforded the opportunity to litigate the facts – in the words of *Hamdi*, they had been provided "notice of the factual basis [for their detention], and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[57]

The petitioners here have been afforded no such opportunity. As the Government now acknowledges, "most of the CSRT conclusions are based in significant part on *classified* information."[58] In other words, petitioners are being detained on the basis of information they are not allowed to know. They have never had the opportunity to confront the key accusations against them and to introduce evidence rebutting those accusations and establishing their innocence. Those rights are essential to any fair hearing, and they are fundamental to the writ of habeas corpus.

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[57] *Hamdi*, 540 U.S. at 533. *See also United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) (holding that deference to administrative fact-finding is limited to determinations made "in a judicial capacity" resolving "disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate").

[58] Gov. Br. at 4 (emphasis added).

CONCLUSION

For six years, the Government has had one goal in these cases – to create a place where it can be free from judicial scrutiny and "safe" from the law. In *Rasul*, this Court rejected the Government's attempt to act outside the law at Guantanamo. It made clear that, as an area within the complete jurisdiction and control of the United States, Guantanamo is not "extraterritorial" but within the "territorial jurisdiction" of the United States, and that aliens detained there "no less than American citizens" are entitled to challenge the legality of their detentions under the writ of habeas corpus. Since then, the Government has done everything in its power to avoid this Court's decision and to avoid providing a fair hearing to the detainees at Guantanamo.

Whatever flexibility the military needs to conduct its operations effectively on the battlefield does not require the Executive to be exempted from our laws in safer times and more secure locations. This is such a time, and Guantanamo is such a location. Some six years after they were shipped to a place that is thousands of miles from any battlefield and under the exclusive jurisdiction and control of the United States, these men are entitled to test the legality of their detentions through the Great Writ of habeas corpus. No further delay should be tolerated.

Respectfully submitted,

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NOVEMBER 13, 2007

6A 308

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 06-1195, 06-1196

In the

Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL.,

Petitioners,

v.

GEORGE W. BUSH, ET AL.,

Respondents.

KHALED A.F. AL ODAH, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTEREST OF THE AMICUS CURIAE[1]

The American Bar Association ("ABA") is the leading national membership organization of the legal profession. The ABA's membership of more than 413,000 spans all 50 states and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.

The ABA's mission is "to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law." Among the ABA's goals is "[t]o increase public understanding of and respect for the law, the legal process, and the role of the legal profession" and "[t]o advance the rule of law in the world."[2] As the voice of the legal profession, the ABA has a special interest and responsibility in protecting the rights guaranteed by the Constitution, safeguarding the integrity of our legal system, and ensuring the sanctity of the rule of law.

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[2] *See* ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html (last visited Aug. 20, 2007).

Preserving access to the writ of habeas corpus, which is essential to these goals, long has been a core ABA concern. Over the course of decades, the ABA has developed special competence in this area through its work to protect the habeas rights of persons deprived of their liberty by arrest or detention.

The ABA's efforts to promote the rule of law, both in this country and in other countries through its Rule of Law Initiative,[3] have confirmed that other fundamentally important legal protections depend upon the writ of habeas corpus. Quite simply, the rule of law has no force against a government that can arrest and detain persons at will with no judicial review. Thus, in working to establish legal systems in developing countries, the ABA has pressed for judicial review of the legality of executive detention.

The ABA has expressed its deep concern about the need to preserve the writ of habeas corpus at home, particularly after the events of September 11, 2001. In February 2002, the ABA's House of Delegates adopted a policy urging that proceedings before military tribunals guarantee the right to petition for habeas corpus, and that they comply with the International Covenant on Civil and Political Rights, which prohibits executive detention without judicial review. *8C Revised Recommendations* (adopted Feb. 2002).[4] In February 2003, the House of Delegates adopted a

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[3] *See* About the ABA Rule of Law Initiative, *available at* http://www.abanet.org/rol/about.shtml (describing the activities of the ABA's Rule of Law Initiative) (last visited Aug. 20, 2007).

[4] *Available at* http://www.abanet.org/poladv/letters/107th/militarytrib8c.pdf (last visited Aug. 20, 2007). The House of Delegates is the ABA's policymaking body, comprising more than 500 delegates and representing various entities within the ABA, as well as the legal profession as a whole. Reports that recommend the

policy urging meaningful judicial review of the status of alleged enemy combatants. While this policy refers to citizens and residents of the United States, the ABA also emphasized that "Congress and the Executive Branch should consider how the policy adopted by the United States may affect the response of other nations to future acts of terrorism." Task Force on Treatment of Enemy Combatants, *Revised Report 109* (adopted Feb. 10, 2003).[5]

When issues regarding habeas corpus have come to the fore in cases before United States courts, the ABA has advanced these same principles of the rule of law. The ABA filed briefs amicus curiae on behalf of petitioners before this Court in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004)[6], and before the United States Court of Appeals for the Second Circuit in *Padilla* v. *Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd* 542 U.S. 426 (2004)[7], urging in both cases that United States citizens and persons residing in the United States detained by the Executive Branch be afforded a meaningful opportunity to challenge the basis for their detention before

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adoption of specific policy positions are submitted by ABA sections, committees, affiliated organizations, state and local bar associations, and individual ABA members. The full House votes on the recommendations and those that are approved become official ABA policy. *See* ABA Leadership, House of Delegates – General Information, *available at* http://www.abanet.org/leadership/delegates.html (last visited Aug. 20, 2007).

5 *Available at* http://www.abanet.org/leadership/recommendations03/109.pdf (last visited Aug. 20, 2007).

6 *Available at* http://www.abanet.org/irr/hamdibrieffeb04.pdf (last visited Aug. 20, 2007).

7 *Available at* http://www.abanet.org/irr/padillabriefjuly03.pdf (last visited Aug. 20, 2007).

an independent judicial officer and to have assistance of counsel in making that challenge.

Because the ABA and its members have observed firsthand the importance of habeas corpus as "an important check on the power of executive detention," the ABA "strongly opposed" the provision of the Military Commissions Act of 2006 now at issue in this case, which seeks to strip courts of jurisdiction to consider existing habeas corpus claims for certain alien detainees in United States custody. Letter from Karen J. Mathis, President, American Bar Association, to United States Senators (Sept. 27, 2006).[8]

In a similar letter a year earlier, the ABA urged the Senate to reject similar jurisdiction-stripping provisions of the Detainee Treatment Act because

> [t]he principle of independent judicial review of governmental detention was important enough to our nation's founders to enshrine in the Constitution, not to be suspended by Congress except in the direst circumstances. Preserving the opportunity for Guantanamo detainees to seek habeas review in our federal courts will demonstrate our nation's commitment to its own constitutional values and serve as an important example to the rest of the world.

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[8] *Available at* http://www.abanet.org/poladv.letters/antiterror/060927letter_senmilcom.pdf (last visited Aug. 20, 2007).

Letter from Michael S. Greco, President, American Bar Association, to United States Senators (Nov. 14, 2005).[9]

Through its overseas programs and its interactions with bar associations in other countries, the ABA is keenly aware of the importance of America's leadership role in promoting the rule of law abroad. Members participating in Rule of Law Initiative programs or conducting business in other countries have observed that a common respect for the rule of law facilitates legal reform efforts abroad and protects American citizens abroad by allowing our government to insist that those citizens be treated according to international norms. From these experiences, the ABA also appreciates that limiting habeas rights not only would undermine the moral authority of the United States in promoting the rule of law, but also would have negative effects on the treatment of Americans abroad, our nation's ability to ensure fidelity to international agreements to which the United States is a party, and needed international cooperation in the fight against terrorism.

SUMMARY OF ARGUMENT

The writ of habeas corpus is the cornerstone of the rule of law and should not be weakened by exceptions of the kind relied on by the Court of Appeals. The Founders recognized the critical role of the writ in our Constitution. History, dating back to the Magna Carta, taught them that executive detention without judicial review is anathema to the rule of law. The inclusion of the Suspension Clause in the Constitution reflects their judgment that the writ is most needed when it, and the rule of law, are under the most intense assault and that exceptions to the writ, even in times

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[9] *Available at* http://www.abanet.org/poladv/letters/antiterror/051114letter_detainees.pdf (last visited Aug. 20, 2007).

of emergency, are inconsistent with the rule of law and threaten to produce tyranny. Hence, only in time of rebellion or invasion does the Constitution authorize Congress to suspend the writ. Now is not such a time.

Exclusion of Guantanamo detainees from the protections of habeas corpus on the ground that Guantanamo is not "sovereign territory" of the United States is the very kind of evasion of the writ that the Suspension Clause sought to prevent. Such a limitation of the writ would permit the creation of a law-free zone where individuals could be deprived of their liberty without adequate judicial review. This is incompatible with the rule of law.

In significant part due to the leadership of the United States, the concept of the Great Writ is now almost universally accepted by the world community. The ABA, in its efforts to promote the rule of law in developing countries, has emphasized the fundamental importance of judicial review of detention. Detentions at Guantanamo – in most cases for more than five years – without adequate judicial review, however, have undermined the leadership role heretofore exercised by the United States in the world community. Reaffirming the rights to habeas corpus of the detainees presently before this Court would help restore our nation's traditional role as the symbol of liberty and the rule of law.

ARGUMENT

I. Habeas Corpus Is Fundamental to Our Constitutional Scheme and Only the Most Narrowly Limited Exceptions to Its Availability Are Permissible.

The ABA's efforts in support of habeas corpus in this country and in training lawyers in developing countries

reflect an appreciation of its critical role from the very inception of our constitutional system. The Founders recognized that the writ was one of the essential protections needed to establish a government of laws, not men, and that it was necessary to ensure that the great purposes of the writ would not be undermined by evasive strategies designed by the Executive Branch or exceptions enacted by Congress. Accordingly, the Founders enacted Article I, Section 9, Clause 2 of the Constitution, which provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it" (the "Suspension Clause"). Since that time, this Court has consistently applied the writ to "a wide variety of cases involving executive detention, in wartime as well as in times of peace." *Rasul* v. *Bush*, 542 U.S. 466, 474 (2004).

The Suspension Clause reflects the Founders' recognition of the lessons taught by English history, from the principle established in Magna Carta "that the king is and shall be below the law" (Frederick Pollock & Frederic W. Maitland, 1 *The History of English Law* 173 (2d ed. 1923)), to the efforts by Parliament in the 17th century to prevent monarchs from evading the writ of habeas corpus.

For example, during the Protectorate period that followed the English Civil War, prisoners were moved between jails to prevent service of habeas corpus petitions, or sent to overseas prisons to avoid the reach of the courts altogether. *See* William F. Duker, *A Constitutional History of Habeas Corpus* 48-53 (1980). Parliament, however, refused to accept these practices. In 1667, Parliament impeached Edward Hyde, Earl of Clarendon, because, among other things:

> he hath advised and procured divers of his majesty's subjects to be imprisoned against law, in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law, and to produce precedents for imprisoning any other of his majesty's subjects in like manner.

Duker, *supra*, at 53 (quoting Proceedings in Parliament against Edward Earl of Clarendon, Lord High Chancellor of England, (1663-1667) 6 St. Tr. 291).

To curb such practices, Parliament enacted the Habeas Corpus Act of 1679, 31 Car. 2, c.2 (1679). While the Act itself did not cure all deficiencies, "[p]erhaps the most important thing the Act did was to . . . demonstrate that abuses with respect to habeas corpus would not be tolerated." R.J. Sharpe, *The Law of Habeas Corpus* 19 (2d ed. 1989). Thus, the Act "established the principle that the efficacy of habeas corpus is not to be thwarted." *Id.* at 20.

It was with the knowledge of the Great Writ's history that the Founders adopted the Suspension Clause. The Founders recognized habeas corpus to be an essential pillar of the rule of law. Thomas Jefferson identified habeas corpus as one of the "essential principles of our Government" (Thomas Jefferson, First Inaugural (Mar. 4, 1802), *reprinted in Inaugural Addresses of the Presidents of the United States*, S. Doc. No. 101-10, at 16 (1989)), stating that the new Constitution must protect "the eternal & unremitting force of the habeas corpus laws" (Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 8 *Documentary History of the Ratification of the Constitution* 250 (1988)). James Madison extolled the writ as a "sacred" principle in the "administration of preventative justice." 4 *Debates in the Several State Conventions on the Adoption of the Federal*

Constitution, as Recommended by the General Convention at Philadelphia in 1787 555 (Jonathan Elliot ed., 2d ed. 1881). Alexander Hamilton declared that "the practice of arbitrary imprisonments, [has] been, in all ages, the favorite and most formidable instrument of tyranny." The Federalist No. 84, at 474 (Isaac Kramnick ed. 1987).

The English monarch's repeated attempts to circumvent the writ and the frequent suspension of habeas by Parliament itself[10] made the Founders wary of creating any exceptions to the protections of habeas corpus. They also recognized that the writ would come under assault, often when the rule of law was most at risk. Thus, they not only refused to give the Executive Branch power to restrict the writ but also tightly limited Congress' power to do so.

At the Constitutional Convention, Charles Pinckney introduced proposed language providing that "the Writ of Habeas corpus . . . shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited period not exceeding . . . months." 2 *The Records of the Federal Convention of 1787* 341 (Max Farrand ed., 3d ed. 1966). Objecting that this language was not strong enough, Edward Rutledge proposed that habeas corpus be declared "inviolable" as he could envision no justification for its suspension. *Id.* at 438. Finally, Gouveneur Morris offered the compromise that became the Suspension Clause (with some minor changes in capitalization): "The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it." *Id.* Thus the Founders considered, but refused to allow, exceptions to the writ even for "the most urgent and

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[10] *See, e.g.*, Rex A. Collings, Jr., *Habeas Corpus for Convicts – Constitutional Right or Legislative Grace?*, 40 Cal. L. Rev. 335, 339-40 (1952).

pressing occasions," instead restricting suspensions to "Rebellion or invasion."

Tellingly, while specific guarantees of individual liberties were added to the original Constitution by the Bill of Rights and later amendments, the Suspension Clause is a guarantor of liberty found in the original Constitution. Its placement there, together with prohibitions on ex post facto laws and bills of attainder, reflects its role as one of the principal bulwarks against Executive and Legislative tyranny. Like the separation of powers and judicial independence, the Suspension Clause is part of the fundamental structure of the Constitution intended to preserve the rule of law.

This Court has "constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme." *Johnson* v. *Avery*, 393 U.S. 483, 485 (1969) (citation omitted). As this Court once observed: "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen* v. *Johnston*, 306 U.S. 19, 26 (1939) (citation omitted).

II. The Denial of Habeas Corpus to Guantanamo Detainees Is Inconsistent with the Constitution and the Rule of Law.

The Court of Appeals' holding that Petitioners may be denied habeas corpus because Guantanamo is not a "sovereign territory" of the United States is the very kind of limitation of the writ the Founders intended to prevent when they adopted the Suspension Clause. Such a distinction creates an area where individual rights are not judicially enforceable, thus undermining the most fundamental attribute of the rule of law. Moreover, it is difficult to assert that

developing countries should follow the rule of law if our government can create an area where the writ is not recognized. Affirmance of Petitioners' right to habeas corpus will not only be consistent with the original intent of the Founders, but will also be consistent with our nation's commitment to promoting the rule of law in the world community.

A. A "Sovereign Territory" Limitation Is Inconsistent with the Constitutional Role of the Writ of Habeas Corpus and the Rule of Law.

The Writ of Habeas Corpus provides the opportunity for a searching review by an impartial tribunal of the legal and factual basis for detention.[11] Without full habeas and all of its attendant procedural rights – the right to review evidence, the right to an attorney, the right to introduce one's own evidence[12] – anyone detained will not have a meaningful

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[11] *See INS.* v. *St. Cyr*, 533 U.S. 289, 304-305 (2001) ("The writ of habeas corpus has always been available to review the legality of executive detention") (citations omitted); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125, 130 (1807) (Marshall, C.J.) (court required to "fully examine[] and attentively consider[]" the facts and testimony on which the habeas petitioners were imprisoned); *see also Harris* v. *Nelson*, 394 U.S. 286, 298 (1969) ("Petitioners in habeas corpus proceedings, as the Congress and this Court have emphasized . . . are entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of the relevant facts."). *See also, e.g.*, United Nations International Covenant on Civil and Political Rights ("ICCPR"), art. 9, § 4, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 717 (ratified by the United States on June 8, 1992).

[12] *See Harris*, 394 U.S. at 298 (petitioners in habeas proceedings are entitled to seek and introduce evidence); *Al Odah* v. *United States*, 346 F. Supp. 2d 1, 8 (D.D.C. 2004) (". . . Petitioners are entitled to counsel . . . in order to properly litigate the habeas petitions . . .

opportunity to demonstrate that "error, neglect or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law." *Harris,* 394 U.S. at 292.

The Court of Appeals nevertheless upheld the denial of the writ based on the ground that Guantanamo, although subject to the exclusive jurisdiction of the United States under an indefinite lease that Cuba is powerless to terminate, is nonetheless not "sovereign territory" of the United States. The denial of habeas based on such a distinction is at odds with the history and language of the Suspension Clause and the great purposes of the writ as a cornerstone of the rule of law. It constitutes the very type of evasion of the writ that the Suspension Clause was designed to prevent.

The ABA recognizes the pressures on the Executive Branch to consider every measure possible to protect the nation in times of peril. History cautions, however, that it is just such pressures and just such times that can undermine basic liberties essential to the rule of law. It was precisely for that reason that the Founders, in framing the Suspension Clause, rejected language that would have given Congress power to suspend the writ in "the most pressing and urgent conditions" and limited such power solely to cases of rebellion and invasion. *See* pp. 8-10, *supra.*

This Court's analysis in *Rasul* confirms that the availability of the historic function of the writ as a safeguard of individual liberty should not turn on geographical niceties such as those relied upon here. As the Court explained:

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before the Court and in the interest of justice."); *cf. Crawford* v. *Washington,* 541 U.S. 36, 49 (2004) ("[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.") (citation omitted).

> As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown." *King* v. *Cowle*, 2 Burr. 834, 854-855, 97 Eng. Rep. 587, 598-599 (K.B.) Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of "the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown." *Ex parte Mwenya* [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.).

Rasul, 542 U.S. at 482.

The Judiciary Act of 1789, enacted contemporaneously with the Constitution, demonstrates that the Founders did not rely on such "formal notions of territorial sovereignty" but on the practical realities of government detention. Thus the 1789 Act provided that federal courts are authorized to entertain petitions for the writ of habeas corpus from prisoners "where they are in custody, under or by colour of the authority of the United States . . . ." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82. *See also Ex parte Bollman*, 8 U.S. at 95 (noting that the Judiciary Act of 1789 "was passed by the first congress of the United States . . . [a]cting under the immediate influence of [the Suspension Clause], [and] they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity"); *accord Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983) (an act "'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty

evidence of its true meaning'") (quoting *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).

The same considerations of the practical realities that require the exercise of the writ as a safeguard against arbitrary detention were reflected in *Rasul*, when this Court, in distinguishing *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), stated that the detainees in *Eisentrager* were proven enemy aliens who were captured, tried and convicted of war crimes in China and imprisoned in occupied Germany while:

> [The individuals held in Guantanamo] are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Rasul, 542 U.S. at 475-76.

Justice Kennedy, in his concurrence in *Rasul*, stated that for purposes of determining application of the writ,

> [w]hat matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it.

Id. at 487 (Kennedy, J., concurring), quoting *Eisentrager*, 339 U.S. at 777-78. Justice Kennedy also stated that, unlike

the prisoners in *Eisentrager*, "the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status." *Id.* at 487-88.

Moreover, Justice Kennedy viewed *Eisentrager* as reflecting separation of powers concerns that required a consideration of all the circumstances to determine whether they involved "a realm of political authority over military affairs where the judicial power may not enter" or whether they dictated that "the courts maintain the power and responsibility to protect persons from unlawful detention even where military affairs are implicated." *Id.* at 487. After noting that the petitioners in *Eisentrager* had been convicted of violating the laws of war after a trial before a military commission, he explained:

> Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.

Id. at 488.

The language and history of the Suspension Clause and its essential role in maintaining the rule of law create a heavy presumption against limits on the judicial power to "protect persons from unlawful detention . . . ." *Id.* at 487. As both the *Rasul* majority's opinion and Justice Kennedy's

concurrence make clear, no "military exigencies" are present here that might overcome this presumption.

Finally, the government's argument that the Detainee Treatment Act ("DTA") provides an adequate substitute for habeas should be rejected. As Petitioners and others have urged, review provided by the DTA fails to satisfy the minimum requirements of due process because it is limited to review by the Court of Appeals for the District of Columbia of whether Combatant Status Review Tribunal ("CSRT") proceedings designating the detainee an "enemy combatant" conform to the standards and procedures of the Department of Defense ("DoD").[13] *See Boumediene* v. *Bush*, 476 F.3d 981, 1005-07 (D.C. Cir. 2007) (Rogers, J., dissenting); Brief of El-Banna Petitioners in *Al Odah*, Argument III; *see also* Brief of Amicus Curiae The Association of the Bar of the City of New York in Support of Petitioners.

In a CSRT proceeding, the detainee lacks assistance of counsel, and the tribunal consists of military officers who are informed at the outset that their DoD superiors have already determined these prisoners to be enemy combatants.[14] Moreover, the detainee is denied access to classified information that forms the basis for the determination and is frequently denied any realistic

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[13] Detainee Treatment Act of 2005, §1005(e), Pub. L. No. 109-148, 119 Stat. 2680 (2005), *amended by* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

[14] *See* Memorandum from Deputy Secretary of Defense Gordon England, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (July 14, 2006), *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf (last visited Aug. 20, 2007).

opportunity to submit evidence or testimony in his defense.[15] Conformance to such standards and procedures is not an adequate substitute for habeas corpus review.

B. Reaffirmation of Guantanamo Detainees' Right to Habeas Corpus Will Help Restore the United States' Role as a Model for the Rule of Law In the World Community.

The principle of habeas corpus has now gained wide acceptance as essential to the rule of law, as is reflected in international human rights treaties, conventions and jurisprudence. This is due in substantial part to the leadership role of the United States and its efforts to promote the rule of law.

The ABA has played a role in those efforts through its Rule of Law Initiative, assisting countries – including the former Soviet republics and countries in Europe, Eurasia, Asia, Africa, the Middle East and Latin America – to develop and implement legal reforms and respect for the rule of law in all nations.[16] The training programs that the ABA conducts for attorneys and judges in these countries emphasize that the writ is essential to ensuring governance under the rule of law.[17]

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[15] *See* Joshua Denbeaux & Mark Denbeaux, *No-Hearing Hearings: CSRT: The Modern Habeas Corpus?* 2-3 (2006), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf (last visited Aug. 20, 2007).

[16] *See* About the ABA Rule of Law Initiative, *available at* http://www.abanet.org/rol/about.shtml (last visited Aug. 20, 2007).

[17] *See* Judicial Reform Programs, *available at* http://www.abanet.org/rol/programs/judicial-reform.html and Legal Profession Reform Programs, *available at* http://www.abanet.org/rol/programs/legal-

The United States played a primary role in the design and adoption of the Universal Declaration of Human Rights, which establishes the right to be protected from arbitrary detention as one of the "equal and inalienable" rights of all peoples.[18] Similarly, the International Covenant on Civil and Political Rights, to which the United States is a party, provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[19] Similar provisions are now found in the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man, the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), and the African Charter on Human and Peoples' Rights.[20]

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profession.html (describing the ABA's international training programs for judges and attorneys) (last visited Aug. 20, 2007).

[18] Universal Declaration of Human Rights, preamble, art. 9, G.A. Res. 217A (III), U.N. Doc. A/810 (1948). For the role of the United States in the drafting and adoption of the Universal Declaration, see Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001).

[19] ICCPR art. 9, § 4.

[20] Organization of American States, American Convention on Human Rights, art. 7, Nov. 22, 1969, *entered into force* July 18, 1978, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, (signed by the United States June 1, 1977); Organization of American States, American Declaration of the Rights and Duties of Man, art. XXV (1948) 9th Int'l Conference of American States, O.A.S. Official Record, OEA/Ser.L/V./II.23, doc.21 rev.6 (adopted by the O.A.S., including the United States); [European] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, Nov. 4, 1950, *entered into force* Sept. 3, 1953, 213 U.N.T.S. 221; Organization of

The prohibition of detention without judicial review is now a fundamental principle of international law. *See, e.g.*, Restatement (Third) of Foreign Relations § 702(e) (1987) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention."). It is also a basis on which the United States judges the commitment of other countries to the rule of law. *See, e.g.*, U.S. Department of State, *Country Report on Human Rights Practices 2006 in Egypt*, March 6, 2007; U.S. Department of State, *Country Report on Human Rights Practices 2006 in Burma*, March 6, 2007.

In the past half century, as terrorism has increased throughout the world, foreign national and international courts have upheld the right to judicial review of detention notwithstanding serious security challenges.

The influence of the United States is made explicit in a recent decision of the Canadian Supreme Court, which relied in part on this Court's decision in *Rasul*. In that case, the Canadian Supreme Court struck down legislation permitting detention up to 120 days without judicial review for foreign nationals deemed ineligible to remain in Canada for security reasons. *Charkaoui* v. *Canada (Citizenship and Immigration)*, S.C.C. 9, (Feb. 23, 2007).[21] Observing that "[i]t is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law, which must involve a meaningful judicial process," *id.* ¶ 28 (citation and internal quotation marks omitted), the court held that "foreign nationals, like others, have the right to

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African Unity, African Charter on Human and People's Rights, art. 6 and art. 7, June 27, 1981, *entered into force* Oct. 21, 1986, 21 I.L.M. 58.

[21] *Available at* http://scc.lexum.umontreal.ca/en/2007/2007scc9/2007scc9.html (last visited Aug. 20, 2007).

prompt review to ensure that their detention complies with the law." *Id.* ¶ 90 (citing, *inter alia*, *Rasul* v. *Bush*, 542 U.S. 466 (2004)).

Other cases in this area show the influence of the Anglo-American principle of habeas corpus. Thus, in *Aksoy* v. *Turkey*, 23 Eur. Ct. H.R. 533 (1996), the European Court of Human Rights held that Turkey had violated Article 5 of the European Convention by holding a suspected terrorist for fourteen days without bringing him before a court. It concluded:

> Article 5 . . . enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimize the risk of arbitrariness and to ensure the rule of law.

Id. ¶ 76 (citation omitted).

National courts of the United Kingdom and Israel have recently reaffirmed the principles of habeas corpus, holding that anyone subject to executive detention has the right to have his or her case heard by a court, notwithstanding claims that such detentions are necessary to combat terrorism.

In *A* v. *Secretary of State for the Home Department*, [2004] UKHL 56, the House of Lords invalidated a provision in the Anti-terrorism, Crime and Security Act 2001, which permitted the detention of suspected alien terrorists who, temporarily or indefinitely, could not be removed from the United Kingdom. As Lord Nicholls of Birkenhead observed,

"[i]ndefinite imprisonment without charge or trial is anathema in any country which observes the rule of law." *Id.* ¶ 74.

And, in 2002, the Israeli Supreme Court deemed illegal two orders permitting the detention of suspected terrorists in the West Bank for up to eighteen days without judicial review. HCJ 3239/02 *Marab* v. *IDF Commander in the West Bank*, [2002] Isr SC 57(2)349. The court held that "the question of detention is to be brought promptly before a judge or other official with judicial authority" regardless of the circumstances because "[j]udicial intervention stands before arbitrariness; it is essential to the principle of rule of law." *Id.* ¶¶ 26, 27; *see also* ¶ 32.

Throughout the world, treaties, cases, and constitutions reflect the United States' influence and leadership in promoting the rule of law. The indefinite detention of prisoners at Guantanamo without meaningful judicial review, however, has led many of our allies to question our departure from principles that we have been so instrumental in developing.

On February 15, 2006, five special rapporteurs from the United Nations issued a report in which they concluded that: "[T]he legal regime applied to these [Guantanamo] detainees seriously undermines the rule of law and a number of fundamental universally recognized human rights, which are the essence of democratic societies. These include the right to challenge the lawfulness of the detention before a court and the right to a fair trial by a competent, independent and impartial court of law . . . ." U.N. Econ. & Soc. Council, Report of the Chairperson of the Working Group on Arbitrary Detention, *Situation of detainees at Guantanamo Bay*, ¶ 17, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006) (internal citations omitted).

The United States' closest allies have urged the United States government to follow the principles that it has so long advocated to others. On February 12, 2006, the European Parliament issued a resolution calling on the United States to close Guantanamo and ensure that every prisoner be "tried without delay in a fair and public hearing by a competent, independent, impartial tribunal." Eur. Parl., *European Parliament Resolution on Guantanamo*, P6_TA(2006)0070. In a recent speech to the ABA House of Delegates, Lord Peter Goldsmith, then Attorney General of the United Kingdom, reminded the ABA that, with respect to the treatment of detainees at Guantanamo, the threat of terrorism "does not mean that we have an unlimited license to throw away our values for the sake of expediency" and that the rule of law requires "subjecting executive action to the scrutiny of the democratic institutions and also of the courts, for judicial scrutiny is a key part of the rule of law."[22]

Reaffirmation and restoration of the rights of the Guantanamo detainees to habeas corpus is consistent with our nation's well-earned reputation as the leading advocate and model for the rule of law. Respect for the rule of law encourages its adoption abroad, solidifies our relations with other nations, and protects Americans abroad. The denial of habeas corpus to Guantanamo detainees undermines these important goals.

* * *

The writ of habeas corpus has been described as the "best example" of "archetypes" of the law that "sum up the

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[22] American Bar Association: Lord Peter Goldsmith, Attorney General United Kingdom Addresses House of Delegates (speech delivered Feb. 12, 2007), *available at* http://www.abavideonews.org/ABA404/av.php#rss (last visited Aug. 20, 2007).

spirit of a whole body of law that goes beyond what they may be thought to require on their own terms." Jeremy Waldron, *Torture and Positive Law*, 105 Colum. L. Rev. 1681, 1723-24 (2005). As Professor Waldron observes, habeas is archetypical "of our legal tradition's emphasis on liberty and freedom from physical confinement . . . [and] of the law's opposition to arbitrariness in regard to actions that have an impact on that right." *Id.* at 1724. Weakening the Great Writ through an exception like that adopted by the Court of Appeals would undermine those principles and the very system of the rule of law envisioned by the Founders.

CONCLUSION

Accordingly, the judgment of the Court of Appeals should be reversed.

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MOTION FILED
OCT 9 - 2007

51008c

~~37~~ pgs
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Nos. 06-1195 and 06-1196

IN THE
SUPREME COURT OF THE UNITED STATES

LAKHDAR BOUMEDIENE, et al., *Petitioners*,
v.
GEORGE W. BUSH, et al., *Respondents*,

KHALED A.F. AL ODAH, et al., *Petitioners*,
v.
UNITED STATES OF AMERICA, et al., *Respondents*.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE OF COURT TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS IN THE ABOVE CAPTIONED CASES

Movant, the American Center for Law and Justice (ACLJ), respectfully moves this Court for leave to file a Brief *Amicus Curiae* in support of the United States Government Respondents in the above-captioned cases.

ARGUMENT AND INTEREST OF AMICUS

In support of this Motion, the ACLJ avers as follows:

(1) The ACLJ is a not-for-profit public interest law firm committed to the constitutional separation of powers.

(2) The proper resolution of this case is a matter of substantial concern to the ACLJ because it will significantly impact the ability of the executive and legislative branches to conduct foreign policy and carry out wartime duties.

(3) Pursuant to Sup. Ct. Rule 37.3(a), the ACLJ has obtained consent from every counsel of record in this matter, save one, to file its Brief *Amicus Curiae* in support of U.S. Government Respondents. The consent letters will be filed with the Court.

(4) The ACLJ recently discovered that consent was not obtained from Respondent Khadr's counsel of record. It was the ACLJ's understanding that Respondent Khadr had been represented by counsel of record for

Petitioners Al Odah, et. al., and that due consent had already been provided.

(5) The ACLJ has attempted to contact Respondent Khadr's counsel of record by phone and electronic mail, but to no avail.

(6) Because the ACLJ desires to file its Brief *Amicus Curiae* on the same day that Respondents must file their brief, October 9, 2007, it is now impossible for the ACLJ to meet the 10-day notice requirement set forth in the new rule changes, or to disclose that all counsels of record have given consent.

(7) As such, to comply with Sup. Ct. Rule 37.3(b), the ACLJ files this Motion seeking leave of Court to file its Brief *Amicus Curiae.*

(8) Moreover, the ACLJ believes that the analysis in its Brief *Amicus Curiae* will assist this Court in properly resolving this issue.

CONCLUSION

FOR THE FOREGOING REASONS, The American Center for Law and Justice respectfully requests that this Court grant the ACLJ leave to file its Brief *Amicus Curiae* in support of the United States Government Respondents in the above-captioned cases.

October 9, 2007

Respectfully submitted,

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ABBREVIATIONS

GC II cmt.	Commentary II Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
GC III	Geneva Convention (III) Relative to the Treatment of Prisoners of War
GC III cmt.	Commentary III Geneva Convention Relative to the Treatment of Prisoners of War
GC IV cmt.	Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War
ICRC	International Committee of the Red Cross

INTEREST OF *AMICUS*[1]

Amicus curiae The American Center for Law and Justice (ACLJ) is a not-for-profit public interest law firm committed to upholding the integrity of our constitutional system of government based on separation of powers. Jay Alan Sekulow, ACLJ Chief Counsel, has argued and participated as counsel of record in numerous cases involving constitutional issues before this Court as well as before lower federal and state courts. The ACLJ is very concerned about Petitioners' attempt to subvert the well-established authority of the Executive and Legislative Branches to deal with the exigencies of war in all their facets and to transfer such authority to the Judiciary. The ACLJ urges this Court to uphold the validity of the Military Commissions Act

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[1]This Brief is filed with the consent of all the parties, save one. The consent letters of the U.S. Government, Respondent Khalid, and Petitioners Boumediene, et. al., are filed herewith. Blanket consent letters from Petitioners El-Banna, et. al., and Al Odah, et. al., were filed with this Court on August 14 and September 4, 2007, respectively. Pursuant to Rule 37.6, *amicus* ACLJ discloses that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation of the submission of this Brief. Counsel of record for all parties, except for Respondent Khadr, received notice at least 10 days prior to the due date, of the *amicus* ACLJ's intention to file this Brief. Because Respondent Omar Khadr's counsel could not be reached, the ACLJ was unable to comply with this provision and obtain his permission to file this Brief. As a result, the ACLJ has filed a Motion for Leave of Court to file its Brief *Amicus Curiae* in this matter.

and to allow military commissions to proceed unhindered and as directed by the Congress.

SUMMARY OF THE ARGUMENT

In enacting the Military Commissions Act of 2006, Congress acted lawfully pursuant to its constitutional authority to remove from this Court's jurisdiction the ability to entertain Petitioners' requests for writs of habeas corpus. As such, this Court must dismiss Petitioners' causes. If this Court were to conclude instead that Petitioners are entitled to some type of disinterested hearing regarding their detention, an adequate alternative forum—the Combatant Status Review Tribunal ("CSRT")—already exists to answer the question whether Petitioners are being properly detained by the Executive. Hence, there is no violation of the Suspension Clause, and this Court should dismiss Petitioners' requests. To the extent that this Court considers relevant what British courts would do in similar circumstances, the Great Writ has historically been denied by British courts to persons interned during hostilities. Hence, there is no historical basis in British law to sanction the issuing of writs of habeas corpus to those interned as enemy aliens at Guantanamo Bay. Finally, much confusion surrounding how to treat the Guantanamo detainees results from this Court's misinterpretation of the meaning and reach of Common Article 3 of the 1949 Geneva Conventions. A proper reading of what transpired at Geneva in 1949 shows that delegates in Geneva never intended Common Article 3 to reach persons like Petitioners. Hence, permitting them

access to United States courts on the basis of Common Article 3 is clearly erroneous and should be reversed.

ARGUMENT

I. ENACTMENT OF THE MILITARY COMMISSIONS ACT LAWFULLY REMOVED FROM THIS COURT ITS AUTHORITY TO ISSUE WRITS OF HABEAS CORPUS TO GUANTANAMO BAY DETAINEES

On June 28, 2004, in *Rasul v. Bush*, 542 U.S. 466 (2004), this Court ruled that detainees held at the Guantanamo Bay Naval Base in Cuba could seek writs of habeas corpus in United States District Courts to challenge their detention. *Id.* at 484. This Court based its conclusion on statutory grounds, *id.* at 479, and hence declined to disturb its prior ruling in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In *Eisentrager*, this Court had concluded, based on Constitutional grounds, that detainees incarcerated by the United States overseas who had never been in the United States could not challenge their detention before United States courts. *Id.* at 777-78. In fact, this Court concluded under the circumstances in *Eisentrager*, that no United States court had jurisdiction to issue a writ of habeas corpus on behalf of petitioners. *Id.* at 778, 781. In *Rasul*, on the other hand, this Court ruled that, because federal statutes had changed, Guantanamo Bay detainees are now able to seek writs of habeas corpus. *Rasul*, 542 U.S. at 478-79. Because the Court was able to decide the

case on statutory grounds, without disturbing the *Eisentrager* decision, it explicitly did so. *Id.* at 479.

The *Rasul* decision proved to be highly controversial. In the wake of that decision, Congress, pursuant to its Constitutional authority to delimit the appellate jurisdiction of this Court, *see* U.S. Const. art. III, § 2, cl. 2, enacted the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2680, in an attempt to overrule by statute what this Court had decided in *Rasul*. The DTA was challenged by Petitioners in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), and this Court ruled that the DTA did not remove the Court's jurisdiction with respect to habeas petitions pending at the time of the DTA's enactment. *Id.* at 2762-69. That decision also proved to be highly controversial. Congress responded by enacting the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, to make clear to this Court and all other federal courts that they no longer had jurisdiction to issue writs of habeas corpus to any Guantanamo Bay detainee, irrespective of when a detainee might have filed suit seeking such relief. MCA §§ 7(a)-(b), 120 Stat. at 2636. Now, the MCA is being challenged before this Court.

A. Congress Has Constitutional Authority to Limit This Court's Jurisdiction, Even to Cases Which Have Been Argued Before, But Not Yet Decided By, The Court

Congress has the authority to remove petitions for writs of habeas corpus from the jurisdiction of all federal courts, including this Court. Likewise,

Congress may divest this Court of any appellate review over original petitions for writs of habeas corpus. The Constitution provides this Court with original jurisdiction in a few enumerated cases and then explains: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*" U.S. Const. art. III, § 2, cl. 2 (emphasis added). The source of jurisdiction for this Court, therefore, is the Constitution, but it has long been settled that Congress has the authority to limit and regulate such jurisdiction. *See, e.g., Felker v. Turpin*, 518 U.S. 651, 661 (1996) (citing *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810)); *Ex parte McCardle*, 74 U.S. (1 Wall.) 506, 512-14 (1868).

Regarding writs of habeas corpus, this Court has "long recognized that 'the power to award the writ by *any* of the courts of the United States, must be given *by written law.*'" *Felker*, 518 U.S. at 663-64 (emphasis added) (quoting *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807)). What Congress enacts, however, it may also rescind. And, in such an instance, this Court is "not at liberty to inquire into the motives of the legislature. [The Court] can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given *by express words.*" *Ex parte McCardle*, 74 U.S. at 514 (emphasis added) (referencing U.S. Const. art. III, § 2, cl. 2).

Ex parte McCardle established the necessary legal principles controlling this issue. In *McCardle*, the Court was in the process of deciding a habeas

petition on appeal, pursuant to jurisdiction granted by an act of Congress in March 1867. 74 U.S. at 512. After the Court had heard oral arguments but before a final opinion issued, Congress repealed the Act relied upon by the petitioner. Congress did not repeal the "whole appellate power of the court, in cases of habeas corpus," but only review of "appeals from Circuit Courts under the act of 1867." *Id.* at 515. When Congress repealed the statute, the Court lacked jurisdiction and had to dismiss McCardle's cause. The Court aptly noted that "judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer." *Id.* at 514-15.

Regarding unlawful enemy combatants detained overseas who have never entered the United States, this Court recognized no constitutional basis granting U.S. courts jurisdiction to hear their petitions for writs of habeas corpus. *Eisentrager*, 339 U.S. at 777-78. In *Rasul*, this Court concluded that U.S. courts have statutory authority to hear such requests. *Rasul*, 542 U.S. at 484. Yet now, by means of the MCA, Congress has deliberately, expressly, and plainly removed any such statutory grant. As in *McCardle*, the MCA does not remove the whole appellate power of the Court, but "a plain[] instance of positive exception" is made by the MCA's terms regarding Guantanamo Bay detainees. *See McCardle*, 74 U.S. at 514.

Congress has authority to set statutory limits on this Court's jurisdiction. *See, e.g.*, U.S. Const. art. III, § 2, cl. 2; *Felker*, 518 U.S. at 661. Congress has explicitly exercised such authority. *See* MCA §§ 7(a)-(b), 120 Stat. at 2636. As such, this Court—and

every other United States court—lacks jurisdiction to hear Petitioners' habeas claims and must dismiss for want of jurisdiction.

B. Even if This Court Were to Determine That Some Type of Hearing is Required for Petitioners, An Adequate Alternative to Habeas Already Exists

The purpose of the Great Writ is to allow a person detained by the Executive to challenge the legal basis of his detention before an impartial adjudicative body. *Peyton v. Rowe*, 391 U.S. 54, 58 (1968). Under United States law, the existence of an adequate alternative remedy suffices to extinguish one's right to the Great Writ. *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (noting that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus"). Whenever possible, judicial prudence instructs courts to avoid far-reaching and unpredictable constitutional implications. *See, e.g.*, *United States v. Hayman*, 342 U.S. 205, 223 (1952) ("This Court will not pass upon the constitutionality of an act of Congress where the question is properly presented unless such adjudication is unavoidable ****"). Thus, Congress may explicitly deny access to writs of habeas corpus, regardless of *where the Great Writ might otherwise apply*, and avoid conflict with the Suspension Clause so long as Congress provides an adequate and effective alternative to habeas. The MCA passes that test.

A substitution to habeas relief avoids Suspension Clause questions if it is adequate and effective "to test the legality of a person's detention." *Swain*, 430 U.S. at 381; *Hayman*, 342 U.S. at 223. In *Swain*, Congress enacted D.C. Code § 23-110 (1970), which directed a prisoner under the sentence of a D.C. Superior Court to seek habeas type relief in the District of Columbia's courts instead of Article III courts. *Swain*, 430 U.S. at 374. A prisoner challenged the statute as an unconstitutional suspension of the writ of habeas corpus. *Id.* at 379. The prisoner argued that any substitution remedy "not '*exactly commensurate*' with habeas relief available in a [federal] district court is a suspension of the writ," and, since judges in the D.C. Superior Courts do not enjoy life tenure and salary protection as federal district court judges enjoy, the prisoner argued that § 23-110 was not exactly commensurate. *Id.*

The Court rejected an "*exactly commensurate*" standard in testing the adequacy of § 23-110. Instead, the fact that D.C. Superior Court judges do not have life tenure or salary protection was no problem because, as the Court emphasized, state court judges are still presumed to be competent officials. *Id.* at 382-83 & n.18. In the instant matter, Congress has deemed military judges overseeing the Combatant Status Review Tribunals ("CSRTs") to be competent to test the legality of Petitioners' detention.[2] Yet, in any event, the MCA

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[2]The CSRTs are working. According to a recent release, "[a]ll detainees at Guantanamo Bay have been through the CSRT process, and dozens have been found to [no] longer be enemy combatants and released or transferred to their home

allows for review of CSRT determinations in an Article III court—the United States Circuit Court of Appeals for the District of Columbia Circuit. *See* MCA § 950(g), 120 Stat. at 2622.

The adequacy of an alternative to habeas is also a matter of scope. *See Swain*, 430 U.S. at 381-82. A key error in Judge Rogers' dissenting opinion below on this issue is that she misunderstood the proper scope of habeas corpus review of military tribunal decisions. *See Boumediene v. Bush*, 476 F.3d 981, 1004-06 (D.C. Circuit 2007), *cert. granted*, 127 S. Ct. 3078 (June 29, 2007) (No. 06-1195) (Rogers, J., dissenting). She characterized the scope of habeas review as being broad, a "careful consideration and plenary processing of their claims." *Id.* at 1005 (quoting *Harris v. Nelson*, 394 U.S. 286, 298 (1969)). Quite the opposite is true. The historic scope of habeas review *of military tribunals* "is of most *limited scope*," inquiring "only whether the military tribunal was legally constituted, and whether it had jurisdiction to impose punishment for the conduct charged." *Eisentrager*, 339 U.S. at 797 (Black, J., dissenting) (emphasis added) (relying on *In re Yamashita*, 327 U.S. 1 (1946)); *see also Ex Parte Quirin*, 317 U.S. 1, 25 (1942). Despite the limited scope required of habeas review of military tribunals in the past, the DTA and MCA significantly expand the scope of review for detainees at Guantanamo. *See* DTA §§ 1005(a), (e)(2), 119 Stat. at 2740-42 (providing, for example, annual reviews of detention,

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countries." Press Release, Fred W. Baker III, Am. Forces Press Serv., Dep't Releases Audio Recording of 9/11 Mastermind's Tribunal (Sept. 13, 2007), *available at* http://www.defenselink.mil/news/newsarticle.aspx?id=47437.

periodic examination for any new relevant evidence, and review by the United States Court of Appeals for the D.C. Circuit). As such, Petitioners have little to complain about in that regard.

Congress has provided an adequate and effective alternative to habeas in the DTA and MCA. And, affirming this alternative avoids deciding unnecessary and problematic constitutional issues. The Court should dispose of Petitioners' claims accordingly.

II. EVEN BRITISH COURTS WOULD NOT ISSUE THE GREAT WRIT TO ENEMY ALIENS INTERNED IN WARTIME

In the Judiciary Act of 1789, Congress authorized federal courts to issue writs of habeas corpus. As such, this Court has concluded that the Suspension Clause protects the writ "as it existed in 1789." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). For an understanding of the common law writ, British sources have been discussed at length. *See, e.g., Rasul*, 542 U.S. at 481-82; *id.* at 502-04 (Scalia, J., dissenting). The *Amicus* Brief submitted by the Commonwealth Lawyers Association in support of Petitioners in this matter cites to a number of sources which actually buttress rather than harm Respondents' case. *See* Br. for the Commonwealth Lawyers Ass'n as *Amicus Curiae* in Support of the Pet'rs at 8 n.19, *Boumediene v. Bush*, No. 06-1195, *cert. granted*, 127 S. Ct. 3078 (June 29, 2007) [hereafter Commonwealth Brief]. Among the sources relied upon by the Commonwealth Lawyers Association is a book by Sir Arnold Duncan McNair.

Id. (citing Sir Arnold Duncan McNair, *International Law Opinions* [hereafter *Opinions*] (The University Press 1956)). The McNair book notes the following concerning British law: "[A] prisoner of war is not entitled to this writ [i.e., a writ of habeas corpus]." McNair, *Opinions* at 106. That observation, in turn, cites to another book by Lord McNair. *See* McNair, *Legal Effects of War* [hereafter *War*] 54-60 (2d ed. 1944). In this latter source, Lord McNair cites English cases in the 18th and 19th centuries for the proposition that *detained prisoners of war* are "not entitled to a writ of habeas corpus." *Id.* at 56. He continues: "Although internment *** does not destroy the alien enemy's normal procedural capacity, *there is one remedy previously referred to which is denied to an alien enemy when interned, namely, the writ of habeas corpus.*" *Id.* at 59 (emphasis added). Lord McNair also notes "that persons, of whatever nationality and wherever they may be, who are in the military *or civilian employment of the enemy* would be debarred from suing in an English court." *Id.* at 61 (emphasis added).

Since Lord McNair is drawing on such early sources, he uses the phrase "prisoner of war" in its common historical understanding, i.e., a person taken captive and detained pursuant to armed hostilities, rather than in the more technical, narrow understanding from the Third Geneva Convention of 1949. *See* GC III art. 4. Notably, Lord McNair cites the case of *R. v. Schiever*, 2 Burr. 765 (1759). *See* McNair, *War* at 56. In *Schiever*, "the writ was denied to the subject of a neutral State captured upon an enemy ship and then held as a prisoner of

war, *though he contended that he had been forced to serve on the enemy ship.*" *Id.* Many of the detainees at Guantanamo Bay make similar claims about being innocent bystanders or being impressed against their will into some service. Nevertheless, according to Lord McNair's usage of the phrase, the detainees at Guantanamo Bay—*persons detained and incarcerated pursuant to hostilities directed against the armed forces of the United States*—would surely qualify as prisoners of war under such a definition. As such, they, too, as war *internees*, would be denied the writ of habeas corpus *under British law.* Even the Commonwealth Lawyers' brief seems to understand this. *See* Commonwealth Brief at 10, n.21 (qualifying its conclusion that the Great Writ would issue in a British court on the assumption that petitioners are *not* "enemy aliens"[3]). Further, the fact that the United States Government refers to the captives at Guantanamo Bay as "detainees" instead of as prisoners of war results from a conscious decision by United States officials to use the definition of Prisoners of War as defined in Article 4 of the Third Geneva Convention of 1949.

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[3]The issue regarding enemy aliens is important, since petitioners are nationals of countries at peace with the United States. Yet, the common presumption that nationals of friendly countries are friendly is, at most, a rebuttable presumption. When a foreign national's actions constitute hostile acts directed against the United States, surely the United States is no longer bound by the legal presumption that such persons are "friendly." Their hostile acts belie such presumed friendship. To expect otherwise is to elevate form over substance. Petitioners' nationalities are irrelevant when their actions are hostile—it is their actions which define them as enemy aliens, irrespective of their nationalities.

As such, any differences between American and British law on this matter concerning the Guantanamo Bay detainees seem to rest on semantics. The Guantanamo Bay detainees fully qualify as "prisoners of war" under Lord McNair's definition even as they fail to do so under the narrower definition laid out in Article 4 of the Third Geneva Convention. Yet, as Lord McNair points out, historically, it is the more general definition that British courts would have applied when disallowing the Great Writ.

The term Prisoners of War in the Third Geneva Convention is very specific and is to be used to determine which combatants may avail themselves of the many protections laid out in the Third Convention. *The term was never meant to determine that combatants failing to meet the standards of conduct expected by the Conventions could, as a result of their greater lawlessness, thereby qualify for greater legal rights and privileges than those who did comply.* Even to suggest such a thing is patently absurd. Those who do not meet the Article 4 criteria are not entitled to the Third Convention's protections. That does not mean, however, that those same persons, when interned, are not prisoners of war in the sense described by Lord McNair and, hence, precluded under British law from seeking a writ of habeas corpus in a British court. They should also be denied access to the Great Writ by American courts in such circumstances.

III. IN ITS *HAMDAN* DECISION, THIS COURT ERRED IN CONCLUDING THAT THE GENEVA CONFERENCE OF 1949 INTENDED COMMON ARTICLE 3 TO APPLY TO PERSONS LIKE PETITIONERS

In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), this Court concluded that Common Article 3 of the 1949 Geneva Conventions applies to detainees currently held at Guantanamo Bay, Cuba. *Id.* at 2796. The Court based its conclusion on the "literal meaning" of the phrase "not of an international character," *id.* at 2795-96, and the statement in the ICRC Commentary that "the scope of the Article must be as wide as possible," *id.* at 2796.

The Court's conclusion seriously misinterprets what the High Contracting Parties actually agreed to when negotiating Common Article 3. *See generally* The Diplomatic Conference of Geneva of 1949, Geneva, Switz., April 26-Aug. 12, 1949, *2B Final Record* [hereafter Final Record] at 9-16, 26, 27, 34, 35, 36-37, 38, 40-50, 76-79, 82-84, 90, 93-95, 97-104, 107, 120-127, 129, 157, 165, 171, 189, 325-339 (2004) (discussing the issues surrounding the adoption of Common Article 3); *see also* Robert W. Ash, *Square Pegs and Round Holes: Al-Qaeda Detainees and Common Article 3*, __ Ind. Int'l & Comp. L. Rev. __, __ (2007) (forthcoming) (summarizing how Common Article 3 was adopted, what the High Contracting Parties intended Article 3 to accomplish, and how Article 3 is currently being misapplied); G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 Brit. Y.B. Int'l L. 173, 210 (1971) (noting that,

because Article 3 "was a pioneer provision in a multilateral convention restricting States in their manner of *quelling internal rebellion*," "it was accepted with difficulty *and considerable caution*" (emphasis added)).

Further, the Court's reliance on the ICRC quote about Article 3's "wide scope" is misplaced and fails to take into account the following: (1) that the ICRC is an advocacy organization with its own views and agenda, *see, e.g.*, GC III cmt. at 36 ("Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of the above conditions? *We [i.e., ICRC] do not subscribe to that view. We [i.e., ICRC] think, on the contrary, that the scope of application of the Article must be as wide as possible.*" (emphasis added)); GC IV cmt. at 23 ("*That may not be a strictly legal interpretation; it does not altogether follow the text itself; but it is in our [i.e., ICRC's] opinion the only honourable and reasonable solution.*" (emphasis added)); GC IV cmt. at 27 (noting that the ICRC encounters obstacles "*as always* when endeavoring to go a step *beyond the text of the Conventions*" (emphasis added)); *see also* Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1, 24 (2003) (noting that ICRC Commentaries' "interpretive propositions are themselves fraught with ambiguities"); (2) that the ICRC, as a non-State actor, was not—and, indeed, could not be—a High Contracting Party to the 1949 Conventions and, as such, could not, and did not, vote on the wording or meaning of any provision of the 1949 Conventions, *see* 2B Final Record at 336 (ICRC representative admitted that the meaning and reach of Article 3 fell

"within the exclusive competence of governments"); and (3) that the ICRC admits that questions of interpretation of individual articles of the Conventions must be answered by the respective High Contracting Parties, not the ICRC, *see, e.g.*, GC III cmt. foreword ("The Committee, moreover, whenever called upon for an opinion of a provision of an international Convention, always takes care to emphasize that *only the participant States are qualified, through consultation between themselves, to give an official and, as it were, authentic interpretation of an intergovernmental treaty.*" (emphasis added)).

The implications of this Court's erroneous interpretation of Article 3 are far-reaching. This Court's *Hamdan* decision has wrongly required the United States Government to assume international *treaty* obligations to which the United States had never agreed at Geneva in 1949. Further, by its decision, this Court has, in effect, compelled the Government to cede sovereign rights and prerogatives concerning treatment of unlawful combatants which the political branches had meant to retain. Since decisions which cede sovereign rights and prerogatives are political decisions, this Court improperly arrogated to itself authority reserved in the Constitution to the political branches, thereby violating separation of powers. *Powell v. McCormack*, 395 U.S. 486, 518 (1969) ("It is well established that the federal courts will not adjudicate political questions."); *Baker v. Carr*, 369 U.S. 186, 210 (1962) (The "nonjusticiability of a political question is primarily a function of the separation of powers."). As such, this Court should

reverse its prior decision regarding the meaning and reach of Article 3.

A. Separation of Powers Requires that Courts Proceed Cautiously in Interpreting Treaties to Avoid Interfering with Powers Accorded by the Constitution Solely to the Political Branches and to Avoid Inadvertently Ceding Sovereign Rights and Prerogatives

Consistent with the principle of separation of powers, the Constitution of the United States distributes to each of the three branches of the federal government authority regarding treaties. The Constitution accords to the Executive Branch the authority to negotiate treaties on behalf of the United States. U.S. Const. art. II, § 2, cl. 2. The Constitution accords to the United States Senate the responsibility to give its advice and consent to treaties submitted to it by the President for ratification. *Id.* The Judiciary, in turn, has the responsibility to interpret such treaties, once ratified. *See, e.g., Sullivan v. Kidd*, 254 U.S. 433, 442 (1921) (noting that "construction of treaties is judicial in its nature").

One must keep in mind that treaties—as agreements between and among sovereign powers—implicate the sovereign rights of the High Contracting Parties thereto. As such, in order to avoid inadvertently ceding sovereign rights and prerogatives meant to be protected and retained, any United States court interpreting the meaning and reach of a treaty must diligently endeavor to discover specifically what the United States and its

treaty partners actually sought to achieve as well as what they actually agreed to be bound by. That is especially true when the treaty concerns matters relating to war and national security. *See, e.g., Haig v. Agee*, 453 U.S. 280, 307 (1981) (citing *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964) (noting as "obvious and unarguable" that there is no governmental interest more compelling than security of the Nation)). *See also Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (noting that "*[w]here *** the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.*" (emphasis added)). Surely, negotiating the terms of a convention on how to modify the law of war is such an instance.

Moreover, as with domestic legislation, a treaty's terms result from the give-and-take of the parties involved in negotiating them. Hence, despite the noblest of goals and intentions, parties to a treaty may be forced to pursue their ultimate goals by means of a series of small steps rather than by one giant step. Such was the case with Common Article 3. *See, e.g.*, 2B Final Record at 335 ("On the one hand *** we are told that [Article 3] does not go far enough, while on the other *** it is said it goes much too far. These two criticisms compensate each other. And *to those who complain that the suggested solution does not go far enough, there is a pertinent reply: Half a loaf is better than no bread.*" (emphasis added)); *id.* (describing Article 3 as a "comparatively

modest" achievement); Jinks, *September 11*, 28 Yale J. Int'l L. at 20 (noting that evidence exists "suggest[ing] that Common Article 3 applies only to civil wars" and that "textual ambiguity in the provision raises some questions about whether [Article 3] applies to transnational armed conflict").

Because of the stakes involved (e.g., issues of national sovereignty and considerations of national reputation for good faith adherence to international agreements), when interpreting a treaty, a court should employ additional safeguards to ensure that the treaty's terms are carried out in good faith. *Good faith implementation, however, does not require that a nation go beyond the terms it has agreed to*, and no United States court has legitimate authority to compel such a result.

B. Judicial Standard for Interpreting Treaties

The judicial standard for interpreting treaties is well-settled in the United States. This Court noted in *Air France v. Saks*, 470 U.S. 392 (1985), that United States courts have a responsibility to read a treaty in a manner "consistent with the shared *expectations of the contracting parties*." *Id.* at 399 (emphasis added) (citing *Reed v. Wiser*, 555 F.2d 1079, 1090 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977)); *see also Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (noting that in interpreting a treaty a court's "role is limited to giving effect to the intent of the treaty parties"); *Chew Heong v. United States*, 112 U.S. 536, 540 (1884) (noting that treaties are to be interpreted "according to the intention of the contracting

parties"). Determining the intent of treaty partners and ensuring that treaties are faithfully implemented require judicial diligence and a look beyond the text to the drafting history of the treaty (to the so-called *travaux preparatoires*). Yet, determining the parties' intent and ensuring faithful implementation necessarily exclude judicial *alteration* of a treaty's terms and reach:

> [T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. *Neither can this Court supply a casus omissus in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.*

Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 135 (1989) (alteration in original) (emphasis added) (quoting *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821)).

Going beyond the four corners of the treaty is key. "Because a treaty ratified by the United States is not only the law of this land *** but also an agreement among sovereign powers, *we have traditionally considered as aids to its interpretation the negotiating and drafting history* ****" *El Al Isr.*

Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 167 (1999) (emphasis added) (quoting *Zicherman v. Korean Airlines, Ltd.*, 516 U.S. 217, 226 (1996)). That should be especially true of Common Article 3 where multiple understandings of its terms are possible. *See, e.g.*, GC III cmt. at 35 (admitting that the phrase "armed conflict not of an international character" is "vague"); Jinks, *September 11*, 28 Yale J. Int'l L. at 38-41 (noting three plausible understandings of the phrase "armed conflict not of an international character"); Nathan A. Canestaro, *"Small Wars" and the Law: Options for Prosecuting the Insurgents in Iraq*, 43 Colum. J. Transnat'l L. 73, 94 (2004) (noting that the "precise meaning" of "'armed conflict not of an international character' is unclear"); Tom Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict,"* 71 Colum. L. Rev. 37, 43 (1971) ("One of the most assured things *** about the words 'armed conflict not of an international character' is that no one can say with assurance precisely what meaning they were intended to convey.").

Additionally, treaties are negotiated by diplomats speaking different languages. This periodically leads to misunderstandings. Even speaking a common language is no guarantee that misunderstandings will not occur. As George Bernard Shaw famously quipped: "England and America are two countries separated by a common language."[4] *See Oxford*

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[4]Winston Churchill cited an historical example to corroborate Shaw's famous quip. Churchill related the following concerning an incident between the British and American Chiefs of Staff during World War II:

Dictionary of Political Quotations 337 (Antony Jay ed., 1996). One can multiply the chances for misunderstanding when non-native speakers begin considering English terms for treaties, just as one can safely assume the same in reverse when non-native speakers of other languages attempt to express themselves in those languages. Hence, confining one's analysis to the four corners of the treaty can lead to erroneous interpretations—as occurred here. Reviewing the treaty's text in its context by examining the treaty's drafting history (the *travaux preparatoires*) is essential to ferret out what was actually agreed to. That did not occur in the *Hamdan* case and helps explain why the Court erred in its interpretation of the meaning and reach of Common Article 3.

> The enjoyment of a common language was of course a supreme advantage in all British and American discussions. The delays and often partial misunderstandings which occur when interpreters are used were avoided. There were however differences of expression, which in the early days led to an amusing incident. The British Staff prepared a paper which they wished to raise as a matter of urgency, and informed their American colleagues that they wished to "table it." To the American Staff "tabling" a paper meant putting it away in a drawer and forgetting it. A long and even acrimonious argument ensued before both parties realised [sic] that they were agreed on the merits and wanted the same thing.

Winston S. Churchill, *The Grand Alliance* 688 (1951).

C. Even a Cursory Review of the Final Record of the Geneva Conference of 1949 Clearly Demonstrates that the Majority of Delegations Intended Common Article 3 to Apply to Serious Internal Conflicts Like Civil Wars and to Nothing Else

At the 1949 Geneva Conference, the ICRC presented the following text (known as the "Stockholm Draft") to the delegates for their consideration:

> *In all cases of armed conflict which are not of an international character*, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties ****

GC III cmt. at 31 (emphasis added). The proposed text proved to be very controversial:

> From the very outset, divergences of views became apparent. A considerable number of delegations were opposed, if not to any and every provision *in regard to civil war*, at any rate to the unqualified application of the Convention to such conflicts**** It was said that [the proposal] would cover all forms of insurrections, rebellion, and the break-up of States, and even plain brigandage**** To compel the Government of a State *in the throes of internal conflict* to apply to such a conflict the whole of the provisions of a Convention expressly concluded to cover the

> case of war would mean giving its enemies, who might be no more than a handful of rebels or common brigands, the status of belligerents, and possibly even a certain degree of legal recognition.

Id. at 32 (emphasis added). At the Plenary Meeting on April 26, 1949, the articles common to all four conventions (which included Article 3[5]) were referred to the committee known as the "Joint Committee." 2B Final Record at 128. At the very first meeting of the Joint Committee to consider extending legal protections to victims of non-international conflicts, the Stockholm Draft's call for applying the Conventions' provisions to "*all* cases of armed conflict which are not of an international character" elicited a number of concerns. *See, e.g., id.* at 10 (noting that applying international protections "to *civil war* would strike at the root of national sovereignty and endanger national security ****" (emphasis added)). Ultimately, because the language was so controversial, a separate, Special Committee was formed to deal specifically with Article 3.

Because of delegates' concerns about the breadth of the Stockholm proposal, the *Special Committee decided to abandon the Stockholm language*—to wit, that the Convention would apply "in *all cases* of armed conflict which are not of an international character," *see* GC III cmt. at 31 (emphasis added)—and to define more clearly to which cases of armed

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[5]Note that Common Article 3 was initially paragraph 4 of Article 2. 2A Final Record at 128. It then was redesignated as Article 2A, *id.* at 129, before ultimately becoming Article 3.

conflict not of an international character the Conventions should apply.

Throughout their discussions, the concerns of the various delegations centered solely on civil wars and other significant *internal* conflicts, such as insurgencies and rebellions. *See, e.g.*, 2B Final Record at 10, 13. No delegation anticipated any type of conflict like the ongoing Global War on Terror (GWOT). As a result, all discussions centered on civil wars and similar internal conflicts. It stretches credulity to the breaking point to conclude that delegates knowingly agreed that Article 3 was to apply to situations which they *neither anticipated nor discussed.* The language in the Joint Committee report to the Plenary Committee confirms this view.

Following many weeks of meetings and discussion, the Joint Committee delivered its report to the Plenary Committee for consideration by all delegations to the Conference. The portion of its report concerning Common Article 3 read, in pertinent part, as follows:

> In the Stockholm Draft, the fourth paragraph of Article 2 [what ultimately became Common Article 3][6] stipulated that, in *all* cases of armed conflict not of an international character, each of the Parties to the conflict should be bound to implement the provisions of the Conventions.
>
> At the present Conference, the question immediately arose of deciding what was to be understood by "armed conflict not of an international character which may occur in

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[6] *See supra* note 5.

> the territory of one of the High Contracting Parties." *It was clear that this referred to civil war*, and not to a mere riot or disturbances caused by bandits. States could not be obliged as soon as *rebellion arose within their frontiers*, to consider the rebels as regular belligerents to whose benefit the Conventions had to be applied. But *at what point should the suppression of the rising be regarded as a civil war*? ****

2B Final Record at 129 (emphasis added). Nowhere in the Final Record is there any indication that any other types of conflict were considered other than serious *domestic* conflicts. Moreover, the delegates had consciously and intentionally removed the term "all" from the phrase proposed at Stockholm, "In *all* cases of armed conflict which are not of an international character ****" *See id.* at 45. They adopted the following phrasing instead:

> In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions ****

See, e.g., GC III art. 3. Moreover, throughout the process, the majority of delegates to the 1949 Conference sought to narrow the reach of Article 3, not expand it. *See, e.g.*, GC III cmt. at 30 (noting even before the Geneva Conference began that "[t]here was reason to fear that there might be objections to the idea of imposing international

obligations on States in connection with their *internal affairs* ****" (emphasis added)); *id.* at 31 (noting that the proposal of the Government Experts in 1947 "fell a long way short of that of the Red Cross Societies"); 2B Final Record at 335-36 (noting that the ICRC "was aware from the outset *** that the original text *** had no chance whatsoever of being adopted by Governments ****"). Hence, the issue of Article 3's alleged "wide scope" merely reflects the aspirations of the ICRC, a non-party to the Conference. As a non-party, the ICRC had no authority to decide either the text or the meaning of any single article in any of the four Geneva Conventions adopted in 1949. Relying on the ICRC comment that Article 3 was meant to be applied broadly, therefore, is like relying on Al Gore's assessment of President Bush's views on global warming—it simply cannot be taken at face value.

Civil wars, insurrections, rebellions, and the like are serious armed conflicts occurring within one country. This concept fully comports with Article 3's current language: "In the case of armed conflict not of an international character *occurring in the territory of one of the High Contracting Parties* ****" *See, e.g.*, GC III art. 3 (emphasis added); *see also* GC II cmt. at 33 (noting that Article 3 applies to conflicts "similar to international war, but [which] take place within the confines *of a single country*" (emphasis added)). Hence, it is fully reasonable that the language adopted by the High Contracting Parties in Geneva was meant to limit Article 3's reach to civil wars and the like and to exclude any type of conflict similar to today's conflict with al-Qaeda and other global terrorist groups. To conclude that Article 3

was meant to apply to such broader conflicts contradicts both the language and the negotiating history of Article 3 and is clearly erroneous. Thus, this Court should revisit this matter and correct its error by reversing its decision in *Hamdan* that Common Article 3 applies to detainees at Guantanamo Bay Naval Base in Cuba.

CONCLUSION

In light of the foregoing, *Amicus Curiae* The American Center for Law and Justice respectfully urges this Court to uphold the validity of the Military Commissions Act, to allow military commissions to proceed unhindered and as directed by the Congress, and to reverse its erroneous interpretation of Common Article 3.

October 9, 2007 Respectfully submitted,

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28 p (17) (29)

Nos. 06-1195 & 06-1196

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

—v.—

GEORGE W. BUSH, *et al.*,

Respondents.

KHALED A.F. AL ODAH, *et al.*,

Petitioners,

—v.—

UNITED STATES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND PUBLIC JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America's entry into World War I, including the prosecution of political dissidents and the denial of basic due process rights for non-citizens. In the intervening eight decades, the ACLU has frequently appeared before this Court during other periods of national crisis when concerns about security have been used by the government as a justification for abridging individual rights.

In this case, the Court of Appeals did not even consider Petitioners' constitutional claims because it held, categorically, that Petitioners were not entitled to any constitutional rights. That ruling effectively deprives Petitioners of any ability to challenge the legality of their detention through the traditional common law writ of habeas corpus or to assert, among other things, that their confinement in military custody without charges or trial for more than five years violates fundamental principles of due process of law. The proper resolution of those issues is a matter of significant concern to the ACLU and its members.

Public Justice, P.C. (formerly known as Trial Lawyers for Public Justice) is a national public interest law firm specializing in precedent-setting and socially significant

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Some parties have submitted blanket consents to the filing of all *amicus* briefs; consent letters from the remaining parties have been submitted along with this brief. Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part and no person other than *amici curiae*, their members or their counsel made a monetary contribution to this brief.

civil litigation, and dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, Public Justice prosecutes high-impact litigation designed to advance consumers' rights, workers' rights, civil rights and civil liberties, public health and safety, environmental protection, and the protection of the poor and the powerless. Public Justice appears as *amicus* in this case because it is committed to ensuring that the United States provides – and stands throughout the world as a beacon for – access to justice.

SUMMARY OF ARGUMENT

This case represents the latest stage in the government's ongoing effort to avoid any meaningful judicial review of its decision to hold hundreds of detainees without charges or trial at the U.S. Naval Base at Guantanamo Bay for as long as it chooses. The government is unapologetic about its position. In the government's view, its detention policies at Guantanamo Bay are not subject to any legal constraint beyond the plainly inadequate safeguards that Congress has belatedly enacted, for two simple reasons: the detainees are not U.S. citizens and they are imprisoned outside the United States.

For nearly eight centuries, the writ of habeas corpus has served as a check against arbitrary executive detention. The Framers regarded habeas corpus as so essential to ordered liberty that they included a provision in the Constitution providing that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. Const. art. I, § 9, cl. 2. The government does not argue that those conditions have been met. Instead, the government argues, and the Court of Appeals agreed, that "the Constitution does not confer rights on aliens without property

or presence within the United States." *Boumediene v. Bush*, 476 F.3d 981, 991 (D.C. Cir. 2007).[2]

This Court has rejected such a categorical rule for more than a hundred years. In different decisions, the Court has emphasized different factors in determining whether the Constitution applies. Here, however, every standard that the Court has articulated is easily satisfied. First, petitioners are asserting fundamental rights. Second, the U.S. has exercised exclusive jurisdiction and control over Guantanamo Bay since 1903. Third, applying the Constitution to these facts would not be "impracticable and anomalous." Indeed, the constitutional anomaly in this case has been created by the decision below, which allows the government to act with impunity and outside any system of checks and balances.

Because it represents such a departure from this Court's longstanding jurisprudence, the decision below can and should be reversed on multiple grounds. Properly understood, the Suspension Clause operates as a direct restraint on the government regardless of where any particular habeas petitioner is detained. The alternative procedures established by Congress in the Military Commissions Act are a patently inadequate substitute for habeas corpus. Respondents' actions in this case are subject to constitutional scrutiny because of the special status of Guantanamo Bay. And, regardless of whether the Constitution applies in its entirety at Guantanamo Bay, Petitioners are entitled to invoke the Suspension and Due Process Clauses because both provisions protect fundamental rights.

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[2] The Court of Appeals first held that the federal habeas corpus statute, 28 U.S.C. § 2241, as amended by the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006), does not confer jurisdiction over habeas petitions filed by non-citizen prisoners captured abroad and detained as "enemy combatants" at the U.S. Naval Base at Guantanamo. 476 F.3d at 988.

Rather than repeat these arguments, each of which is discussed at length by petitioners and other *amici*, this brief focuses on the "impracticable and anomalous" test first articulated by Justice Harlan in 1957, elaborated upon by Justice Kennedy in 1990, and implicitly endorsed by a majority of this Court in 2004. We begin, in Point I, by arguing that the categorical rule adopted by the Court of Appeals is inconsistent with this Court's precedents. In Point II, we examine the genesis and reasoning of the "impracticable and anomalous" test. Finally, in Point III, we explain why that test requires reversal of the decision below. By clearly holding that government officials operating outside the United States are obligated to obey the Constitution unless it is "impracticable and anomalous" to do so, this Court will provide the lower courts with needed guidance on a critical question of constitutional law. Equally significant in light of past history, it will discourage the government from seeking to evade the effect of an adverse ruling by transferring petitioners to another facility located outside the United States or by incarcerating future detainees in such facilities.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN STATING CATEGORICALLY THAT THE CONSTITUTION ENFORCES NO CONSTRAINT ON U.S. GOVERNMENT CONDUCT WITH RESPECT TO NON-U.S. CITIZENS OUTSIDE THE UNITED STATES

The Court of Appeals erroneously interpreted this Court's precedents in stating that "the Constitution does not confer rights on aliens without property or presence within the United States," 476 F.3d at 991. For at least 100 years, this Court has rejected such categorical pronouncements in

deciding whether the U.S. government is subject to constitutional constraints outside the United States. Rather, when confronted with claims of constitutional violations outside the United States, this Court has examined the particular circumstances of each case and reached various conclusions as to whether and how the U.S. Constitution applies. Beginning with the Insular Cases of the early twentieth century, the Court has evaluated many relevant factors, such as the nature of the right, the context in which the right is asserted, the nationality of the person asserting the right, and whether recognition of the right would conflict with any foreign sovereign's laws or customs. That case-by-case evaluation belies the Court of Appeals' categorical holding that the Constitution can never constrain the government's conduct with respect to a non-U.S. citizen without property or presence within the United States.

Unlike the Court of Appeals, this Court has not even purported to rely on such a categorical rule since the late nineteenth century. In *Ross v. McIntyre (In re Ross)*, 140 U.S. 453 (1891), a merchant seaman was charged with murdering his shipmate on board a U.S. vessel at port in Japanese waters.[3] The defendant was convicted by a U.S. consular tribunal in Japan. He filed a habeas petition challenging his conviction on the ground that the proceedings violated his Fifth Amendment right to indictment by grand jury and his Sixth Amendment right to a jury trial. This Court denied the petition and, relying on the language of the Preamble to the Constitution, stated that the Constitution is "ordained and established 'for the United States of America' and not for countries outside of their limits." *Id.* at 464. For that reason, the Court held that the Fifth and Sixth

[3] The petitioner in *Ross* claimed to be a British national, while the government contended that he was a U.S. citizen. *Id.* at 454, 457-58. The Court concluded that because the petitioner had enrolled on a U.S. vessel, he should be treated as a U.S. seaman and subject to U.S. laws, including the jurisdiction of the consular tribunal. *Id.* at 472-75.

Amendments "apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad....The constitution can have no operation in another country." *Id.* (citation omitted). As set forth below, that broadly worded proposition has long since been superseded. *See Reid v. Covert*, 354 U.S. 1, 12 (1957).

But even in *Ross*, the Court softened its categorical statement with its actual, context-specific reasoning. In addition to quoting the language from the Preamble, the Court also relied upon two very practical concerns. First, the Court espoused a contract theory about the relationship between the United States and foreign countries, noting that when U.S. officers act in foreign countries, "it must be on such conditions as the two countries may agree; the laws of neither one being obligatory upon the other." 140 U.S. at 464. Thus, the Court expressed a concern about possible conflicts between the United States and another sovereign power. Second, the Court reasoned that recognition of the claimed Sixth Amendment rights in the context of consular trials in foreign countries would be "impracticable from the impossibility of obtaining a competent grand or petit jury." *Id.*

Since *Ross*, the Court has continued to engage in circumstance-specific analysis and has repudiated categorical rules limiting the force of the Constitution abroad. *See Reid*, 354 U.S. at 12 (noting that the "approach that the Constitution has no applicability abroad has long since been directly repudiated by numerous cases"). In the Insular Cases of the early twentieth century, the Court confronted various constitutional claims arising out of newly acquired territories of the United States. In each of those cases, the Court declined to follow *Ross*'s broad statement and instead evaluated the specific circumstances of each case, with particular emphasis on the nature of the right asserted. In

Downes v. Bidwell, 182 U.S. 244 (1901), the Court considered whether the revenue clauses of Article I applied to Puerto Rico, which had recently been ceded by Spain to the United States. The Court noted that the "personal rights" of territorial inhabitants could not be "unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress," *id.* at 283, even though the Court ultimately rejected the plaintiff's efforts to recover tariffs imposed on his goods imported from Puerto Rico to New York. While reserving opinion on the exact contours of such fundamental rights, the Court emphasized that citizens and non-citizens alike are protected against violations of *fundamental* constitutional rights. *Id.* at 268, 282-83. "Even if regarded as aliens," the residents of the territories "are entitled under the principles of the Constitution to be protected in life, liberty, and property." *Id.* at 283.

After *Downes*, the Court repeatedly assessed whether an asserted constitutional right is "fundamental" in determining whether it constrained government action outside the United States. For example, in *Territory of Hawaii v. Mankichi*, 190 U.S. 197 (1903), *Dorr v. United States*, 195 U.S. 138 (1904), and *Balzac v. Porto Rico*, 258 U.S. 298 (1922), the Court confronted claims by criminal defendants in the newly acquired territories of Hawaii, the Philippines and Puerto Rico, respectively, that their constitutional right to trial by jury had been violated. In all three cases, the Court emphasized, as it had in *Downes v. Bidwell*, that fundamental constitutional rights apply outside the United States. In *Mankichi*, the Court rejected the petitioner's claim on the ground that the asserted rights "are not fundamental in their nature." 190 U.S. at 218. In *Dorr v. United States*, the Court cited its earlier opinions in noting that if the right to a jury trial were "fundamental," it had to apply within the territory. 195 U.S. at 148. And in *Balzac*, the Court emphasized that while a non-fundamental constitutional right may or may not apply in a given situation,

"[t]he guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without the due process of law," must always apply. 258 U.S. at 312-13. *See also Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976) (noting that in the Insular Cases, the Court held that for "territories destined for statehood from the time of acquisition, ... the Constitution ... applied ... with full force," while in unincorporated territories, "only 'fundamental' constitutional rights were guaranteed to the inhabitants"). In each case, however, the Court concluded based on the circumstances that the right to a jury trial was not fundamental.[4] Thus, in the criminal process cases, the Court's analysis was premised entirely on the holding that fundamental constitutional rights apply outside the United States.

While *Downes*, *Mankichi*, *Dorr* and *Balzac* concerned the assertion of constitutional rights in unincorporated U.S. territories, the fundamental rights doctrine that those decisions espouse has not been limited to such territories. Later in the twentieth century, the Court cited the fundamental rights doctrine from the Insular Cases when it had occasion to consider the application of the Constitution in a sovereign foreign country. In *Reid v. Covert*, 354 U.S. 1 (1957), the petitioners, civilian spouses of U.S. servicemen stationed on U.S. military bases in Japan and England, were tried, convicted and sentenced to death by courts-martial for

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[4] Those conclusions were based in large measure on a practical consideration – that the territories already had criminal justice procedures in place and that imposing the Anglo-American system of indictment and trial would wreak havoc on the existing system. *Mankichi*, 190 U.S. at 215-16; *Dorr*, 195 U.S. at 148; *Balzac*, 258 U.S. at 309-10 (noting that Puerto Rico, which had an existing criminal justice system based on the Spanish civil law model, could be distinguished from Alaska, which was sparsely populated when acquired by the United States and more easily accessible, and therefore applying U.S. laws did not pose same practical difficulty).

the murder of their husbands. The petitioners claimed that the court-martial proceedings violated their Fifth Amendment right to indictment by grand jury and Sixth Amendment right to trial by petit jury. As in the Insular Cases, the Court's analysis in *Reid* focused on the importance of the constitutional right asserted rather than on the location of the alleged constitutional violation. Indeed, in his opinion for the four-member plurality, Justice Black criticized the Insular Cases' fundamental rights doctrine for not going far enough where U.S. citizens are concerned:

> This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States. While it has been suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.

354 U.S. at 8-9 (footnotes omitted). Thus, the plurality in *Reid* would have held that U.S. citizens enjoy the full panoply of constitutional rights wherever in the world their government acts against them.[5] The Court noted that the assertion in *Ross* that the Constitution did not apply outside the United States "cannot be understood except in its peculiar setting; even then, it seems highly unlikely that a similar result would be reached today." *Id.* at 10.

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[5] In his concurring opinion, Justice Harlan rejected the idea that U.S. citizens enjoy every constitutional right everywhere in the world. 354 U.S. at 74 (Harlan, J., concurring). That issue is not presented by this case, however, which involves only the rights of non-citizens outside the United States. Nothing in *Reid* curtailed the fundamental rights doctrine as it already applied to non-U.S. citizens.

As in the Insular Cases, the Court in *Reid* examined the actual circumstances of the case and assessed the practical effect of its decision. The Court noted that the practical concerns that had animated the Insular Cases' holdings – that the territories in question had "wholly dissimilar traditions and institutions" – were not present in *Reid*. *Id.* at 14. The Court also considered the government's arguments that the Constitution could not apply "in the field" because of "conditions of world tension," but concluded that enforcing the petitioners' asserted Fifth and Sixth Amendment rights would not have any deleterious effect on U.S. military operations because there were no active hostilities in the area. *Id.* at 34-35. The Court emphasized, however, that "[e]ven during time of war the Constitution must be observed." *Id.* at 35 n.62. Thus, the plurality opinion in *Reid* carefully weighed the practical considerations involved in applying the Fifth and Sixth Amendments on the facts presented and the essential civil liberties that those amendments protect. On balance, the Court concluded, the *Reid* petitioners enjoyed those rights even when the U.S. government acted against them in a sovereign foreign country.

Thus, contrary to the Court of Appeals, this Court has declined to pronounce categorical rules against the application of the Constitution outside the United States. Instead, the Court has examined the particular circumstances in individual cases to determine whether an asserted right should apply. To the extent the Court has pronounced categorical rules, they have been in favor of constitutional rights – as in the Insular Cases, which held that fundamental rights are always protected regardless of alienage, or *Reid v. Covert*, where a plurality of the Court concluded that U.S. citizenship should carry full constitutional protections worldwide. Nonetheless, the Court of Appeals set forth a categorical rule that "the Constitution does not confer rights on aliens without property or presence within the United

States." 476 F.3d at 991. In support of that statement, the Court of Appeals cited three decisions of this Court: *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); and *Zadvydas v. Davis*, 533 U.S. 678 (2001). 476 F.3d at 991-92. None of those decisions remotely supports the Court of Appeals' categorical rule.

Rather than espouse any categorical rule against application of the Constitution to non-U.S. citizens outside the United States, *Eisentrager* actually reflects a nuanced analysis of all the circumstances in the particular case.[6] In *Eisentrager*, the petitioners were German prisoners of war whom the United States had captured in China. They were convicted of war crimes by U.S. military commissions in China, which were established with the consent of the Chinese government, and were committed to serve life sentences at a U.S. military base in Germany. 339 U.S. at 766. The petitioners challenged their convictions on due process and other constitutional grounds. *Id.* at 767. The Court rejected the petitioners' claims and held that they were not entitled to any process greater than what they received in their military commission trials. *Id.* at 785. *Eisentrager* does not, however, set forth a categorical rule that non-citizens are not entitled to any constitutional rights outside the United States. To the contrary, the Court took pains to enumerate all of the factors justifying its holding:

> We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas corpus. To support that

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[6] Moreover, this Court recently noted in *Rasul v. Bush*, 542 U.S. 466, 479 (2004) that *Eisentrager* has been overruled at least in part. To the extent that *Eisentrager* held that the habeas corpus statute, 28 U.S.C. § 2241, did not provide jurisdiction over petitions filed by non-citizens outside the United States, it is no longer good law. *Id.*

> assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

339 U.S. at 777.[7] Indeed, in its recent decision in *Rasul v. Bush*, this Court emphasized that "the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant ... to the question of the prisoners' *constitutional* entitlement to habeas corpus." 542 U.S. at 476 (emphasis in original).[8] In short, *Eisentrager* was limited to

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[7] In addition to relying upon these facts, *Eisentrager* noted the practical difficulties that would have attended recognition of habeas corpus rights at that time. The Court worried that "[t]o grant the writ to these prisoners might mean that our army must transport them across the seas for hearing." *Id.* at 778-79. These considerations, of course, are generally less applicable today, as the habeas statute no longer requires physical production of the detainee in court. Lower courts have construed 28 U.S.C. § 2243 to require production of the petitioner in court only when the district court issues an order to show cause and schedules an evidentiary hearing, and the case presents issues of fact. *See Roman v. Ashcroft*, 162 F. Supp. 2d 755, 760 (N.D. Ohio 2001). In practice, those circumstances are rare. *Id.*; *see also* 1 J. Liebman & R. Hertz, Federal Habeas Corpus Practice & Procedure § 2.4b n.26 (5th ed. 2005) (noting that federal district courts ordered hearing in less than 1.17% of habeas corpus cases).

[8] The *Rasul* Court's characterization of *Eisentrager* helps to place in context Justice Jackson's observation, in *Eisentrager*, that "[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of right as he increases his identity with our society," 339 U.S. at 770. While Justice Jackson noted that "most" cases extending rights to aliens involved aliens within the territorial jurisdiction in the United States, *id.* at 771, he did not say that

its facts and the Court of Appeals therefore erred in relying upon it for its categorical rule.

The Court of Appeals also erred in relying upon *Verdugo-Urquidez*. As in all of the foregoing cases, the Court engaged in a careful analysis of all the circumstances, including practical considerations, before holding that a non-U.S. citizen who was abducted from his home in Mexico at the direction of U.S. government agents and tried for drug offenses in U.S. courts was not protected by the warrant clause of the Fourth Amendment. Writing for a majority of five, Chief Justice Rehnquist examined the history of the Fourth Amendment and concluded that the Framers intended only to restrict searches and seizures within the United States.[9] *Id.* at 266. In addition, *Verdugo-Urquidez* rested

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such presence is a *sine qua non*. Had that one factor been dispositive, it would have been unnecessary for Justice Jackson to offer six different reasons why constitutional habeas was unavailable in that case.

[9] Chief Justice Rehnquist also mentioned in passing the textual distinction between the Fifth Amendment's use of the word "persons" and the Fourth Amendment's use of the term "the people." While acknowledging that this "textual exegesis is by no means conclusive," he suggested that the phrase "the people" might signify a narrowly defined "class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 265; *see also id.* at 271 (distinguishing immigration decisions cited by petitioner as establishing "only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"). This view did not command a majority of the Court. Justice Kennedy, who provided a fifth vote for the majority, expressly disagreed that the difference between "the people" and "persons" had any significance. *Id.* at 276 (Kennedy, J., concurring). More generally, Justice Kennedy rejected any categorical rules about the applicability of the Constitution to non-citizens outside the United States. *Id.* Thus, Chief Justice Rehnquist's language about "sufficient" or "substantial connection" (1) was dicta; (2) related to the *Fourth Amendment* issue in *Verdugo-Urquidez*; and (3) was rejected by a majority of the Court.

Nonetheless, the D.C. Circuit has relied upon this dicta from *Verdugo-Urquidez* to state broadly that a non-citizen without a connection to the

upon practical considerations. As the Court noted, application of the Fourth Amendment's warrant requirement to searches in other countries would plunge courts into a "sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad." *Id.* at 274. Moreover, the Court noted, any warrant issued by a magistrate "would be a dead letter outside the United States." *Id.*; *see also id.* at 278 (Kennedy, J., concurring) ("The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all

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United States can never have any constitutional rights. The Court of Appeals below relied on two such opinions. 476 F.3d at 992 (citing *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999); *32 County Sovereignty Comm. v. U.S. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002)). Other circuits have made similarly broad statements. *See, e.g., Al-Marri v. Wright*, 487 F.3d 160, 174-75 (4th Cir. 2007); *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1352 (Fed. Cir. 2004). Those decisions are inconsistent with longstanding decisions recognizing that non-U.S. citizens have rights under the Due Process Clause, regardless of whether they have entered the United States voluntarily or formed ties with the United States. For example, this Court has held that non-U.S. citizens without ties or presence in the United States are entitled to due process rights when they are sued in U.S. courts. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108-09 (1987) (defendant non-resident, non-U.S. corporation without minimum contacts in forum state was protected by Fourteenth Amendment's Due Process Clause against exercise of personal jurisdiction by state court); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (same); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (recognizing that non-resident, non-U.S. corporations have individual liberty interest under Fifth Amendment Due Process Clause but holding on the merits that defendants' due process rights were not violated). In these decisions, it is the very lack of a substantial connection with the United States that triggers the due process right not to be haled into a U.S. court. Although these cases concerned foreign business entities, there is no reason the U.S. Constitution should confer fewer rights on a non-citizen human being than on a non-citizen corporation.

indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country."); *id.* at 279 (Stevens, J., concurring in the judgment) ("I do not believe the Warrant Clause has any application to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches."). Thus, like all the Court's other decisions on application of the Constitution outside the United States, *Verdugo-Urquidez* set forth no categorical rules but rested instead on an evaluation of myriad relevant factors.

In citing *Verdugo-Urquidez* to support its broad categorical rule, the Court of Appeals relied primarily on Chief Justice Rehnquist's statement that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." 476 F.3d at 991 (quoting 494 U.S. at 269). That reliance was misplaced for two reasons. First, it is clear from the context that the Chief Justice was not stating a categorical rule that the Court *always* rejects such claims, but merely making a prefatory remark before citing one particular instance – *Eisentrager* – in which the Court had held that a non-citizen did not have a Fifth Amendment right. 494 U.S. at 269. Second, even if Chief Justice Rehnquist had meant the statement to be categorical, it was dicta that has never been endorsed by a majority of the Court. In *Verdugo-Urquidez*, the Court granted *certiorari* solely on two Fourth Amendment questions, and there was no Fifth Amendment issue before the Court. 494 U.S. at 264 (noting that Fifth Amendment "is not at issue in this case"). Indeed, before the decision below, the D.C. Circuit acknowledged that *Verdugo-Urquidez*'s language about the Fifth Amendment was dicta.[10] *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir.

[10] As set forth below in Point II, Justice Kennedy – the fifth member of the majority – clearly rejected any categorical rules against application of the Constitution outside the United States, and therefore could not have agreed to any categorical rule about the Fifth Amendment.

2003), *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 (2004). Thus, *Verdugo-Urquidez* does not support the extreme categorical approach announced in the decision below.

Nor does this Court's decision in *Zadvydas v. Davis* support the Court of Appeals' view. In *Zadvydas*, the Court considered the constitutional claims of lawful permanent residents of the United States who were physically present in the United States. 533 U.S. at 684-86. The *Zadvydas* petitioners challenged their prolonged and indefinite detention while the government sought to remove them from the United States based on their criminal convictions. *Id.* The Court noted that "[a] statute permitting indefinite detention of an alien would raise serious constitutional problems," *id.* at 690, and therefore construed the Immigration and Nationality Act not to authorize detention when removal is not reasonably foreseeable. *Id.* at 699. The Court of Appeals below quoted dicta in *Zadvydas* stating that "certain constitutional provisions available to persons inside the United States are unavailable to aliens outside of our geographic borders." 476 F.3d at 991-92 (quoting *Zadvydas*, 533 U.S. at 693). This dicta, of course, does not support the Court of Appeals' conclusion that non-citizens outside the United States *never* have constitutional rights. The Court, rather, was emphasizing that once a non-citizen enters the United States, she has *full* protection under the Constitution. *Id.*

In short, none of this Court's modern precedents support the categorical rule applied by the Court of Appeals below.

II. THE "IMPRACTICABLE AND ANOMALOUS" TEST PROVIDES A SUITABLE FRAMEWORK FOR ANALYZING THE CONSTITUTIONAL CLAIMS IN THIS CASE

Although this Court long ago concluded that constitutional claims arising outside the United States must be evaluated on a case-by-case basis, its decisions in this area "have been neither unambiguous nor uniform," as the Court itself has acknowledged. *Examining Bd. of Eng'rs*, 426 U.S. at 599. That ambiguity may not matter in this case because Petitioners are entitled to prevail under the fundamental rights doctrine of the Insular Cases, standing alone. *See supra* at 6-9. Nevertheless, this case provides the Court with an opportunity to bring important clarity to the law by applying the "impracticable and anomalous" test to its consideration of Petitioners' constitutional claims.

The decision below is not the first by the D.C. Circuit misinterpreting this Court's precedents and stating that non-citizens outside the United States do not have any constitutional rights.[11] *See Al Odah v. United States*, 321 F.3d 1134, 1140-41 (D.C. Cir. 2003) (noting that *Verdugo-Urquidez*'s discussion of the Fifth Amendment was dicta, but stating nonetheless that non-citizens without property or presence in the United States have no constitutional rights), *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 (2004). The Court should make a clear statement to prevent the lower courts from adopting such categorical rules with unforeseeable future consequences.

The "impracticable and anomalous" test was first articulated by Justice Harlan in his concurring opinion in *Reid v. Covert*, 354 U.S. 1. Like the plurality, *see supra* at 9-

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[11] In contrast, other circuits have correctly recognized that *Verdugo-Urquidez*'s holding is limited to the Fourth Amendment's Warrant Clause. *See, e.g., United States v. Inigo*, 925 F.2d 641, 656 (3d Cir. 1991); *Lamont v. Woods*, 948 F.2d 825, 834 (2d Cir. 1991).

10, Justice Harlan expressly rejected a categorical rule that the Constitution should never apply to the trial of U.S. citizens outside the United States. In his view, the question whether any asserted constitutional right applies outside the United States should depend upon an analysis of the particular circumstances of the case:

> [I]t seems to me that the basic teaching of *Ross* and the Insular Cases is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous....Decision is easy if one adopts the constricting view that these constitutional guarantees as a totality do or do not 'apply' overseas. But, for me, the question is which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it. The question is one of judgment, not compulsion.

354 U.S. at 74-75 (Harlan, J., concurring).[12] Thus, Justice Harlan put into words what the plurality did in fact – examine all the relevant circumstances before drawing a conclusion about whether a constitutional right applies in the given circumstance.

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[12] For example, Justice Harlan stressed the fact that the petitioners were charged with capital offenses in concluding that they were entitled to trial rights under the Fifth and Sixth Amendments. *Id.* at 76-77 (Harlan, J., concurring). So did Justice Frankfurter. *Id.* at 49 (Frankfurter, J., concurring in the result). In later opinions, the Court held that the Fifth and Sixth Amendments applied even in cases where the offense did not carry the death penalty. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

Although the particular facts of *Reid* involved U.S. citizens in foreign countries, Justice Harlan's "impracticable and anomalous" test has not been limited to claims by U.S. citizens.[13] Justice Kennedy subsequently adopted and refined Justice Harlan's "impracticable and anomalous" test in *United States v. Verdugo-Urquidez*, which involved a constitutional claim by a Mexican citizen based on events arising in Mexico.[14] *Id.* at 277 (Kennedy, J., concurring) (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)). Justice Kennedy began his concurring opinion in *Verdugo-Urquidez* by noting that "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." *Id.* at 277 (Kennedy, J., concurring). But, he concluded, "[t]he conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous," based on various practical factors such as "[t]he absence of local judges or magistrates available to issue warrants." *Id.* at 278.

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[13] Justice Harlan himself obviously did not intend such a limitation. In setting forth the "impracticable and anomalous" test, he relied upon the Insular Cases, most of which involved non-citizen claimants. 354 U.S. at 74 (Harlan, J., concurring).

[14] Notably, in *Verdugo-Urquidez*, the government argued for the adoption of Justice Harlan's flexible approach and against categorical rules:

> [T]he decision whether to give extraterritorial application to particular constitutional provisions in particular contexts is not one that admits of categorical answers. Instead, it requires a careful assessment of several factors, including the nature of the underlying right, the character of the territory in which the constitutional claim arose, and the relationship of the claimant to the United States. That is the approach to questions of extraterritoriality articulated by Justice Harlan in his concurring opinion in *Reid v. Covert* [citation omitted]. That approach is also faithful to the analysis the Court has employed, and the results the Court has reached, in cases involving the extraterritorial application of the constitutional guarantees. We urge that approach here.

See Br. for the United States, *United States v. Verdugo-Urquidez*, No. 88-1353 (U.S.), 1989 WL 1127203 at *12-13.

Notwithstanding this conclusion, Justice Kennedy did not treat the "impracticable and anomalous" test as limited to the particular circumstances of *Reid* – *i.e.*, a constitutional claim by a U.S. citizen abroad. As he explained in *Verdugo-Urquidez*: "The restrictions that the United States must observe with reference to aliens beyond its territory or jurisdiction depend ... on general principles of interpretation, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of 'the people.'" *Id.* at 276 (Kennedy, J., concurring).

In one of its first cases implicating national security after September 11, 2001, a majority of this Court appeared to approve the Harlan-Kennedy "impracticable and anomalous" test. In *Rasul v. Bush*, 542 U.S. 466 (2004), the Court held that non-citizens detained by the United States at the U.S. navy base at Guanatanamo Bay had the right to pursue constitutional and statutory claims against the U.S. government through habeas petitions under 28 U.S.C. § 2241. 542 U.S. at 484. Although the Court's holding concerned statutory jurisdiction, the Court considered in a footnote whether the Guantanamo detainees in *Rasul* had alleged "custody in violation of the Constitution or laws or treaties of the United States," as required for jurisdiction under 28 U.S.C. § 2241(c)(3). The Court concluded that the detainees' allegations – of prolonged executive detention without access to counsel and without being charged with any wrongdoing – "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" 542 U.S. at 484 n.15 (quoting 28 U.S.C. § 2241(c)(3)). Immediately following this statement, the Court cited the portion of Justice Kennedy's *Verdugo-Urquidez* concurrence that set forth the "impracticable and anomalous" test and also the "cases cited therein." *Id.* (citing *Verdugo-Urquidez*, 494 U.S. at 277-78 (Kennedy, J., concurring)). The Court of Appeals sought to minimize the significance of that footnote in *Rasul* by dismissing it as dicta. Whether

dicta or not, this Court's observation in *Rasul* was fundamentally sound and should now be reaffirmed.

By adopting the "impracticable and anomalous" test, the Court would provide much-needed guidance to the lower courts in an age of increasing U.S. government activity outside the 50 states. The test permits courts to account for different conditions and locations, from sovereign foreign countries (as in *Reid* and *Verdugo-Urquidez*) to unusual leaseholds such as the U.S. Naval Base at Guantanamo Bay. The "impracticable and anomalous" test also strikes the proper balance between the Constitution's structure of limited government power, and the need of the U.S. government to act effectively in the global arena. By applying the test, U.S. courts can give due recognition to core constitutional rights – such as the right against indefinite executive detention without any charge and based on evidence obtained by torture – while abiding by the common-sense principle that not every person outside the United States may enjoy the full panoply of rights under the Constitution when he encounters an agent of the U.S. government.

III. PETITIONERS HAVE ASSERTED VALID CONSTITUTIONAL CLAIMS UNDER THE "IMPRACTICABLE AND ANOMALOUS" TEST

The validity of Petitioners' constitutional claims has been amply demonstrated in Petitioners' own briefs and in the briefs submitted by other *amici*. We will not repeat those arguments here. For present purposes, we note that if the Court does adopt the "impracticable and anomalous" test, Petitioners' constitutional claims are more than sufficient to meet that test. In a nation committed to the rule of law, it would be "impracticable and anomalous" to rule that Petitioners have no right to challenge their detention in

federal court after they have been held without charges or trials, in some instances, for more than five years.

As set forth above in Point I, this Court has considered a number of factors in its cases on the application of the Constitution outside the United States. Two of those factors are dispositive in this case. First, the Court has considered the nature of the constitutional provision asserted, as in the Insular Cases when it determined whether a given constitutional right is "fundamental."[15] *See Downes*, 182 U.S. at 282-83; *Balzac*, 258 U.S. at 312-13; *Mankichi*, 190 U.S. at 217-18. *See also Examining Bd. of Eng'rs*, 426 U.S. at 601 n.30. Under those precedents, when a right is fundamental, it must apply. Second, the Court has considered the relationship between the United States and the location in question – for example, whether exercise of the constitutional provision would interfere with another sovereign. *See, e.g., Eisentrager*, 339 U.S. at 766 (noting that Chinese government consented to the trial of detainees by U.S. military commission in China). In addition, the Court has also considered myriad other factors going to the practicability of applying an asserted constitutional right, from the logistical problems in obtaining a search warrant in a foreign country, *Verdugo-Urquidez*, 494 U.S. at 273-74, to the mischief that would be caused by inserting American constitutional procedures into an existing criminal justice system where they are unknown, *see, e.g., Dorr*, 195 U.S. at 148.

On the facts of this case, it would plainly be neither "impracticable" nor "anomalous" to recognize the constitutional rights that Petitioners assert. First, by challenging their indefinite detention by the Executive Branch without any charges or trial, Petitioners raise claims that lie at the very heart of the Bill of Rights and the

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[15] Indeed, the Court has considered the importance of an asserted right even when it deems it not to be "fundamental." *Reid*, 354 U.S. at 8-9.

Suspension Clause. Accordingly, this case falls squarely within the longstanding fundamental rights doctrine from the Insular Cases. Under the Insular Cases, this alone is enough to require reversal of the decision.[16]

Second, there are no practical impediments, nor any risk of conflict between sovereign nations, in recognizing Petitioners' rights under the Fifth Amendment and the Suspension Clause. The petitioners are detained not in a sovereign foreign nation, but at the U.S. Naval Base in Guantanamo, which this Court has already held to be unique because the United States has "plenary and exclusive jurisdiction." *Rasul*, 542 U.S. at 475. Thus, there is no risk of any conflict between the rights under the Constitution that the Petitioners assert and foreign laws. Nor would recognition of Petitioners' rights in habeas corpus present undue logistical difficulties.

Based on all the circumstances, it would not be "impracticable and anomalous" to hold that core due process rights against indefinite executive detention apply at Guantanamo or to recognize Petitioners' access to the courts under the Suspension Clause. This Court has already implicitly taken that view in *Rasul*, 542 U.S. at 484 n.15, and should make that holding explicit here.

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[16] *Amici* agree with Petitioners that the Suspension Clause is also applicable for a second and independent reason – namely, it constrains the government without respect to where an individual habeas petitioner is located.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

Respectfully submitted,

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Dated: August 24, 2007

47P

(22) (16)

No. 06-1195, 06-1196

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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INTERESTS OF THE AMICI

Pursuant to Rule 36 of the Rules of this Court, Amnesty International, the Human Rights Institute of the International Bar Association, the International Federation for Human Rights, and the International Law Association respectfully submit this brief as *amici curiae* in support of Petitioners. The interests of *amici* are set forth in Appendix "A" hereto.[1]

SUMMARY OF ARGUMENT

The Military Commissions Act of 2006 ("MCA") purports to eliminate federal court jurisdiction "to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." Pub. L. No. 109-366, § 7(a), 120 Stat. 2600 (2006).

Amici respectfully urge this Court to find that by denying the availability of the writ of habeas corpus to Petitioners and similarly situated detainees, the MCA is an unconstitutional suspension of the writ that is also in direct conflict with the United States' obligations under international law.

The right to challenge the lawfulness of one's detention before a competent, independent and impartial

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[1] Amici state that no party or their counsel has authored this Brief in whole or in part nor has any person or entity other than *amici* and their counsel made monetary contribution to its preparation. All parties have consented to the filing of this Brief. Letters of consent have been lodged with the Clerk of the Court.

tribunal is a cornerstone of international human rights law. International human rights law, which is distinct from but complementary to international humanitarian law, applies to *all individuals* regardless of their location and status. Both as a matter of treaty and customary international law, the United States must accord individuals within its power or effective control, regardless of territorial boundaries or nationality, the rights protected by the relevant provisions of domestic and international law. *Amici* submit this brief to set forth the international legal framework that requires the United States to provide all individuals the right to effectively challenge the lawfulness of their detention.

In expressing its consent to be bound by the International Covenant on Civil and Political Rights ("ICCPR"), the United States affirmatively accepted the obligation that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR, adopted Dec. 19, 1966, art. 9(4), 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) ("ICCPR"). The United States remains bound by its international obligations, including those arising under the ICCPR.

The right of individuals to challenge the lawfulness of their detention in a court is also a fundamental principle of customary international law. This customary rule is evidenced by widespread state practice, and is reflected in numerous treaties, other international instruments, and international and domestic jurisprudence.

International human rights law also defines the nature of a competent, independent, and impartial tribunal, which is the *sine qua non* of any meaningful review procedure. The Combatant Status Review Tribunals ("CSRTs") were set up

by the United States, more than two years after detentions began in Guantánamo, following this Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), to determine whether each detainee being held in Guantánamo was "properly detained as an enemy combatant."

The CSRTs, however, fall far short of the international legal requirements for a competent, independent, and impartial tribunal administered under procedures which safeguard due process, in several important respects. Accordingly, detainees are precluded by the CSRTs' composition, procedural deficiencies and narrow subject matter jurisdiction from presenting a meaningful and effective challenge to the factual and legal basis for their detention.

The Court of Appeals' decision, which serves to deprive hundreds of individuals of their right to pursue their petitions for habeas corpus to challenge the legality of their detention, cannot be reconciled with the United States' obligations under international law.

I. INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW PROVIDE A SEAMLESS FRAMEWORK OF LEGAL PROTECTION FOR ALL INDIVIDUALS.

For over five years, the United States has subjected hundreds of individuals at the Guantánamo Bay Naval Base in Cuba to indefinite detention without charge or trial. Many detainees were taken into custody in Afghanistan and Pakistan during the international and non-international armed conflicts in Afghanistan, but an unknown number were detained far from any battlefield in a variety of other countries, including the Petitioners in *Boumediene* who were seized in Bosnia-Herzegovina.

None of the individuals detained in Guantánamo is a citizen of a nation presently at war with the United States.

As of August 22, 2007, there were approximately 355 detainees remaining in indefinite detention without charge at Guantánamo.[2] None of these detainees had had the lawfulness of his detention reviewed by a court of law. All except four detainees transferred to the base in 2007 had reportedly had final CSRT decisions in their cases. A CSRT affirmation of "enemy combatant" status represents a potential life sentence for a detainee. As the District Court noted, "[i]t is the government's position that in the event a conclusion by the tribunal that a detainee is an 'enemy combatant' is affirmed," the United States is legally permitted "to hold the detainee in custody until the war on terrorism has been declared by the President to have concluded or until the President or his designees have determined that the detainee is no longer a threat to national security." *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 451 (D.D.C. 2005). "At a minimum, the government has conceded that the war could last several generations." *Id.* at 465.

International human rights law and, where applicable, international humanitarian law, afford protection to all persons deprived of their liberty wherever detained. Human rights are inherent in the human person, as recognized by the Universal Declaration of Human Rights. Human rights treaty law applies to everyone within the territory or jurisdiction of the state concerned.

International humanitarian law, at times referred to as the law of war, does not displace international human rights

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[2] U.S. Department of Defense, Detainee Transfer Announced, No. 987-07, Aug. 9, 2007, *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=11219.

law. In situations of armed conflict, where international humanitarian law is applicable, the two bodies of law complement one another. The law of war does not apply where there is no situation of armed conflict, such as in the case of those Petitioners taken into United States custody in Bosnia-Herzegovina in January 2002 and transported to Guantánamo Bay. However, for detainees who are legitimately subject to the law of war, international humanitarian law constitutes *lex specialis*, or specific guidance, for the implementation of human rights guarantees.

For example, while human rights law prohibits the arbitrary deprivation of any person's life or liberty, international humanitarian law may be relevant in determining what is arbitrary in a situation of armed conflict. The International Court of Justice ("ICJ") has held that human rights law "does not cease in times of war . . . . The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict[.]" Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8).[3]

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[3] *See also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) (explaining that "the protection offered by human rights conventions does not cease in case of armed conflict"); *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 (Dec. 19, 2005); Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13, ¶ 11 (2004) ("While . . . more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.") ("General Comment 31");

Therefore, an individual detained in connection with an armed conflict is protected both by international humanitarian law and international human rights law. Those detained while participating in hostilities during the international armed conflict in Afghanistan (between October 7, 2001, and the establishment of the new government on June 19, 2002) may be entitled to protection under international humanitarian law relating to international armed conflict, while those detained after June 19, 2002, in the context of an ongoing armed conflict in Afghanistan are entitled to the protections relating to non-international armed conflict. All of the detainees, including those detained outside of armed conflict (international and non-international), are protected under the provisions of international human rights law.

II. INTERNATIONAL HUMAN RIGHTS LAW AFFORDS ALL INDIVIDUALS THE RIGHT TO CHALLENGE THE LEGALITY OF THEIR DETENTION BEFORE A COURT.

The right to be free from arbitrary detention is a universally recognized legal norm, essential for upholding the inherent dignity of all human beings and reaffirmed in every

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Inter-American C.H.R., Detainees in Guantanamo Bay, Cuba, Request for Precautionary Measures, (March 13, 2002) ("It is well-recognized that international human rights law applies at all times, in peacetime and in situations of armed conflict. . . . Further, in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another[.]").

major human rights treaty.[4] This right is also a binding rule of customary international law.

The United States invoked the universal prohibition on arbitrary detention before the ICJ almost thirty years ago, proclaiming that there is "a responsibility under international law, independent of any specific treaty commitment" to adhere to a "minimum standard of treatment which is recognized by the international community as due to all aliens," under which "aliens are entitled to be free from arbitrary . . . arrest and detention." *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States v. Iran*), Memorial of the Government of the United States of America, 181-182 (1980). The duty of every state to respect these rights, including the right not to be arbitrarily detained, is "reflected, *inter alia*, in the Charter of the United Nations, the Universal Declaration of Human Rights and corresponding portions of the International Covenant on Civil and Political Rights, regional conventions and other instruments defining basic human rights." *Id.*

Over the course of the three decades since the United States made this argument before the ICJ, the international community has continued to recognize and promote the

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[4] *See* ICCPR, art. 9; American Convention on Human Rights, Nov 22, 1969, art.7(3),(5),(6), 1144 U.N.T.S. 123, 9 I.L.M. 99 (entered into force July 18, 1978) ("ACHR"); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 5(1),(4), 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) ("ECHR"); African Charter on Human and Peoples' Rights, June 27, 1981, arts. 6, 7(1), O.A.U. Doc. CAB/LEG/67/3/rev. 5 (entered into force Oct. 21, 1986) ("African Charter"); League of Arab States, Revised Arab Charter on Human Rights, May 22, 2004, art. 14 (1)(2)(6), *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005) ("Arab Charter").

universal prohibition on arbitrary detention. As of August 22, 2007, 160 countries, including the United States, had become party to the ICCPR, which guarantees everyone the right not to be arbitrarily detained and obligates every state party to provide meaningful judicial review of the legality of all detention. The United States continues to assert that the ICCPR "is the most important human rights instrument adopted since the UN Charter and the Universal Declaration of Human Rights, as it sets forth a comprehensive body of human rights protections."[5]

The United States has repeatedly joined in consensus resolutions addressing arbitrary detention adopted by the former U.N. Commission on Human Rights. In a 2005 resolution, the Commission encouraged all states "[t]o respect and promote the right of anyone who is deprived of his/her liberty by arrest or detention to be entitled to bring proceedings before a court, in order that the court may decide without delay on the lawfulness of his/her detention and order his/her release if the detention is not lawful," and also "to ensure that [this right] is equally respected in cases of administrative detention, including administrative detentions in relation to public security legislation."[6]

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[5] Opening Statement to the U.N. Human Rights Committee by Matthew Waxman, Principal Deputy Director of the Policy Planning Staff at the Department of State, Head of US Delegation, Geneva, Switzerland, July 17, 2006, *available at* http://www.state.gov/s/p/rem/69126.htm.

[6] Arbitrary Detention, Human Rights Resolution 2005/28, *available at* http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN 4_RES-2005-28.doc

Such judicial review, in the form of habeas corpus and similar procedures in other legal systems, is an indispensable safeguard of the fundamental right of every person not to be illegally or arbitrarily detained.[7] "[T]he cornerstone guarantee . . . is that a detainee must have the right to actively seek judicial review of his detention." *Rakevich v. Russia,* Eur. Ct. H.R., App. No. 58973/00, ¶ 43 (2003).

The rule of law requires that the judiciary play a fundamental role in protecting the right to liberty and security of person inherent in every human being. The United Kingdom House of Lords (Law Lords), despite the continuing threat of terrorism, recently reaffirmed that "neither the common law, from which so much of the European Convention is derived, nor international human rights law allows indefinite detention at the behest of the executive, however well-intentioned." *A and others v. Secretary of State for the Home Department*, 2 AC 68, ¶ 222 (U.K.H.L. 2005). As the court explained, "[o]nly the courts can [authorize such detention] and, except as a preliminary step before trial, only after the grounds for detaining someone has been proved. Executive detention is the antithesis of the right to liberty and security of person." *Id.*

The United States has affirmatively accepted the right to access to a competent and independent court to challenge the legality of detention as a treaty obligation. Article 9 (4) of the ICCPR codifies the right of habeas corpus: "Anyone who

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[7] *See Habeas Corpus in Emergency Situations* (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Inter-Am. Ct. H.R., Advisory Opinion OC-8/87 of Jan. 30, 1987 at ¶ 35) (finding that for habeas to serve its purpose a detained person must be brought before a competent judge or tribunal to "obtain a judicial determination of the lawfulness of a detention[.]").

is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[8] The U.S. Senate consented to ratification of the ICCPR, without any reservations, understandings, or declarations with respect specifically to Article 9 (4).

Moreover, the right to challenge the legality of one's detention is a universal human right that is based on the inherent dignity of every person and does not rest on narrow legal distinctions between types of people, places, or circumstances. *See, e.g.,* ICCPR Preamble ("these rights derive from the inherent dignity of the human person"); *accord*, United States Declaration of Independence (proclaiming "that all men are created equal; that they are endowed by their Creator, with certain inalienable rights").[9] None of the human rights treaties that codify the right to such

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[8] The ICCPR provides in Art. 2 (1) that its scope of application should extend to "all individuals within its territory and subject to its jurisdiction[.]" The ICJ has found that this provision "did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory." Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131, ¶ 109. Thus, the ICJ agreed with the Human Rights Committee, the ICCPR's authoritative interpreter. *See* General Comment 31, ¶ 10 ("[A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party[.]").

[9] *See also* Judicial Guarantees in States of Emergency, Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (Ser. A) No. 9, ¶¶ 33-34 (1987) (holding that habeas corpus is among the "guarantees . . . derived from representative democracy as a form of government").

judicial review exempts any category of persons from its application.

This plain understanding has been repeatedly reaffirmed by the Human Rights Committee, the body of experts established under the ICCPR to monitor its implementation. For instance, when Finland argued that Article 9(4) of the ICCPR did not apply to members of the military detained under the military disciplinary codes where the maximum period was 15 days of close detention, the Committee observed that "the Covenant does not contain any provision exempting from its application certain categories of persons. . . . The all-encompassing character of the terms of [the Covenant] leaves no room for distinguishing between different categories of persons, such as civilians and members of the military, to the extent of holding the Covenant to be applicable in one case but not in the other." *Vuolanne v. Finland*, U.N. Human Rights Committee, Comm. No. 265/1987, ¶ 9.3, CCPR/C/35/D/265/1987 (1989); *see also* U.N. Human Rights Committee, General Comment 8, ¶ 1 (1982) ("[T]he right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention.").

In addition to its treaty obligation under the ICCPR, the United States is bound by customary international law to respect the right to such judicial review. The right to be provided access to a court to challenge the legality of detention is clearly among the binding rules of customary international law as a key component of the prohibition on arbitrary detention. Rules of customary international law are binding and arise from practices that states generally follow from a sense of legal obligation. *See* Restatement (Third) of Foreign Relations Law § 102 (2) (1987). The ratification and adoption of numerous treaties and international instruments,

as well as consistent state practice, demonstrate that States understand this right to be a matter of legal obligation.

The universal recognition that judicial review is an essential component of the right not to be arbitrarily detained is reflected in Article 9 (4) of the ICCPR and in the fact that all regional human rights instruments contain similar provisions.[10] The widely-held understanding of this right is that it does not apply only to criminal defendants, or only to citizens, but to *anyone* who is deprived of liberty. The United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment affirms that "[a] person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority." G.A. Res. 43/173, U.N. Doc. A/43/49, Principle 11.1 (1988).[11]

The right to such judicial review is also recognized by states around the world, including those that have faced terrorism and other serious security threats for decades. Regional human rights bodies have consistently held that individuals suspected of engaging in such activities retain their fundamental rights, including the right to challenge the legality of their detention before a competent and independent court. For instance, in the landmark *Castillo Petruzzi* case, the Inter-American Court of Human Rights held that despite "a terrible disruption of public law and order . . . with acts of terrorism that left many victims in their wake," Peru's holding of four suspected terrorists without the right to access to a

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[10] *See* ACHR, arts. 7(3),(5),(6); ECHR, arts. 5(1),(4); African Charter, art. 7(1); Arab Charter, art. 14(6).

[11] Adopted by U.N. General Assembly Resolution 43/173 of 9 December 1988.

court for habeas corpus proceedings violated their right against arbitrary detention. *Castillo Petruzzi et al. v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 52, ¶¶ 109-12 (1999). *See also Law Office of Ghazi Suleiman v. Sudan*, African Commission on Human and Peoples' Rights, Comm. Nos. 222/98 and 229/99 (2003) (upholding accused terrorists' right not to be arrested and detained without charge) ("ACHPR").[12]

The drafters of the major human rights treaties specifically contemplated situations in which states would legitimately seek to limit the scope of certain rights in exigent circumstances and included provisions permitting states to formally derogate from some provisions during public emergencies. ICCPR, art. 4; ACHR, art. 27. The established rule is that states may derogate from particular obligations formally and publicly, and that derogations must be temporary, non-discriminatory, and narrowly tailored to the extent that is strictly necessary to meet a specific threat to the life of the nation.[13] However, even applying these strict

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[12] *See also* Commission on Human Rights, Situation of Detainees at Guantánamo Bay, U.N. Doc. E/CN.4/2006/120 (2006) (report of five experts to the UN Commission on Human Rights) ("U.N. Experts Guantanamo Report").

[13] U.N. Human Rights Committee, General Comment 29, States of Emergency, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶ 2 (2001) ("General Comment 29") ("Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency."); *see also Brannigan and McBride v. United Kingdom*, 17 Eur. H.R. Rep. 539 (1993).

conditions, the right to challenge the lawfulness of one's detention can never be the object of derogations.

The U.N. Human Rights Committee, for example, considered whether curtailment of such judicial review is permissible under the ICCPR in situations of emergency. It determined that the provisions of Article 9 must be respected at all times. "States parties may in no circumstance invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance . . . through arbitrary deprivations of liberty". General Comment 29, ¶ 11. The Committee has also stressed that "a State party may not depart from the requirement of effective judicial review of detention." *Id.* at n.9. In any event, the United States has never proclaimed either a state of emergency as would be recognized under Article 4 of the ICCPR or an intent to derogate from any of the provisions of the ICCPR.

In addition to protecting the right of all persons to be free from arbitrary deprivations of liberty, judicial review also protects against other fundamental rights violations such as enforced disappearance, torture, and other cruel, inhuman and degrading treatment.[14] "In order to protect non-derogable

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[14] U.N. Committee Against Torture, Conclusions and Recommendations on the Second Periodic Report of the United States of America, U.N. Doc. CAT/C/USA/CO/2, ¶ 22 (2006) ("[D]etaining persons indefinitely without charge [at Guantanamo Bay] constitutes per se a violation of the Convention [Against Torture]"); *see also Habeas in Emergency Situations* at ¶ 35 ("[H]abeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment."). *See also*, Guidelines on

rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant." General Comment 29, ¶ 16. *See also Coard v. United States*, Inter-Am. C.H.R., Case No. 10.951, 109/99 (1999); ACHR, art. 27 (2) (prohibiting suspension of "the judicial guarantees essential for the protection of" other non-derogable rights); *Habeas Corpus in Emergency Situations*, ¶¶ 36, 42 (holding that the right of habeas corpus is non-derogable for this reason); General Comment 29, ¶¶ 15-16 ("It is inherent in the protection of rights explicitly recognized as non-derogable . . . that they must be secured by procedural guarantees, including, often, judicial guarantees.").

Therefore, as a matter of treaty and customary law, wars – however defined – and other emergencies do not justify a state's abandonment of its human rights obligations.

III. COMBATANT STATUS REVIEW TRIBUNALS ARE NOT AN ADEQUATE SUBSTITUTE FOR HABEAS CORPUS REVIEW UNDER INTERNATIONAL LAW.

In June 2004, this Court held in *Rasul v. Bush* that federal courts have jurisdiction to hear Guantánamo detainees' habeas petitions. 542 U.S. 466 (2004). In response

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Human Rights and the Fight Against Terrorism, Committee of Ministers of the Council of Europe, Sec. 7, ¶ 3, July 11, 2002 ("A person arrested or detained for terrorist activities must be able to challenge the lawfulness or his/her arrest and of his/her police custody before a court.").

to *Rasul* and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Administration established the Combatant Status Review Tribunals ("CSRTs") as its proposed means of providing Guantánamo detainees with some form of review of their classification as "enemy combatants."

The CSRTs themselves must be measured against the standards for a competent, independent, and impartial tribunal, because international law requires that detainees be able to access a court to challenge their detention, not merely be provided with appellate review of an administrative review procedure. The CSRTs fail to measure up to these standards.

The CSRTs consist of panels of three military officers who are "not bound by the rules of evidence such as would apply in a court of law" and may consider any information – including classified, hearsay, and coerced information – in making their determination as to whether, by a "preponderance of the evidence", the detainee is "properly detained as an enemy combatant".[15] The detainee is not entitled to legal counsel and is not entitled to have access to or know the details of any classified evidence used against him. There is a presumption that the Government Information submitted to the CSRT in support of the detainee's classification as an "enemy combatant" is "genuine and accurate."[16]

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[15] Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, Deputy Secretary of Defense, July 7, 2004, *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf ("CSRT Order").

[16] Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, July 14, 2006, *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf ("Implementation of CSRT Procedures").

In its concluding observations in 2006 on United States compliance with the ICCPR, the U.N. Human Rights Committee said: "The Committee is concerned that, following the Supreme Court's ruling in *Rasul v. Bush* (2004), proceedings before Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs)...may not offer adequate safeguards of due process," and noted in particular, "their lack of independence from the executive branch and the army, restrictions on the rights of detainees to have access to all proceedings and evidence, the inevitable difficulty they face in summoning witnesses, and [their capacity] to weigh evidence obtained by coercion for its probative value."[17]

The United States "should ensure, in accordance with article 9 (4) of the Covenant, that persons detained in Guantánamo are entitled to proceedings before a court to decide without delay on the lawfulness of their detention or order their release if the detention is not lawful." *Id.* With respect to the composition of such a court, the Committee noted that "due process, independence of the reviewing courts from the executive branch and the army, access of detainees to counsel of their choice and to all proceedings and evidence, should be guaranteed in this regard." *Id.*

The limited judicial review of finalized CSRT decisions provided under the Detainee Treatment Act of 2006 ("DTA") does not cure the CSRTs of their fundamental flaws or provide those held in Guantánamo with access to remedy, as required under international law. Pub. L. No. 109-148, 119

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[17] Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, July 10-28, 2006.

Stat. 2939 (2006). The DTA limits the scope of review, allowing jurisdiction only over whether a CSRT was "consistent" with its own deficient "standards and procedures[,]" § 1005 (e)(2)(C)(i), and whether those procedures are consistent with the Constitution "to the extent the Constitution and the laws of the United States are applicable[.]"§ 1005 (e)(2)(C)(ii). Thus, the appellate review provided under the DTA, which purports to prohibit fact-finding by the reviewing court, is severely limited. Furthermore, the DTA provides that "[n]othing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States." § 1005 (f).

The CSRT process falls far short of the international law standards embodied in ICCPR Article 9 (4), analogous international treaty provisions and customary law.[18] Courts and human rights bodies have interpreted Article 9 (4) and similarly worded provisions in regional human rights instruments to identify the minimum procedural guarantees to which detainees are entitled in challenging the lawfulness of their detention under international law. In the sections below, *amici* demonstrate that the CSRTs, in respect of their composition, powers, competencies and procedures, fail to meet these international standards.

The reasons why the CSRTs and the DTA review of their decisions does not provide a meaningful substitute for habeas corpus are set out at length in the briefs of the

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[18] ECHR, art. 5(4) employs nearly identical language as ICCPR, art. 9(4) and the case law interpreting 5(4) is cited in this brief to reflect findings on the customary law underlying the common principles of the ECHR, ICCPR and ACHR, art. 7(6) and Arab Charter, art. 14 (6).

Petitioners and several of the other *amici*. This brief will not repeat the discussion of those issues that appear elsewhere. *Amici* here address below only some of the most glaring structural defects of the CSRTs.

A. Competence of the Tribunal

Article 9(4) of the ICCPR requires that the presiding court must provide fundamental guarantees of judicial procedure and that the scope of judicial review must be wide enough to allow for an examination of all the conditions essential for lawful detention.[19] A competent court is one that can determine the legality of the deprivation of liberty and that has the authority to order the release of the detainee. ICCPR, Art. 9(4).[20]

Even when a detainee is determined by the CSRT not to be an "enemy combatant," the CSRT does not have the power to order the detainee's release.[21] The Court of Appeals

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[19] *A v. Australia*, U.N. GAOR, 59th Sess., U.N. Doc. CCPR/C/59/D/560/1993 (1997)(Mr. Bhagwati concurring) (explaining that "article 9, paragraph 4, which embodies a human right ... must be interpreted broadly and expansively"); *see also E. v. Norway*, App. No. 9278/81 & 9415/81, 35 Eur. Comm'n H.R. Dec. & Rep. 30 (1984).

[20] *A v. Australia*, at ¶ 9.5 ("[W]hat is decisive for the purposes of [art. 9(4)] is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release 'if the detention is not lawful,' article 9, paragraph 4, requires that the court be empowered to order release . . . .").

[21] For example, three of the thirty-eight detainees found not to be "enemy combatants" in the 558 CSRT decisions finalized by

is likewise given no authority under the DTA to order the release of the detainee if the CSRT procedures are found not to have been properly applied. The detainee will simply be returned to executive detention and perhaps another CSRT.

The court must be competent to satisfy the international obligation to provide the right to a remedy. As provided in ICCPR Article 2.3, a State must ensure that any person whose rights under the treaty are violated "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."

The U.N. Human Rights Committee has found that failure to comply with the requirements of right to judicial review under ICCPR 9(4) can also constitute a denial of a right to an effective remedy.[22]

B. Independence of the Tribunal

In order to ensure effective protection against arbitrary detention and to respect procedural fairness, including within the meaning of Article 9(4), the court before which detainees

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March 2005 were still in Guantánamo twenty months later, before being sent to Albania on or around November 16, 2006. Department of Defense, News Release, *available at* http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10204.

[22] *Luyeye Magana ex-Philibert v. Zaire*, Comm. No. 90/1981, U.N. Doc. CCPR/C/OP/2, ¶ 124 (1990); *Baritussio v. Uruguay (Carmen Amendola Masslotti and Graciela Baritussio v. Uruguay*, Comm. No. R.6/25, U.N. Doc. Supp. No. 40, A/37/40, ¶ 187 (1982)). *See also Castillo Petruzzi et al v. Peru*, Inter-Am. Ct. H.R. (Ser. C) No. 52, ¶¶ 174,188 (1999).

challenge their detention must function independently of any other branch of government – in this case especially the Executive who is empowered to order the detention – and must be sufficiently impartial to fulfill the requirements of the provision.[23] International bodies have consistently underscored the fundamental nature of this requirement.[24]

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[23] *Weeks v. United Kingdom*, App. No. 9787/82 (1987), 10 Eur. Comm'n H.R. Rep. 293, ¶ 61 (1987) ("The 'court' . . . does not necessarily have to be a court of law of the classic kind integrated within the standard judicial machinery of the country. The term denotes bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case, but also the 'guarantees' 'appropriate to the kind of deprivation of liberty in question' – 'of [a] judicial procedure', the forms of which may vary but which must include the competence to 'decide' the lawfulness of the detention and to order release if the detention is unlawful."); *Murat Satik and others v. Turkey*, Eur. Ct. H.R., App. No. 31866/96, ¶ 31 (2002); *Habeas Corpus in Emergency Situations*, ¶¶ 30-32; ACHPR, Principle M (5(e)) of the Principles and guidelines on the right to a fair trial and legal assistance.

[24] *Torres v. Finland*, U.N. Human Rights Committee, Comm. No. 291/1988, ¶ 7.2 (1990) ("[T]he committee has taken note of the State party's contention that the author could have appealed the detention orders ... to the Ministry of the Interior. In the Committee's opinion, this possibility ... does not satisfy the requirements of [art. 9(4)], which envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control."); *Vuolanne v. Finland*, U.N. Human Rights Committee, Comm. No. 265/1987, at ¶ 9.6 ("[W]henever a decision depriving a person of his liberty is taken by an administrative body or authority, there is no doubt that [art. 9(4)], obliges the State party

CSRT panels, which are composed entirely of military personnel whom the Executive can "control [and] direct ... is incompatible with the notion of an independent and impartial tribunal." *Olo Bahamonde v. Equatorial Guinea*, Comm. No. 468/1991, U.N. Doc. CCPR/C/49/D/468/1991, ¶ 9.4 (1993). Therefore, CSRTs are a legally inadequate forum for detainees to challenge their detention.

C. Procedural Deficiencies Undermining Fairness

1. Right to be Informed of the Basis for One's Detention

Detainees must be informed of the basis for their detention so that they can respond to arguments brought forward by the detaining authority. ICCPR, Art. 9 (2), (4). *See also Sanchez-Reisse v. Switzerland*, 9 Eur. H.R. Rep. 71, ¶ 51 (1987); *Trzaska v. Poland*, Eur. Ct. H.R., No. 25792/94, ¶ 78 (2000); *Toth v. Austria*, 14 Eur. H.R. Rep. 551, ¶ 84 (1991). A fair hearing is not possible if detainees are "denied access to those documents in the investigation file which are essential in order to effectively challenge the lawfulness of [one's] detention."*Lamy v. Belgium*, Eur. Ct. H.R., No. 19444/83, ¶ 29 (1989).

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concerned to make available to the person detained the right of recourse to a court of law . . . ."); *see also Keus v. Netherlands*, 13 Eur. Ct. H.R. Rep. 700, App. No. 12228/86, ¶ 28 (1990); *Lawless v. Ireland*, 1 Eur. Ct. H.R. (Ser. A, No. 3) (1961); *Ireland v. UK*, 25 Eur. Ct. H.R. (Ser. A) (1978); *Amnesty International and Others v. Sudan*, African Comm. on Human and Peoples' Rights, Comm. Nos. 48/90, 50/91, 89/93, ¶ 60 (1999).

The CSRT process violates this principle of Article 9 (2), (4) because the Government is not required to provide detainees with the information which forms the basis of the executive's determination of their "enemy combatant" status.[25] CSRTs merely require that a detainee be notified of any *unclassified* factual basis for his or her detention. CSRT Order (g)(1). The Government enjoys the discretion to determine what information is classified, and the vast majority of the information regarding "enemy combatant" status is deemed classified. *In Re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 468 ("[I]t appears that all of the CSRT's decisions substantially relied upon classified evidence.").

Detainees have an internationally recognized right to have access to information on which their detention is based. *See e.g., Lietzow v. Germany*, Eur. Ct. H.R., No. 24479/94 (2001) (finding a violation of article 5(4) because the defense had no access during hearings on detention to the prosecution files with statements of two witnesses – the basis on which the prosecution and the court relied in ordering detention).

A court examining a challenge to the legality of detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties. Equality of arms is not ensured if the detainee is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of the detention. *See, e.g., Lamy v. Belgium*, Eur. Ct. H.R., No. 19444/83, ¶ 29

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[25] "The detainee's Personal Representative only "*may* share the unclassified portion of the Government Information with the detainee." Implementation of CSRT Procedures, § F(8), July 14, 2006 (emphasis added).

(1989); *Nikolova v. Bulgaria*, Eur. Ct. H.R., App. No. 31195/96, ¶ 58 (1999).

2. Right to Be Represented by Counsel

Though the right to be represented by counsel in the course of challenging one's detention is not expressly enumerated in Article 9(4) or corresponding provisions in regional conventions and other international instruments, case law and state practice interpreting the right to judicial review assert that the right to be represented and present a defense is a fundamental guarantee.[26]

In its concluding observations in 2006 on United States compliance with the ICCPR, in relation to the Guantánamo detainees' rights under Article 9(4) to take proceedings before a court without delay to determine the lawfulness of their detention, the UN Human Rights Committee found that "access of detainees to counsel of their choice . . . should be guaranteed in this regard."[27]

For the CSRT process, however, the detainee "shall not be represented by legal counsel." Implementation of CSRT Procedures, July 14, 2006, Enclosure 1, Sec. F(5). Instead, the detainee is provided with a government-selected Personal Representative (PR) who is a commissioned officer

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[26] *Hammel v. Madagascar*, U.N. Human Rights Committee, Comm. No. 155/1983, ¶ 18 (1987) ("[t]he state party should ensure that all aspects of detention, including the period of detention and availability of legal aid, are administered in full compliance with article 9 of the Covenant.").

[27] Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, 2006.

in the U.S. Armed Forces and who "shall not be a judge advocate". Implementation of CSRT Procedures, July 14, 2006, Enclosure 3 §A(1). The PR's relationship with the detainee is not confidential and he or she can be obligated to divulge to the CSRT any information provided by the detainee. *Id.* § D. As the District Court pointed out, "there is inherent risk and little corresponding benefit should the detainee decide to use the services of the Personal Representative." *In Re Guantanamo Detainee Cases,* 355 F. Supp. 2d at 472.

The fundamental requirement that detainees have access to legal counsel in challenging the lawfulness of their detention cannot be satisfied by mere assistance from a non-lawyer agent of the detaining Government who is chosen by the detaining Government. By depriving the detainees of counsel, the CSRTs violate both international human rights treaties and customary international law.

3. Right to Be Present at the Hearing and the Right to Confront Accusers

Article 9(4) and corresponding provisions in other treaties require that detainees be afforded the right to be present to challenge their detention and the right to confront their accusers. "The proceedings must be adversarial and must always ensure 'equality of arms' between the parties . . . ." *Garcia Alva v. Germany*, Eur. Ct. H.R., App. No. 23451-94, ¶ 39 (2001). Furthermore, both the government and the detainee must be given access to and the opportunity to contest evidence introduced in the proceedings. *Id.*

A detainee may elect to participate in the CSRT process or may waive such participation. Waiver can be

inferred by the PR from a detainee's "silence or actions when the Personal Representative explains the CSRT process to the detainee." Implementation of CSRT Procedures, July 14, 2006, § F(1). No assessment of any such detainee's psychological condition is required, including in the case of an individual who has been in indefinite detention for several years virtually incommunicado and confronted by a culturally unfamiliar administrative review system.

The CSRT is authorized to request only "reasonably available" information in the possession of the government bearing on the issue of whether the detainee meets the criterion of designation as an "enemy combatant," and detainees–held for years virtually incommunicado far from their home countries–may present only the testimony of witnesses deemed "reasonably available" and whose testimony is considered by the CSRT to be "relevant." Implementation of CSRT Procedures, July 14, 2006, §§ E(3), F(6).

The CSRT records demonstrate that the United States has failed to uphold procedural justice. In 102 CSRTs, the government did not present a single witness against a single detainee. Every request to call an un-detained defense witness was denied. Seventy-four percent of requests to call a detained defense witness were denied. In 96% of the CSRTs, the government did not present any documentary evidence to the detainee prior to the hearing. In 89% of the tribunals, absolutely no evidence was presented on behalf of the detainee. The analysis of these 102 CSRTs contains countless additional and equally disturbing statistics.[28]

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[28] Denbeaux and Denbeaux, *No Hearing Hearings, CSRT: The Modern Habeas Corpus?* Seton Hall Univ. School of Law, *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

The CSRTs fail to ensure that detainees can be present to challenge their detention or that they have the opportunity to confront their accusers. Under CSRT rules, the government can exclude detainees from proceedings on national security grounds at its discretion. CSRT Order (g)(4). If the government classifies most or all information pertaining to a detainee's case, it effectively revokes the detainee's right to be present to challenge his or her detention. In addition, with the power to classify information, including testimony, and intelligence methods and activities used to obtain information, the government has the power to deny detainees the right to confront their classified accusers and their classified methods and activities.[29] CSRTs provide the detaining authority with exclusive control over detainees' right to attend their status tribunals and to confront their accusers. The government's exclusive control over, and consistent denial of these rights violates international law.

4. Obligation of State Not to Admit Coerced Evidence

Numerous allegations have come to light of torture and other cruel, inhuman or degrading treatment (ill-treatment) inflicted upon detainees held in Guantánamo, including in the custody of the United States or other governments prior to their transfer to the Naval Base. A number of detainees have alleged that they have made

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[29] *See, e.g.*, USA: Law and Executive Disorder: President Gives the Green Light to Secret Detention Program, August 2007, *available at* http://web.amnesty.org/library/pdf/AMR511352007ENGLISH/$File/AMR5113507.pdf.

statements as a result of torture, other ill-treatment or coercion.[30] International law prohibits the admission "in any proceedings" of information obtained under torture or other ill-treatment (except against a person accused of torture). *See* art. 15, CAT, Human Rights Committee, General Comment 20, ¶ 12, UN Doc. HRI/GEN/Rev.7 (1992).[31]

Prior to passage of the DTA, when the vast majority of CSRTs so far carried out were conducted, the tribunal was "free to consider any information it deem[ed] relevant and helpful to a resolution of the issues before it."[32] Admission of coerced information was neither prohibited nor subject to any

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[30] *See, e.g., In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 473 ("[T]he CSRT did not sufficiently consider whether the evidence upon which the tribunal relied in making its 'enemy combatant' determinations was coerced from the detainees."); *see also Boumediene v. Bush*, Brief of *Amici Curiae* Retired Federal Jurists in Support of Petitioners' Supplemental Brief Regarding the Military Commissions Act of 2006, In the U.S. Court of Appeals for the District of Columbia Circuit, Nov. 1, 2006 ("The CSRT panels did little to evaluate the probity of allegedly coerced evidence. . . .A number of CSRTs simply ignored testimony that the detainee's prior statements to interrogators were the result of torture. . . .*Amici* are not aware of a single CSRT that permitted the prisoner to develop an evidentiary record regarding statements allegedly obtained by torture.").

[31] The United States ratified the Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") on October 21, 1994.

[32] Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba, July 29, 2004. Encl. 1, § G(7).

inquiry to assess whether the information had been coerced. Under the DTA, CSRT's are to assess, "to the extent practicable, whether any statement derived from or relating to such detainee was obtained as a result of coercion and the probative value, if any, of such statement." Thus, CSRTs may still rely upon information coerced from persons including detainees who have been questioned while held in incommunicado or secret detention and persons who have been subjected to torture and other forms of ill-treatment. Implementation of CSRT Procedures, July 14, 2006, Enclosure 10, §B.

CONCLUSION

As this Court has long held, international law is an integral part of United States law. *The Paquete Habana*, 175 U.S. 677 (1900). The United States has a long-stated tradition of providing "a decent respect to the opinions of mankind." The Declaration of Independence, ¶ 1.[33] This practice seeks to inform the interpretation and understanding of core legal principles, such as due process and fundamental fairness.

Many of this Court's rulings have relied in part on comparative analysis and consideration of the international

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[33] The U.S. Department of State has also recognized the relevance of international law for purposes of judicial inquiry. Indeed, "[e]ven when a treaty is 'non-self-executing,' courts may nonetheless take notice of the obligations of the United States thereunder in an appropriate case...." Committee against Torture, Consideration of Reports Submitted By States Parties Under Article 19 of the Convention: United States of America, U.N. Doc. CAT/C/28/Add.5, ¶ 57 (2000).

obligations of the United States.[34] In *Atkins v. Virginia*, this Court noted the overwhelming disapproval of the world community in the imposition of the death penalty for offenders with mental retardation. 536 U.S. 304, 316 (2002). This Court found that such evidence "lends further support to our conclusion that there is a consensus among those who have addressed the issue." *Id.*

The uniformity of international opinion and international obligation on the issue of judicial access before the Court should be considered by this Court in deciding the important constitutional issues before it.

August 24, 2007 Respectfully Submitted,

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[34] *Roper v. Simmons*, 543 U.S. 551 (2005) ("It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."); *Lawrence v. Texas*, 539 U.S. 558 (2003) ("The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.").

APPENDIX

APPENDIX

AMNESTY INTERNATIONAL

Amnesty International Ltd is a company limited by guarantee. It aims to secure the observance of the Universal Declaration of Human Rights and other international standards throughout the world. It monitors law and practices in countries throughout the world in the light of international human rights and humanitarian law and standards. It is a worldwide human rights movement of some 1.8 million people (including members, supporters and subscribers). It enjoys Special Consultative Status to the Economic and Social Council of the United Nations and Participatory Status with the Council of Europe. Its mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression and freedom from discrimination, within the context of its work to promote all human rights. The organization works independently and impartially to promote respect for human rights, based on research and international standards agreed by the international community. It does not take a position on the views of persons whose rights it seeks to protect. It is concerned solely with the impartial protection of internationally recognized human rights.

HUMAN RIGHTS INSTITUTE OF THE INTERNATIONAL BAR ASSOCIATION

The Human Rights Institute of the International Bar Association helps to promote, protect and enforce human rights under a just rule of law, and works to preserve the

independence of the judiciary and legal profession worldwide. Founded in 1995, the Institute now has more than 7,000 members. The Institute was established by the International Bar Association, which was created in 1947, to support the establishment of law and the administration of justice worldwide, and is composed today of 30,000 individual lawyers and over 195 Bar Associations and Law Societies.

INTERNATIONAL FEDERATION FOR HUMAN RIGHTS

Established in 1922, the International Federation for Human Rights (FIDH) is a federation of 155 non-profit human rights organizations in more than 100 countries. FIDH coordinates and supports affiliates' activities at the local, regional and international level. FIDH strives to obtain effective improvements in the prevention of human rights violations, the protection of victims, and the sanction of their perpetrators. With activities ranging from judicial enquiry, trial observation, research, advocacy, and litigation, FIDH seeks to ensure that all international human rights and humanitarian law instruments are respected by State parties. FIDH also represents victims of grave crimes before the International Criminal Court in The Hague. Since 2002, FIDH has initiated and supported key proceedings before domestic courts and regional and international monitoring bodies in cases concerning arbitrary detention, torture, and other abusive practices undertaken in the context of the fight against terrorism.

INTERNATIONAL LAW ASSOCIATION

The Human Rights Committee of the American Branch of the International Law Association has a longstanding interest in the progressive development of the international legal order, the rule of law and the protection of fundamental human rights. It is comprised of individuals from the academic, public and private sectors who have extensive experience in the field of international law and, specifically, human rights law. Members of the Human Rights Committee have taught subjects such as international law, foreign relations law, human rights law and constitutional law and have written extensively in these fields. They have participated extensively at the trial and appellate court levels, including the United States Supreme Court, and have litigated cases involving the rights of aliens under domestic and international law. In the past, members of the Committee have testified before the Foreign Relations Committee of the United States Senate on a variety of issues, including human rights treaties.

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Supreme Court, U.S.
FILED
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35pp (30) (9)

Nos. 06-1195, 06-1196

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,
Petitioners,

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, *et al.*,
Respondents.

KHALED A.F. AL ODAH, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae the Association of the Bar of the City of New York (the "ABCNY") is an independent professional association of more than 22,000 lawyers, judges and legal scholars. Founded in 1870, the ABCNY is devoted to advancing the role of the legal system in our society, including protecting against Government infringement of individual rights guaranteed by the United States Constitution.

The ABCNY adheres to the fundamental proposition that the rule of law requires that all those in jeopardy of their freedom have meaningful access to counsel and courts. Assuring such access is a core concern of the ABCNY, and the ABCNY has asserted the critical importance of counsel in a wide range of civil, criminal, and immigration proceedings. The issues of this case implicate the lawyer's central role, not only of providing counsel to the individual whose liberty is at stake, but of assisting the tribunal by making the presentation concerning the relevant facts and law that only a trained advocate can provide. The ABCNY has an interest in ensuring that the issues in this case are resolved to give proper weight to values of individual liberty, fairness, and equal justice under law.

Amicus is particularly concerned with, and informed about, the position of the detainees at the Guantanamo Bay Naval Base. Several ABCNY members, acting in accord with the highest ideals of the profession, provide pro bono

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus* certify that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than *Amicus* or counsel, has made a monetary contribution to the preparation or submission of this brief. The Parties have consented to the filing of this brief; such consent, in the form of letters and/or blanket consent, has been filed with the Clerk of this Court. Sup. Ct. R. 37.3(a).

representation to the detainees, and the ABCNY has written a number of analyses, in reports and *amicus* briefs, concerning the legal requirements applicable to the detainees.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

On June 28, 2004, this Court held in *Rasul v. Bush*, 542 U.S. 466, 484 (2004), that aliens being detained at the United States Naval Base at Guantanamo Bay, Cuba ("detainees") were entitled to invoke the jurisdiction of federal courts to petition for a writ of habeas corpus to challenge the legality of their detention. The following year, Congress enacted the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) ("DTA"), and amended the habeas statute to provide that "no court, justice, or judge" may exercise jurisdiction over "an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba[.]" DTA § 1005(e)(1). Six months later, on June 29, 2006, this Court decided *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 (2006), and held that Section 1005(e)(1) of the DTA did not apply to habeas claims pending at the time of its enactment. Once more reacting quickly, Congress passed the Military Commissions Act of 2006, Pub. L. No. 109-366,

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[2] *See, e.g.*, THE IMPERIAL PRESIDENCY AND THE CONSEQUENCES OF 9/11: LAWYERS REACT TO GLOBAL WAR ON TERRORISM (James R. Silkenat & Mark R. Shulman, eds., 2007); Brief of *Amicus Curiae* the Association of the Bar of the City of New York, *et al.* in Support of the Respondent, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027); Brief of the Association of the Bar of the City of New York, *et al.* as *Amici Curiae* in Support of Petitioner, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184); Brief *Amici Curiae* of Bar Associations, *et al.* in Support of Petitioners' Motions to Set Procedures and for Entry of Protective Order and in Opposition to Respondent's Motion for Protective Order, *Bismullah v. Gates*, 2007 WL 2067938 (D.C. Cir. July 20, 2007) (Nos. 06-1197 and 06-1397).

120 Stat. 2600 (2006) ("MCA"), and again amended the habeas statute to provide that no court, justice, or judge shall have jurisdiction over an application for a writ of habeas corpus filed by a detainee determined to be, or awaiting determination as, an "enemy combatant," and that the amendment was intended to apply to "all cases, without exception, pending on or after the date of the enactment . . . ." MCA §§ 7(a) & (b).

The Suspension Clause of the United States Constitution provides that the "Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. If the privilege applies to a person in custody, Congress may withhold access to the Great Writ from that person only if it provides an adequate alternative.[3] No such adequate alternative exists for the detainees of Guantanamo Bay.[4] Under current procedures, a

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[3] *See INS v. St. Cyr*, 533 U.S. 289, 305 (2001) (noting that "a serious Suspension Clause issue would be presented if . . . [the] statutes have withdrawn [habeas] power from federal judges and provided no adequate substitute for its exercise"); *Swain v. Pressley*, 430 U.S. 372, 381 (1977); *see also Boumediene v. Bush*, 476 F.3d 981, 1004 (D.C. Cir. 2007) (recognizing that Congress, "[i]f it so chooses . . . may replace the privilege of habeas corpus with a commensurate procedure" and that this Court has, on three occasions, "found a replacement to habeas corpus to be adequate") (Rogers, J., dissenting).

[4] In the decision currently under review, *Boumediene v. Bush*, the court held that the detainees did not have a constitutional right to habeas relief, and, therefore, did not reach the question whether the review process provided for by the DTA is an adequate alternative to a habeas proceeding. 476 F.3d at 990–92. While *Amicus* believes that the detainees have the right to habeas relief, that issue is dealt with elsewhere by the Parties and other *amici*. The question of particular relevance to *Amicus*, and the issue *Amicus* addresses here, is the more limited question whether, in denying the detainees access to the writ of habeas corpus, Congress has provided an adequate alternative in the form of Combatant Status Review Tribunal proceedings combined with review by the D.C. Circuit. Because these proceedings deny a detainee any

three-person military tribunal reviews a detainee's enemy combatant status and, accordingly, whether the detainee may be held in custody, at a proceeding in which the detainee is denied any access to or representation by counsel. The United States Constitution prohibits the Government from depriving a person of his life, liberty, or property without due process of law. U.S. Const. amend. V. Due process requires that the litigant be provided notice and a meaningful opportunity to be heard, which, when a litigant's personal liberty is at stake, at minimum, requires that the litigant be permitted the assistance of counsel. The detainees of Guantanamo Bay are denied this essential component of due process.

Habeas relief routinely is granted when a petitioner was denied the effective assistance of counsel, and thereby denied his due process rights, at the underlying proceeding that extinguished his liberty. And in the habeas hearing itself, the petitioner never is refused the right to bring in counsel; indeed, courts often appoint counsel for a habeas petitioner to ensure adequate representation at the habeas hearing. Pursuant to the Combatant Status Review Tribunal ("CSRT") procedures and the DTA, however, a detainee's liberty is determined in a proceeding where the assistance of *any* counsel, including any counsel that the detainee has retained on his own behalf, is *affirmatively prohibited.* For this fundamental reason alone, the DTA cannot be regarded an adequate substitute for habeas.

The availability of counsel later, once the CSRT determination comes to the D.C. Circuit for review, does not render this statutory process an adequate alternative to habeas for at least two reasons: the availability of appellate review does not negate the denial of due process in the first

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counsel, retained or appointed—a deprivation of constitutional significance that would result in immediate relief by any habeas court—the answer is "no."

instance where liberty is extinguished, and the absence of counsel at the CSRT hearing stage virtually guarantees that the record on appeal will be inadequate for an Article III court to provide meaningful review.

ARGUMENT

I. The CSRT Procedure Explicitly Withholds From Detainees The Benefit Of The Assistance of Counsel.

In direct response to this Court's holding in *Rasul v. Bush* that detainees are entitled to invoke the jurisdiction of the federal courts to petition for a writ of habeas corpus to challenge the legality of their detention, 542 U.S. at 484, then-Deputy Secretary of Defense Paul Wolfowitz issued a memorandum to the Secretary of the Navy establishing CSRTs for the review of detainees' status as "enemy combatants."[5] The CSRT decides whether the detainee will remain classified as an "enemy combatant" and subject to imprisonment for an indefinite period. The Establishing Order defines "enemy combatant" as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." Establishing Order, *supra* note 5, at 1. Three weeks after the Deputy Secretary of Defense issued the Establishing Order, the Secretary of

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[5] Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* www.defenselink.mil/news/Jul2004/d20040707review.pdf [hereinafter "Establishing Order"].

the Navy issued a memorandum setting out the manner in which the CSRT procedures were to be implemented.[6]

The procedures outlined in both the Establishing Order and Implementation Memo for the review of status determinations raise serious due process concerns.[7] Detainees are not brought before a neutral decision-maker, but before a three-member panel of commissioned Armed Forces officers who have been informed that the detainee already has been determined to be an enemy combatant after "multiple levels of review by officers of the Department of Defense." Establishing Order, *supra* note 5, at 1. Detainees are not permitted to see any of the classified evidence upon which the determination of their enemy combatant status was based.[8] Implementation Memo, *supra* note 6, enc. (1) at 2–

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[6] Memorandum from Secretary of the Navy Gordon England for Distribution, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004), *available at* www.defenselink.mil/news/Jul2004/d20040730comb.pdf [hereinafter "Implementation Memo"].

[7] *See Hamdi v. Rumsfield*, 542 U.S. 507, 532–33, 539 (2004) (plurality) (determining that a United States citizen captured on the battlefield while engaged in combat against the United States there and detained, first at Guantanamo and then in the United States, is entitled to due process which, at minimum, requires notice of the basis for detention, a fair opportunity to be heard before a neutral decision-maker, and access to counsel). *Amicus* recognizes that the plurality in *Hamdi* limited its resolution to the precise circumstances presented there. When read with *Rasul*, however, *Hamdi* may fairly be interpreted to impose the same due process requirements for alien detainees at Guantanamo as for United States citizens detained as "enemy combatants."

[8] The "inherent lack of fairness" in CSRT proceedings was described in *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468 (D.D.C. 2005):

> The CSRT reviewed classified information when considering whether each detainee presently

3. Even though the CSRT procedures purportedly afford the detainees the right to call witnesses if "reasonably available," Department of Defense data reveal that detainees' requests to call witnesses routinely are denied, even when the witnesses also are detained at Guantanamo.[9] Establishing Order, *supra* note 5, at 2. The CSRT is not bound by any rules of evidence: the panel is free to rely on hearsay and is permitted to base its determination on testimony elicited by torture or other coercive means.[10] *Id.* at 3. The Government's evidence is granted a rebuttable presumption that it is "genuine and accurate," and the Government need only prove by a preponderance of the evidence that "each detainee meets the criteria to be designated as an enemy combatant." Implementation Memo, *supra* note 6, enc. (1) at 6. To grant the Government a "rebuttable presumption," when the detainee is in no position to rebut it, is in fact to grant the Government an irrebuttable presumption.

> before this Court should be considered an "enemy combatant" . . . . No detainee, however, was ever permitted access to any classified information nor was any detainee permitted to have an advocate review and challenge the classified evidence on his behalf. Accordingly, the CSRT failed to provide any detainee with sufficient notice of the factual basis for which he is being detained and with a fair opportunity to rebut the government's evidence supporting the determination that he is an "enemy combatant."

[9] *See* MARK DENBEAUX & JOSHUA DENBEAUX, NO-HEARING HEARINGS: CSRT: THE MODERN HABEAS CORPUS?, at 27 (2006), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf [hereinafter "NO-HEARING HEARINGS"].

[10] *Amici* Retired Federal Judges discuss the grave implications of a system in which an Article III court becomes complicit in a CSRT status determination (and the resulting imprisonment) in proceedings that lack the basic requirements of due process.

What little possibility that justice could be done by the CSRT process is eliminated by the deprivation of counsel: the detainees are not permitted the advice or assistance of lawyers at any point during the process. Rather, they are "assisted" by a "Personal Representative," and the Implementation Memo explicitly prohibits this Personal Representative from being a lawyer.[11] Although the Personal Representative is able to review all Government Information,[12] he is forbidden from revealing classified information to the detainee. Implementation Memo, *supra*

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[11] Implementation Memo, *supra* note 6, enc. (1) at 4 ("The detainee shall not be represented by legal counsel but will be aided by a Personal Representative . . . ."); *id.* enc. (3) at 1 ("The Personal Representative shall not be a judge advocate."). In contrast, it is "preferabl[e]" that the "Recorder," who "has a duty to present to the CSRT such evidence . . . as may be sufficient to support the detainee's classification as an enemy combatant," be a judge advocate. *Id.* enc. (2) at 1. The CSRT procedures do call for the appointment of a judge advocate officer as a "Legal Advisor to the Tribunal process." *Id.* enc. (1) at 2. The Legal Advisor is for the benefit of the Tribunal, and not the detainee. *See id.* ("The Director, CSRT, shall appoint a judge advocate officer as the Legal Advisor to the Tribunal process. The Legal Advisor shall be available . . . to each Tribunal as an advisor on legal, evidentiary, procedural or other matters.").

[12] "Government Information" is defined as:

> [S]uch reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings[.]

Implementation Memo, *supra* note 6, enc. (1) at 3.

note 6, enc. (3) at 2. Communications between the detainee and the Personal Representative are not confidential and may be revealed to the CSRT by the Personal Representative. *Id.* enc. (3) at 3. As Judge Green stated in *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 472, (vacated and dismissed for lack of jurisdiction by the court below), there is both "inherent risk" and "little corresponding benefit" to a detainee's choice to rely upon a Personal Representative.

During the hearing, the Personal Representative is under no obligation to act as an advocate in the detainee's favor. On the contrary, he is obliged to inform the detainee: "I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing." Implementation Memo, *supra* note 6, enc. (3) at 3. According to the Implementation Memo, the Personal Representative is appointed "to ensure [the detainee] understand[s] [the] process" and his function is to "assist" the detainee at the hearing, in gathering materials for the hearing, and in preparing an oral or written presentation for the Tribunal. *Id.* enc. (3) at 2–3. The Personal Representative may choose to "comment" upon classified information to the CSRT, outside the presence of the detainee, if he believes it would "aid" the Tribunal's deliberations. *Id.* enc. (3) at 2.[13] The only party with any obligation to alert the Tribunal to evidence that may be in the detainee's favor is the Recorder—the Government's advocate. *Id.* enc. (1) at 7.

The detainee's choice is truly no choice at all: take someone who is untrained and cannot put his best interests first, or take no one.

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[13] 12% of the time, the Personal Representative did not say a word. 36% of the time, he made non-substantive comments. 52% of the time, the Personal Representative made substantive comments; in a number of those cases, however, he did so to advocate on behalf of the Government. *See* NO-HEARING HEARINGS, *supra* note 9, at 16.

II. Access To Counsel When Liberty Is At Stake Is Central To Our System of Justice.

Effective assistance of counsel is fundamental to the rule of law when liberty is at stake. *Lakeside v. Oregon*, 435 U.S. 333, 341 (1978) ("In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel."); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) ("[The assistance of counsel] is one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty."); *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937) ("[T]he right of one accused of crime to the benefit of counsel . . . . ha[s] been found to be implicit in the concept of ordered liberty. . . . ") (internal citation and footnote omitted). Recognition that assistance of counsel is essential to the protection of liberty is premised on the reality that, without counsel's assistance, accused persons cannot meaningfully defend themselves and tribunals lack the wherewithal to reach just decisions.

A. When Liberty Is At Stake, Counsel Cannot Be Denied.

The importance of assistance by trained counsel is never greater than when the Government seeks to deprive a person of his liberty. This guiding principle has been recognized and articulated since the earliest days of our nation's Founding: the Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence" and federal law provided for the

appointment of counsel in federal capital proceedings. Federal Crime Act of 1790, ch. 9, 1 Stat. 112, 118. The right to the provision of counsel in all federal criminal proceedings which threaten the defendant's liberty, including non-capital proceedings, was confirmed in *Johnson v. Zerbst*, when this Court held that "[t]he Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." 304 U.S. at 463.

In *Powell v. Alabama*, 287 U.S. 45 (1932), this Court went beyond reliance on the Sixth Amendment and identified the interplay between the assistance of counsel and the essential element of due process, the right to be heard. "It never has been doubted," Justice Sutherland wrote, "that notice and hearing . . . constitute basic elements of the constitutional requirement of due process of law." *Id.* at 68. He continued: "Historically and in practice, in our own country at least, [a hearing] has always included the right to the aid of counsel . . . . The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* at 68–69. Accordingly, this Court held in *Powell* that, under the Fourteenth Amendment, in a state capital case, "it is the duty of the court . . . to assign counsel . . . as a necessary requisite of due process of law[.]" *Id.* at 71. Central to the holding in *Powell* was the fact "above all," that defendants "stood in deadly peril of their lives[.]" *Id.*

In a series of opinions issued thirty years later, this Court established, through the Sixth Amendment and principles of incorporation, that defendants are entitled to the appointment of counsel in all criminal proceedings, both federal and state, in which their liberty is in jeopardy. *See Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) ("We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether

classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."); *Gideon*, 372 U.S. at 344 (holding it is an "obvious truth" that any person "haled into court . . . cannot be assured a fair trial unless counsel is provided for him").

The right to the provision of counsel has not been limited to the criminal context. This Court has stated that the "pre-eminent generalization" of its precedents on the right to appointed counsel is that the right exists in cases "where the litigant may lose his physical liberty if he loses the litigation." *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981). Thus, "it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel[.]" *Id.*; *see also Vitek v. Jones*, 445 U.S. 480, 492, 496–97 (1980) (plurality) (due process requires appointment of counsel to indigent prisoners who are facing transfer hearings from the main prison facility to mental health hospital because of the "adverse social consequences" and "stigma" that can result from a finding of mental illness); *In re Gault*, 387 U.S. 1, 41 (1967) (because a juvenile delinquency proceeding, though civil, may result "in commitment to an institution in which the juvenile's freedom is curtailed," due process mandated the appointment of counsel); *cf. Addington v. Texas*, 441 U.S. 418, 425 (1979) ("This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.").

While the right to appointed counsel in cases where liberty is at stake is firmly entrenched in this nation's jurisprudence, the right to call on the assistance of retained counsel in such a situation is all the more indisputable. *Indeed, at no time has this Court, or any other, ever held that a litigant may be precluded from utilizing the assistance of*

counsel he has retained on his own behalf when his liberty is threatened.[14]

In *Powell*, Justice Sutherland wrote: "If in any case, civil or criminal, a . . . court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and . . . due process in the constitutional sense." 287 U.S. at 69. *See Chandler v. Fretag*, 348 U.S. 3, 9 (1954) ("Petitioner did not ask [to be furnished] . . . counsel; rather, he asked for . . . [time to] obtain his own. The distinction is well established in this Court's decisions. Regardless of whether petitioner would have been entitled to the appointment of counsel, *his right to be heard through his own counsel was unqualified.*") (internal citations omitted) (emphasis supplied); *see also Powell*, 287 U.S. at 68 ("[A hearing] has always included the right to the aid of counsel *when desired and provided by the party asserting the right.*") (emphasis supplied).

The litigant's unqualified right to rely upon retained counsel has been acknowledged outside the criminal context. Most recently, and most relevant here, in *Hamdi*, 542 U.S. at 539, a plurality of this Court determined that a United States citizen captured on the battlefield while engaged in combat against the United States there and detained, first at Guantanamo and then in the United States, "unquestionably has the right to access to counsel" during his habeas proceeding. *See also id.* at 553 ("[N]or, of course, could I disagree with the plurality's affirmation of Hamdi's right to counsel") (Souter, J., concurring in part and dissenting in part); *cf. Goldberg v. Kelly*, 397 U.S. 254, 270 (1970)

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[14] *Cf. United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2562–64 (2006) (holding that erroneous exclusion of retained counsel, even when competent counsel is provided, violates a defendant's Sixth Amendment right to the assistance of counsel of choice and that such violation is per se reversible error).

("[T]he recipient must be allowed to retain an attorney if he so desires.") (termination of welfare benefits).

The principle that assistance of counsel is necessary when liberty is at stake rests, in part, on the fact that most laypersons lack the expertise required to represent themselves effectively. In *Powell*, this Court recognized that "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law." 267 U.S. at 69. Because the layman "lacks both the skill and knowledge adequately to prepare his defense," this Court determined that due process required the defendant have the "guiding hand of counsel at every step in the proceedings against him." *Id.* The layman's inability to defend himself adequately is exacerbated where the litigant is in a vulnerable position because of limited resources, education or language skills, or otherwise has "a greater need for assistance in exercising [his] rights." *Vitek*, 445 U.S. at 496.

This Court has observed also that the unrepresented are particularly vulnerable when faced with an adversary equipped with the familiarity with the legal system that they lack. *See, e.g., United States v. Cronic*, 466 U.S. 648, 654 (1984) ("[T]he core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.") (quoting *United States v. Ash*, 413 U.S. 300, 309 (1973)); *Bhd. of R.R. Trainmen v. Virginia ex rel Va. State Bar*, 377 U.S. 1, 7 (1964) ("Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries[.]"); *Johnson*, 304 U.S. at 462–63 ("[The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.").

B. The Assistance of Counsel Furthers Society's Interest In Assuring Justice.

The right to counsel is necessary, not only to protect an accused's liberty interests, but also to further the interest of the courts and society in ensuring justice. *See Penson v. Ohio*, 488 U.S. 75, 84 (1988) ("The paramount importance of vigorous representation follows from the nature of our adversarial system of justice."); *Cronic*, 466 U.S. at 655 ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.") (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)); *Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."); *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness."). Indeed, courts, judges, and the judicial system as a whole cannot function without the aid of effective attorneys. *See, e.g.*, Irving R. Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175, 175 (1974) ("The interdependence of bench and bar is the linchpin of our legal system.").

Because the adversarial presentation from competing counsel is essential to reaching just results, the absence of representation for one side necessarily places that objective in peril. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546 (2001) (noting that restrictions on access to counsel and undue limitations on the effectiveness of counsel are both a danger to individual rights and a "severe impairment of the judicial function"); *Lankford v. Idaho*, 500 U.S. 110, 127 (1991) ("If . . . the adversary process is not permitted to function properly, there is an increased chance of error, and

with that, the possibility of an incorrect result.") (internal citation omitted); *see also* Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 505 (1998) ("[T]he task of determining the correct legal outcome is rendered almost impossible without effective counsel.")

III. The CSRT Procedure And Review By The D.C. Circuit Cannot Substitute Adequately For Habeas Relief.

A. Due Process Requires That Counsel Assist Detainees Before The CSRT.

Though it lacks virtually all of the procedural safeguards associated with a fair fact-finding process, the CSRT proceeding effectively is the detainee's "trial": subject only to limited review by the D.C. Circuit, it is the detainee's sole opportunity to contest his designation as an enemy combatant and thus his continued, potentially lifelong, imprisonment by United States authorities. According to the Establishing Order, the Government's advocate supplies the Tribunal with all the documentary evidence supporting the Government's determination that the detainee is an enemy combatant, and the detainee is provided the opportunity to present evidence as to why he should not be classified as an enemy combatant, to question witnesses, and to speak on his own behalf. Establishing Order, *supra* note 5, at 2–3. The Tribunal determines, by majority vote applying a preponderance of the evidence standard, whether the detainee was properly classified. *Id.* at 3. The determination of the detainee's status may result in the indefinite loss of his liberty. Like a criminal trial or civil proceeding in which the litigant's liberty is at stake, the CSRT purports to be both a

fact-finding proceeding and a definitive adjudication of the detainee's status.

Because the CSRT proceeding can result in the detainee's indefinite confinement, due process requires that the detainee be permitted the assistance of counsel in connection with the proceedings.[15] As discussed above, this Court, beginning in *Powell*, has held steadfastly that the fundamentals of due process—notice, the opportunity to be heard, and the right to counsel—are required when life or liberty is at stake. *See* 287 U.S. at 68–69; *see also Vitek*, 445 U.S. at 492, 496–97 (indigent prisoner facing transfer hearing from main prison facility to mental health hospital must be provided with due process); *In re Gault*, 387 U.S. at 41 (juvenile delinquency hearing which may result in commitment must accord with principles of due process).

Powell is particularly apt. It is difficult to imagine a situation that exemplifies the factors that influenced this Court's decision there more saliently than the present one. In *Powell*, it was the defendants' "ignorance and illiteracy . . . their youth, the circumstances of public hostility, the imprisonment and the close surveillance . . . by the military forces, the fact that their friends and families were all in other states and communication with them [was] necessarily difficult, and above all that they stood in deadly peril of their lives" which persuaded this Court to hold they had a due process right to the assistance of counsel. 287 U.S. at 71. Here, similarly, the detainees of Guantanamo

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[15] That the detainees held at Guantanamo have rights under the Due Process Clause and are entitled to fundamental procedural fairness before being subjected to potentially lifelong incarceration follows ineluctably from this Court's decisions in *Rasul* and *Hamdi*. The error of the court below's contrary conclusion is fully canvassed in other briefs submitted to the Court. Moreover, as the Parties and various *amici* also demonstrate, habeas petitioners at common law were entitled to the unfettered assistance of counsel in investigation and advocacy—an entitlement that the Suspension Clause protects regardless of whether or not the detainees have Fifth Amendment rights.

have been imprisoned for years without charges; they are held under harsh, often isolating conditions that in many cases have had damaging effects on their mental and physical condition; they are unfamiliar with our language, laws, and customs; they are deprived of support or communications with family and friends and closely guarded at all times; they have no independent ability to communicate with potential witnesses or obtain access to any other evidence that might help their cause; and they are faced with the prospect of indefinite detention, possibly for life. As Judge Kollar-Kotelly observed in *Al Odah v. United States*:

> [I]t is simply impossible to expect [the detainees] to grapple with the complexities of a foreign legal system and present their claims to this Court without legal representation. [They] face an obvious language barrier, have no access to a law library, and almost certainly lack a working knowledge of the American legal system.

346 F. Supp. 2d 1, 8 (D.D.C. 2004). Absent counsel, the detainees have virtually no hope of adequately representing themselves or advocating on their own behalf.

Finally, unlike the detainee who has only his "Personal Representative," in most cases the Government will be represented by a trained lawyer. *See* Implementation Memo, *supra* note 6, enc. (1) at 2 (stating that the Personal Representative "shall not be a judge advocate," but that it is "preferabl[e]" the Recorder be one). Although Department of Defense data demonstrate that the Government rarely calls witnesses or produces evidence during the CSRT proceedings, instead relying on the presumption of reliability

granted to classified evidence,[16] the fact remains that, by design, the CSRT procedure forces detainees into the precise position of imbalance that has influenced this Court's determination that the absence of counsel at hearings in which a litigant's liberty is at stake raises due process concerns. *See, e.g., Cronic*, 466 U.S. at 654; *Johnson*, 304 U.S. at 462–63.

We do not suggest that the absence of counsel is the sole due process inadequacy of the CSRT process, or that providing counsel to the detainees would alone cure the constitutional deficiencies of the process. As discussed in the briefs of the Parties and several other *amici*, the CSRT has a number of structural limitations—including the lack of access to classified information, the presumptive reliability of that information, the admission of hearsay evidence and evidence elicited by torture, and the limited or nonexistent ability to confront the Government's witnesses—which singly and in combination raise many troubling due process concerns. We do maintain, however, that when the deck is stacked so solidly against the detainee, the assistance of counsel may be all that stands between an innocent prisoner and a lifetime in jail.

The CSRT procedure explicitly forbids detainees the assistance of counsel, yet presumes to determine their liberty. By so doing, the CSRT fails to provide the essential component of due process that this Court requires when a person's liberty is at stake.

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[16] NO-HEARING HEARINGS, *supra* note 9, at 5.

B. The Great Writ Provides Relief When Liberty Is Adjudicated At Trial Without The Assistance Of Counsel While The CSRT And The DTA Do Not.

The complete absence of the assistance of counsel at the trial stage, where the right of liberty is first determined, is an error sufficient to mandate immediate habeas relief. *Chandler*, 348 U.S. at 10 ("By denying petitioner any opportunity whatever to obtain counsel . . . the trial court deprived him of due process of law as guaranteed by the Fourteenth Amendment. It follows that petitioner is being held by respondent under an invalid sentence. The . . . denial of habeas corpus relief[] is accordingly reversed."); *cf. Johnson*, 304 U.S. at 468 (holding that if the Sixth Amendment requirement that counsel be appointed for an indigent defendant "is not complied with, the court no longer has jurisdiction . . . . [t]he judgment . . . is void, and one imprisoned thereunder may obtain release by habeas corpus").

This is so because "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658.[17] "The

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[17] To provide effective assistance defense counsel must, among other obligations, consult with his or her client, investigate the facts, mount a competent defense, and raise objections to potentially prejudicial evidence. *See Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (reviewing precedents establishing counsel's duty to "conduct a thorough investigation of the defendant's background") (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)); *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984) (finding ineffective assistance of counsel requiring habeas relief when lawyer "prepared no defense strategy . . . . filed no pretrial motions, sought no defense witnesses, failed to properly interview . . . accused witnesses, . . . failed to interview the state's witnesses" and "did not visit the scene of the crime"). *See generally United States v. DeCoster*, 487 F.2d 1197, 1203–04 (D.C. Cir. 1973)

presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *Id.* at 659. Such unfairness renders the "adversary process itself presumptively unreliable." *Id.* The guarantee of a fair trial is so central to the proper functioning of the judicial system and our nation's ideals of due process, that the defendant is entitled to immediate relief, even when represented by counsel, if that representation was constitutionally deficient. *See id.* at 654 n.11 ("In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant's Sixth Amendment right to 'have Assistance of Counsel' is denied.") (quoting *United States v. DeCoster*, 624 F.2d 196, 219 (D.C. Cir. 1976) (MacKinnon, J., concurring)); *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel.").

When presented with a petition for habeas relief from a detention determination reached by a tribunal or other authority where counsel is barred from aiding the prisoner, a habeas court would have no choice but to provide immediate relief to the detainee, no matter what other incidents of due process might have been granted. The review the DTA provides does not mandate the same result. The D.C. Circuit's review is severely limited in scope: the court has jurisdiction only to review whether the CSRT proceedings conformed to the standards and procedures specified by the Secretary of Defense and whether the standards and procedures employed by the CSRT are consistent with the Constitution and laws of the United States "to the extent the

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(holding that a defendant is entitled to "reasonably competent assistance" and setting forth specific duties a lawyer owes to his or her client).

Constitution and laws of the United States are applicable."[18] DTA § 1005(e)(2)(C)(i) & (ii). The DTA does not permit the detainee to conduct discovery at the appellate level or to submit new evidence to the D.C. Circuit. There is no evidentiary hearing, no investigation, no presentation of witnesses or exculpatory evidence; the appellate court does not engage in habeas-like fact finding; its review is not *de novo*. In short, the relief afforded by the DTA is the furthest cry from the relief possible under the Great Writ.

C. Assistance Of Counsel On Appeal Does Not Cure The Deficiencies At The CSRT.

Section 1005(e)(2)(A) of the DTA provides that the D.C. Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." The fact that detainees may be represented by counsel on appeal to the D.C. Circuit does not cure the constitutional deficiency of the CSRT proceeding. A later appeal does not change the reality that the detainee was denied due process during the initial proceeding in which his liberty was adjudicated. Furthermore, the D.C. Circuit's review cannot be meaningful, as it is limited to the CSRT record, created at a proceeding in which the detainee was prohibited access to counsel, and the Government Information, to which the

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[18] Considering the determination of the court below that Guantanamo detainees have no constitutional rights, *see Boumediene*, 476 F.3d at 992–93, it is unclear what protection, if any, this latter provision provides. As demonstrated by *Amicus*, if the detainees have rights under the Constitution, then the entire CSRT procedure is invalid because of the deprivation of counsel.

detainee does not have access and therefore has not been subject to adversarial testing.[19]

1. The Detainee Is Entitled To Have Counsel Advocate On His Behalf Before The Initial Decisionmaker.

Because the detainee cannot be represented or assisted by counsel while preparing for or during the CSRT hearing, the hearing result presented to the D.C. Circuit is "presumptively unreliable." *See Cronic*, 466 U.S. at 659. Procedural deficiencies which deprive the litigant of a fair trial and due process of law cannot be cured by appellate review. *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972). In *Ward*, the respondent argued that any "unfairness at the trial level" caused by an non-impartial adjudicator could be "corrected on appeal and trial de novo[.]" *Id.* at 61. This Court held, however, that "the State's trial court procedure [may not] be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication." *Id.* "Petitioner is entitled to a neutral and detached judge in the first instance." *Id.* at 61–62. Here, as in *Ward*, the detainees are entitled to due process "in the first instance." And due process requires that the detainees be permitted the assistance of counsel at the proceeding in which their liberty interest is determined, which is, the CSRT proceeding. The detainees are not permitted such assistance; it is explicitly withheld from them. Review by the D.C. Circuit cannot ameliorate that wrong.

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[19] In *Bismullah v. Gates*, 2007 WL 2067938, at *7 (D.C. Cir. July 20, 2007), the court held that, for purposes of appeal, the "record" consists of the Government Information "plus any evidence submitted by the detainee or his Personal Representative."

2. A Record Assembled Without The Participation Of Counsel Provides An Inherently Unreliable Record For Review.

Even if it were possible for appellate review to diminish the procedural unfairness of an initial proceeding, appellate review of the CSRT determination cannot reliably reach just results, much less substitute for the procedures available in a habeas court. The CSRT determination of the detainee's status is made based on information to which, in large part, the detainee has no access, and at a proceeding in which the detainee is denied counsel. The result is a record for appellate review that lacks the degree of constitutional integrity necessary for that review to be meaningful.

The participation of counsel in an adversarial proceeding is essential to the development of the facts and law that create a complete and adequate record. *See McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders*, 264 F.3d 52, 78 (D.C. Cir. 2001) ("Critical to the development of a proper record is a well-functioning adversarial process in which lawyers serve both as zealous representatives of their clients and as officers of the court[.]") (Tatel, J., concurring in part and dissenting in part); *United States v. Kincade*, 379 F.3d 813, 838 (9th Cir. 1994) ("In our system of government, courts base decisions . . . on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record."). It was precisely because the detainees were unable to "investigate the circumstances surrounding their capture and detention" on their own that Judge Kollar-Kotelly held in *Al Odah v. United States* that the detainees had the right to the assistance of counsel "in order to properly litigate the habeas petitions presently before the Court and in the interest of justice." 346 F. Supp. 2d at 8 ("To say that Petitioners' ability to investigate the

circumstances surrounding their capture and detention is 'seriously impaired' is an understatement. The circumstances of their confinement render their ability to investigate nonexistent.").

A complete and accurate record is vital; without it, appellate courts are unable to serve the reviewing function that is committed to them by law. *See, e.g., United States v. Lewis*, 433 F.2d 1146, 1152 (D.C. Cir. 1970) ("The rationale for these requirements [such as the requirement that a party object during trial in order to preserve it on appeal] includes importantly the need for a record, developed by adversary processes, on which appellate consideration and resolution can safely proceed.") (footnote omitted); *Lee v. Habib*, 424 F.2d 891, 897 (D.C. Cir. 1970) ("There can never be effective appellate review if the reviewing court is not able to obtain a clear picture of the precise nature of the alleged errors in the court below."); *cf. Smith v. Robbins*, 528 U.S. 259, 295 (2000) (Souter, J., dissenting) ("A judicial process that renders constitutional error invisible is, after all, itself an affront to the Constitution.").

The D.C. Circuit's review is confined to the Government Information, much of which the detainee is prohibited from seeing, and the record of a proceeding based upon that Information, in which the Information is granted a presumption of accuracy. At no point is the detainee afforded a realistic opportunity to challenge the evidence against him or fully to develop the evidence that might exonerate him. The result is appellate review of a record that has never been subject to true adversarial testing—which is to say, no review at all.

The assistance of counsel at the appellate level is too little, too late: confined to an incomplete, inadequate, and potentially inaccurate record, the appellate court is incapable of conducting a meaningful review of the determination below. Rather than exercising the right to a meaningful review, the detainee exercises "only the right to a

meaningless ritual . . . ." *Douglas v. California*, 372 U.S. 353, 358 (1963).

CONCLUSION

The decision of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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64 41P (20) (14)

Nos. 06-1195, 06-1196

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*

KHALED A.F. AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF ON BEHALF OF FORMER FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici curiae will address the following question, which bears on the first question presented in *Boumediene v. Bush*, No. 06-1185, and the second and fourth questions presented in *Al Odah v. United States*, No. 06-1186:

> Whether federal judicial review under the Detainee Treatment Act (DTA), Pub. L. No. 109-148, tit. X, 119 Stat. 2680, 2739 (2005), of a final decision by the Combatant Status Review Tribunal (CSRT) that an individual is properly detained by the government as an enemy combatant is an adequate substitute for the common law writ of habeas corpus, when the CSRT may have relied on statements extracted by torture or other impermissible coercion and the DTA does not appear to authorize the court to make factual determinations regarding such reliance in ruling on the legality of the detention.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former federal judges who dedicated their judicial careers to promoting the rule of law:

Hon. William G. Bassler (appointed to the United States District Court, District of New Jersey, by President George H.W. Bush; served 1991-2006);

Hon. Michael Burrage (appointed to the United States District Court, Western, Northern and Eastern Districts of Oklahoma, by President Clinton; 1994-2001);

Hon. Edward N. Cahn (appointed to the United States District Court, Eastern District of Pennsylvania, by President Ford; served 1974-1998);

Hon. Susan Getzendanner (appointed to the United States District Court, Northern District of Illinois, by President Carter; served 1980-1987);

Hon. Shirley Hufstedler (appointed to the United States Court of Appeals for the Ninth Circuit by President Johnson; served 1968-1979);

Hon. Nathaniel R. Jones (appointed to the United States Court of Appeals for the Sixth Circuit by President Carter; served 1979-2002);

Hon. Thomas D. Lambros (appointed to the United States District Court, Northern District of Ohio, by President Johnson; served 1967-1995);

Hon. Timothy K. Lewis (appointed to the United States District Court, Western District of Pennsylvania, by George H.W. Bush; served 1991-1992; appointed to the United States Court of Appeals for the Third Circuit by President George H.W. Bush; served 1992-1999);

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[1] Letters from all parties consenting to the filing of this brief are being filed with the Clerk of this Court, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief.

Hon. James K. Logan (appointed to the United States Court of Appeals for the Tenth Circuit by President Carter; served 1977-1998);

Hon. H. Curtis Meanor (appointed to the United States District Court, District of New Jersey, by President Nixon; served 1974-1983);

Hon. Abner Mikva (appointed to the United States Court of Appeals for the District of Columbia Circuit by President Carter; served 1979-1994);

Hon. William A. Norris (appointed to the United States Court of Appeals for the Ninth Circuit by President Carter; served 1980-1997);

Hon. Robert J. O'Conor, Jr. (appointed to the United States District Court, Southern District of Texas, by President Ford; served 1975-1984);

Hon. Stephen Orlofsky (appointed to the United States District Court, District of New Jersey, by President Clinton; served 1995-2003);

Hon. Raul A. Ramirez (appointed to the United States District Court, Eastern District of California, by President Carter; served 1980-1989);

Hon. Stanley J. Roszkowski (appointed to the United States District Court, Northern District of Illinois, by President Carter; served 1977-1998);

Hon. H. Lee Sarokin (appointed to the United States District Court, District of New Jersey, by President Carter; served 1979-1994; appointed to the United States Court of Appeals for the Third Circuit by President Clinton; served 1994-1996);

Hon. William S. Sessions (appointed to the United States District Court, Western District of Texas, by President Ford; served 1974-1987);

Hon. Patricia M. Wald (appointed to the United States Court of Appeals for the District of Columbia Circuit by President Carter; served 1979-1999);

Hon. Alfred M. Wolin (appointed to the United States District Court, District of New Jersey, by President Reagan; served 1987-2004).

These consolidated cases raise an issue that goes to the heart of the process of judging and poses a significant threat to the integrity of the federal judicial process.

The Detainee Treatment Act, Pub. L. No. 109-148, tit. X, 119 Stat. 2680, 2739 (2005), authorizes limited judicial review of an Executive Branch decision that an individual is properly detained by the government as an enemy combatant, but does not appear to authorize the court, when it rules on the legality of that detention, to determine whether statements upon which the detention is based were extracted by torture or other impermissible coercion. Such review cannot be considered an adequate substitute for the common law writ of habeas corpus.[2]

SUMMARY OF ARGUMENT

The English common law and our Nation's fundamental traditions condemn judicial reliance upon statements extracted by torture or other impermissible coercion. There are substantial allegations, however, that Combatant Status Review Tribunal (CSRT) panels have

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[2] The court of appeals denied, over dissent, leave to file a brief as *amici curiae* by several former federal judges (including some of the instant *amici*) on the ground that it was inappropriate for the proposed *amici* to describe themselves as "retired federal judges." C.A. Order (Dec. 29, 2006). This Court, however, has accepted for filing, and has relied upon, *amicus* briefs that have been submitted by former federal and state judges in other cases. *See, e.g.*, *Hamdan v. Rumsfeld*, 546 U.S. 1166 (2006) (mem.) ("The motion of former Federal Judges Shirley M. Hufstedler and William A. Norris for leave to file a brief as *amici curiae* [is] granted."); *Smith v. Robbins*, 528 U.S. 259, 282 n.13 (2000) (citing "Brief for Retired Justice Armand Arabian et al. as *Amici Curiae*").

relied on such statements to uphold the detention of individuals by the United States as enemy combatants. Those allegations cast a disturbing shadow over judicial review of the CSRT panel decisions. Unless the Detainee Treatment Act (DTA) authorizes the court to determine whether, and to what extent, an Executive detention is based on statements extracted by torture or other impermissible coercion when the court rules on the legality of the detention, judicial review under the DTA cannot be an adequate substitute for the common law writ of habeas corpus.

A. Torture has been illegal under English common law for more than 350 years. Even the notorious Star Chamber used torture rarely, and its willingness to do so was one of the reasons that it was abolished.

Common law judges did not admit as evidence against a defendant statements that had been extracted by torture because they recognized that such evidence is inherently unreliable and that it degrades the dignity of humanity and justice when judges acquiesce in such cruelty. The applicable common law rules of evidence also excluded confessions that had been coerced through means less cruel than torture.

Our Nation's founders shared the common law's revulsion for torture and other impermissible coercion. The Fifth Amendment's protection against self-incrimination was enacted as a direct response to the historical experience of the Star Chamber and was intended to prohibit extreme methods of coercion, including torture, as well as judicial reliance on statements extracted by such methods. Additionally, the prohibitions against unreasonable searches and seizures and cruel and unusual punishments, and also the guarantee of due process, reflect the Founders' antipathy to government cruelty and undue coercion within the justice system.

Like the common law courts, our Founding Fathers viewed statements extracted by impermissible coercion also as unreliable. They also prohibited the government from relying on such tactics as a means to protect individual

liberty, to guard against tyranny, and to preserve the balance between the state and the individual that lies at the core of the American system of government.

B. The public record reveals that CSRT panels routinely made detention determinations without investigating torture allegations or excluding statements allegedly extracted through impermissible coercion, and the government maintains that the CSRT panels were authorized to rely on evidence extracted through such means. The CSRT panels typically proceeded as though it was not their role to assess whether statements offered as evidence were extracted by impermissible coercion. The information presented to the panels might also have been insufficient to enable them to determine the provenance or reliability of such statements.

C. The judicial review authorized under the DTA does not appear to allow the court, when it rules on the legality of the detention, to engage in the factfinding necessary to determine the extent to which the CSRT's detention decision relied on statements extracted by torture or other impermissible coercion. As such, the statute would force the federal judiciary to uphold Executive Branch detention of an individual even when that detention is based on evidence that has long been considered unreliable, inadmissible, and contrary to human dignity. Such review corrupts the judicial function, contravenes established common law and legal tradition, and is an inadequate substitute for the common law writ of habeas corpus.

ARGUMENT

THE DETAINEE TREATMENT ACT'S JUDICIAL REVIEW IS NOT AN ADEQUATE SUBSTITUTE FOR THE COMMON LAW WRIT OF HABEAS CORPUS BECAUSE IT APPEARS THAT THE COURT IS NOT AUTHORIZED TO DETERMINE THE EXTENT TO WHICH THE CSRT RELIED ON STATEMENTS EXTRACTED BY TORTURE, OR OTHER IMPERMISSIBLE COERCION, WHEN THE COURT RULES ON THE LEGALITY OF THE DETENTION

Although there are few absolutes in history, this much is clear: Reliance on statements extracted by torture or

other impermissible coercion is contrary to the clear condemnation of such conduct that existed at common law and that is woven into the fabric of our Nation's Constitution. A judicial review procedure that does not allow a court to determine whether, and to what extent, the detention before it is based on statements extracted by torture or other impermissible coercion when the court rules on the legality of that detention ignores the lessons of history, taints the federal judiciary, and provides an inadequate substitute for the common law writ of habeas corpus.

A. Common Law Courts And Our Founding Fathers Denounced Torture As Illegal And Refused To Rely Upon Statements Extracted By Torture Or Other Impermissible Coercion

1. Torture has been illegal under English common law for more than 350 years

a. More than a millennium ago, torture was allowed in England in trials by ordeal, which required the accused to submit to various painful tests, to decide questions of guilt and civil liability. *See* A. Lawrence Lowell, *The Judicial Use of Torture*, 11 HARV. L. REV. 220, 221-222 (1897). The use of such torture tactics—often involving fire or water—was not based on any theory that such methods would lead to reliable statements, but rather on the belief that God would intervene to disclose the truth. *See* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 4 (1978).

Torture was abandoned as part of the truth-seeking function in England in 1215, when trial by jury was introduced. Indeed, England prided itself at that time on its rejection of the legal system adopted by continental Europe, which incorporated torture of criminal defendants as a systemic element of its legal machinery. *See* John H. Langbein, *Torture and The Law of Proof* 73 (1976). In the late 1400s, for example, Chief Justice Fortescue of the King's Bench emphasized that the torture conducted in Europe, but rejected in England, yielded unreliable results

and thus did "its utmost to condemn the innocent and convict the judge of cruelty." John Fortescue, *De Laudibus Legum Angliae, A Treatise in Commendation of the Laws of England* 73 (Francis Gregor, trans., Cincinnati, Robert Clarke & Co. 1874) (c. 1460-1470).

b. The use of torture had one, relatively brief, resurgence in England between 1540 and 1640, a period during which the notorious Star Chamber operated. *See* Langbein, *supra*, 79, 81. The Star Chamber supplemented the proceedings of the common law and equity courts in both civil and criminal matters and placed a premium on speed and flexibility. *See* 5 William S. Holdsworth, *A History of English Law* 156, 165 (1924). In criminal matters, the Star Chamber considered itself "free to disregard not only the ordinary rules of procedure, but also the ordinary rules of law," and, consequently, "torture was freely used, to extort either a confession, or the disclosure of further information." 5 Holdsworth, *supra*, at 184-185; *see* Lowell, *supra*, at 290.

Even during the height of the Star Chamber, however, torture was used relatively rarely by that body (and not at all by the common law courts). Torture was authorized only by special warrants issued by the King or his Privy Council, *see* Lowell, *supra*, at 293, and such warrants were issued in only eighty-one cases. *See* Langbein, *supra*, at 81; *see also* David Jardine, *A Reading on the Use of Torture in the Criminal Law of England* 73-109 (London, Baldwin and Cradock 1837) (collecting many of the warrants).[3] The

[3] Although the records of the warrants are incomplete, these eighty-one cases likely do "not drastically understate the total" number because torture "remained a very exceptional practice of the highest central authorities." Langbein, *supra*, at 82. The warrants typically authorized torture by rack or manacle, but could also include other coercion such as inhumane cells or extended deprivation of necessities. *See, e.g.*, Jardine, *supra*, at 79-80 (Sherwood Warrant) (accused committed to the "dungeon amongst the ratts"); *id.* at 82 (Humfrey Warrant) (authorizing "some slight kinde of torture, such as may not touch the losse of any lymbe, as by whipping"); *id.* at 31-32, 39 (Briant Warrant) (in addition to "the ordinary torture," authorizing "torture by

(Continued on following page)

most frequent victims of torture, by far, were those accused of political and religious wrongdoing, *see* Langbein, *supra*, at 88, 94-122, particularly those suspected of offenses against the State. *See* Lowell, *supra*, at 294-295.[4]

By the end of the Star Chamber period, common law courts declared that torture was unlawful and, in fact, regarded the preceding era as an improper exercise of royal prerogatives. Torture was clearly denounced as contrary to English law in the mid-to-late 1600s, some 350 years ago.

c. The precise explanation for the decline and ultimate cessation of torture in England is a matter of historical debate. Some attribute it to "the great constitutional struggle and civil war which made the government subject to the law" and prompted Parliament to abolish the Star Chamber. *A(FC) v. Secretary of State for the Home Department*, [2005] UKHL 71, at 53 ¶83, [2006] 2 A.C. 221 (appeal taken from Eng.) (Hoffman, L.); *see* An Act for the Regulating of the Privy Council, and for

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famine," during which the individual "was reduced to such extremities that he ate the clay out of the walls of his prison, and drank the droppings of the roof"); James Heath, *Torture and English Law* 190, 219 (1982) (Beesley and Humberson Warrant) (authorizing use of the "Little Ease," a small cell in which a man could not stand erect).

[4] In these instances, torture was most likely used to discover information about whom to investigate as possible accomplices, to quash threatened sedition, and to investigate felonies in which the victim had strong political connections. Torture was not viewed, even then, as a tactic that would directly yield reliable evidence for trial. *See* Langbein, *supra*, at 89-90, 136-137; Francis Bacon, *Certain Considerations, Touching the Better Pacification and Edification of the Church of England* (1604), *reprinted in* 2 Basil Montagu, *The Works of Francis Bacon, Lord Chancellor of England* 425 (Philadelphia, A. Hart 1850) ("torture is used for discovery, and not for evidence"). One popular commentator explained at the end of the 19th Century that he was not "aware of any single instance, even in the worst years of tyranny and prerogative, * * * when confessions obtained by the rack have been used for the conviction of accused persons." Frederick Andrew Inderwick, *The King's Peace: A Historical Sketch of the English Law Courts* 88-89 (London, Swan Sonnenschein & Co. Ltd. 1895) (footnote omitted).

taking away the Court commonly called the Star-Chamber (Habeaus Corpus Act), 1640, 16 Car. I, c. 10 § 3 (Eng.). At that same time, Parliament enacted legislation that is viewed as the predecessor of the Fifth Amendment's privilege against self-incrimination. *See* A Repeal of a Branch of a Statute *primo Elizabeth,* Concerning Commissioners for Causes Ecclesiastical, 1640, 16 Car. I, c. 11 § 4 (Eng.) (prohibiting ecclesiastical courts from requiring a person, under oath to "confess or to accuse himself or herself or any Crime * * * or any Neglect, Matter or Thing, whereby or by reason whereof he or she shall or may be liable or exposed to any Censure, Pain, Penalty or Punishment whatsoever"); John H. Wigmore, *The Privilege Against Self-Crimination: Its History*, 15 HARV. L. REV. 610, 633-635 (1902). These two Acts are appropriately viewed as a clear rejection of reliance on testimony extracted by torture or even lesser forms of compulsion.[5]

Other historians mark the turning point for the decline of torture to be a bit earlier, in the judicial consensus evidenced in *Felton's* case in 1628. *See R v. Felton,* (1628) 3 Howell's State Trials 369, 371. In that case, John Felton was accused of assassinating the Duke of Buckingham. One of the councilors employed to examine Felton threatened him with the rack unless he divulged the names of his accomplices. *Ibid.* The council then debated "whether by the law of the land they could justify the putting him to the rack," and King Charles I asked the common law judges whether it was legal to impose such torture. *Ibid.* The judges unanimously agreed that Felton "ought not by the law to be tortured by the rack, for no such punishment is known or allowed by our

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[5] The Act that abolished the Star Chamber also provided for judicial review of the legality of the Star Chamber's detentions. The Act stated that "any Person" imprisoned by order of the Star Chamber, King, or Council should have habeas corpus and be brought before the court "without delay" with the cause of imprisonment shown and determined whether "just and legal." Habeaus Corpus Act, *supra*, § 8.

law." *Ibid.*; *accord* James Heath, *Torture and English Law,* 162-164 (1982) (quoting Bulstrode Whitelocke the Elder's similar contemporaneous account of the decision in Felton's case).

Although some modern academics question the scope and accuracy of the report in *Felton*'s case, it was clearly understood in the late eighteenth century to express a definitive common law prohibition of torture. In reflecting on *Felton's* case, Blackstone stated in 1769 that a rack for torture "still remains in the tower of London: where it was occasionally used as an engine of state," but, he noted, the device was "not of law." William Blackstone, 4 *Commentaries* *326 (spelling modernized; footnotes omitted). *Accord* 2 Howell's State Trials 774 n.(a) (commentary added in 1775 by Francis Hargrave to fourth edition citing *Felton's* case for the proposition that torture was unlawful). Blackstone also praised the judges in *Felton's* case, noting that they had "declared unanimously, *to their own honour and the honour of the English law*, that no such proceeding was allowable by the laws of England." *Ibid.*; *see also* Leonard MacNally, *The Rules of Evidence of Pleas on the Crown* 278 (London, J. Butterworth 1802) (discussing *Felton's* case, "to the honour of the law, and of themselves, [the judges] unanimously resolved, that the *rack* cannot be legally used") (spelling modernized).

Moreover, writings by Sir Edward Coke contemporaneous to *Felton's* case reflected the same condemnation of torture as unlawful. In his *Second* and *Third Part of the Institutes of the Laws of England*, the manuscripts of which were prepared by Coke between 1629 and 1634, *see* 1 Steve Sheppard, *The Selected Writings and Speeches of Sir Edward Coke* lxv (2003), Coke asserted that to "put [a man] to torture" was contrary to the Magna Carta insofar as it would violate the prohibition on any freeman being in "any [way] otherwise destroyed" unless by lawful judgment or by law of the land. Edward Coke, *Second Part of the Institutes of the Laws of England* 48 (1642); Edward Coke, *Third Part of the Institutes of the Laws of England* 35 (1644). In his Third *Institutes*, Coke declared that "there is no law to warrant tortures in this land" and

"there is no one opinion in our books, or judicial record (that we have seen and remember) for the maintenance of tortures & torments." *Ibid.* (spelling modernized).[6]

These denunciations by preeminent jurists, together with the undisputed fact that the authorized use of torture ceased in England by the mid-1640s point to one conclusion: "that the Common Law, however ill-defined in some areas, did condemn interrogatory torture in any context, whether Executive, judicial (although outside its own process), or quasi-judicial." Heath, *supra,* at 178.

Now is not the time to abandon this 350-year-old doctrine.

2. Common law courts did not admit statements extracted by torture or other inhumane treatment to support determinations of guilt because of the inherent unreliability of such statements and because the cruelty of torture corrupts the judicial function

a. Even during the anomalous Star Chamber period, the weight of historical evidence indicates that statements extracted by torture or other inhumane treatment were not used against defendants in English common law courts. For example, a statute enacted in 1552 provided that a single confession was sufficient to prove the crime of treason, which normally required the testimony of two witnesses, but only if the confession was made "willingly without Violence." An Act for the Punishment of divers

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[6] Because Coke had, earlier in his career, signed warrants authorizing torture, Coke's denouncement of torture in his *Institutes* appears to reflect an evolution of his thinking on the issue. One scholar suggests that Coke's views changed "when the constitutional controversies of the seventeenth century had made it clear that the existence of any extraordinary power in the crown was incompatible with the liberty of the subject." 5 Holdsworth, *supra*, at 194. The *Institutes* thus reflected Coke's final conclusion that torture "always had been illegal by the common law, and the authority under which it had been supposed to be legalised he now denied." *Ibid.* (footnotes omitted).

kinds of Treasons, 1551, 5 & 6 Edw. VI, c. 11, §§ 9, 12. That restriction on the use of confessions only if voluntary and "*without violence*" was an express response to the fact that torture was used during the Star Chamber era even though the practice was "*against law*." Michael Foster, *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry; and of Other Crown Cases: To Which Are Added Discourses upon a Few Branches of the Crown Law* 244 (2d ed. corrected, London, W. Strahan & M. Woodfall 1776) (spelling modernized).

b. The common law courts also subsequently adopted rules of evidence that expressly prohibited use against defendants of testimony extracted by torture, inhumane treatment, or other, lesser forms of coercion. The courts did so because coerced testimony is inherently unreliable, because of the "cruelty of the practice as applied to those" determined to be innocent, and because of "the belief that it degraded all those who lent themselves to the practice." *A(FC)*, [2005] UKHL 71, at 6 ¶11 (Bingham, L.).

Sir Matthew Hale's *Pleas of the Crown* stated that, in order for a defendant's confession made prior to trial to be admissible at trial "it must be testified that he did [the confession] freely, without any menace or undue terror imposed upon him." 2 Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* 284 (1736), quoted in *Bram v. United States*, 168 U.S. 532, 546 (1897). Likewise, Lord Chief Baron Gilbert stated in 1760 that "this confession must be voluntary, and without compulsion; for our law in this differs from the civil law; that it will not force any man to accuse himself; and in this we do certainly follow the law of nature, which commands every man to endeavor his own preservation; and therefore pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on." Baron Gilbert, *The Law of Evidence* 139 (2d ed. 1760), quoted in *Bram*, 168 U.S. at 546.

Thus, well before the American Revolution, it was settled in the common law that, when persons make

"confessions under threats or promises," then "frequently * * * such examinations and confessions have not been made use of against them on their trial." *The King v. Rudd*, (1775) 168 Eng. Rep. 160, 161 (K.B.); *see The King v. Warickshall*, (1783) 168 Eng. Rep. 234, 235 (K.B.) ("no credit ought to be given" to "a confession forced from the mind by the flattery of hope, or by the torture of fear" and it "cannot be received in evidence").[7]

This rule derived in part from the unreliability of statements induced by threats or promises whereby innocent defendants were punished. *See Warickshall*, 168 Eng. Rep. at 235 n.1 (discussing *Perry's Case*, (1660) 14 Howell's State Trials 1312, in which a man "under a promise of pardon, confessed himself guilty of" the murder of Mr. Harrison and was executed and yet "a few years afterwards it appeared that Mr. Harrison was alive"); Theodore Barlow, *The Justice of Peace: A Treatise Containing the Power and Duty of That Magistrate* 189 (London, Lintot 1745) (claiming torture is not only "cruel" but "at the same Time uncertain, as being rather Trials of the Strength and Hardiness of the Sufferer, than any Proof of the Truth").

The rule was also adopted because experience demonstrated that "confessions extorted from the fear of death [or], the infliction of torture * * * so far from accelerating and clearing, impedes and fouls the current of justice." MacNally, *supra,* 44; *accord A(FC)*, [2005] UKHL 71, at 52 ¶82 (Hoffman, L.) (torture "corrupts and degrades * * * the legal system which accepts it"); *id.* at 80 ¶150 (Carswell, L.) (allowing admission of such evidence

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[7] *See also* John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1198 n.147 (1996) (collecting cases from the 1770s in the Old Bailey and at York assizes that excluded confessions); Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* 328-329 (1968) (collecting additional examples from England prior to the American Revolution).

would "degrade the [judicial] proceedings and involve the state in moral defilement").

3. Our Founding Fathers shared the common law's rejection of torture and the Bill of Rights demonstrates their disavowal of even lesser forms of coercion

The Founding Fathers embraced the English common law's rejection of torture and other impermissible coercion, which they viewed as a tool of royal despotism. *See* Seth F. Kreimer, *Too Close To The Rack And The Screw: Constitutional Constraints On Torture In The War On Terror*, 6 U. PA. J. CONST. L. 278, 312 (2003). The notion "that men are not to be imprisoned at the unfettered will of their prosecutors, nor subjected to physical brutality by officials charged with the investigation of crime" was "well known to those who established the American government." *Culombe v. Connecticut*, 367 U.S. 568, 581 (1961). In fact, such principles were "branded into the consciousness of our civilization by the memory of the secret inquisitions, sometimes practiced with torture, which were borrowed briefly from the continent during the era of the Star Chamber." *Ibid.*; *see also* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1681 (2005) (the prohibition against torture "is not just one rule among others, but a legal archetype—a provision which is emblematic of our larger commitment to nonbrutality in the legal system").

a. The debates surrounding the adoption of the Constitution demonstrate that the historical lessons drawn by the Founding Fathers about the Star Chamber, and its use of torture, underlay many of the provisions of the Bill of Rights. Most clearly, the Fifth Amendment was the Founders' response to the Star Chamber. "The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chambers proceedings occurring

several centuries ago." *Michigan v. Tucker*, 417 U.S. 433, 440 (1974).

In the ratification debates in Virginia, Patrick Henry observed that the distinguishing feature of America's common-law ancestors was that "they would not admit of tortures, or cruel and barbarous punishment." 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 447-448 (2d ed., Philadelphia, J.B. Lippincott Co. 1891). Henry noted that, absent a bill of rights, the new Congress might point to "the practice of civil law [in France, Spain, and Germany]" and assert that "there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture." *Id.* at 447-448. In arguing for the inclusion of a bill of rights during the constitutional conventions, other delegates expressly reflected on the horrors of the Star Chamber and railed against "the potentially oppressive use of the criminal justice system by the new federal government." Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment*, in *The Privilege Against Self Incrimination: Its Origins and Development* 109, 137 (Richard H. Helmholz ed., 1997).

George Nicholas argued in the Virginia ratification debates, in opposition to Patrick Henry, that no bill of rights was necessary because Virginia's Declaration of Rights, adopted in 1776, did not prohibit torture and yet no one had been tortured in Virginia. *See* 3 Elliot, *supra*, at 451. Nicholas was later forced to admit his error after George Mason, who was the principal author of the Declaration of Rights, responded that "the worthy gentleman was mistaken in his assertion that the [Virginia] bill of rights did not prohibit torture," because "one clause expressly provided that no man can give evidence against himself," in contrast to "those countries" where "torture is used" to "extort[]" evidence "from the criminal himself." *Id.* at 452.

James Madison drew from the language of the Virginia provision discussed by George Mason in proposing what is now the Fifth Amendment's Self-Incrimination

Clause. *See United States v. Hubbell*, 530 U.S. 27, 52-53 (2000) (Thomas, J., concurring). The provision was understood in part as "a ban on torture and a security for the criminally accused." Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* 430 (1968); *see* Akil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 927 (1995) ("The Founding-era history of the self-incrimination slogan in America was bound up with concerns about torture."). But those were not its only functions. *See* Levy, *supra*, at 430. The "rack in the Tower" was simply "the emblem of the need for a guarantee against coerced confession." Moglen, *supra*, at 137. The Fifth Amendment was also intended to prohibit "improper methods of interrogation," such as "incriminating interrogation under oath." Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, in Helmholz, *supra*, 181, 185, 192.

Other provisions of the Bill of Rights also reflect the Founding Fathers' antipathy toward torture and impermissible coercion within the justice system. For example, the Eighth Amendment's cruel and unusual punishments prohibition was enacted "as an admonition to all departments of the national government" to "warn * * * against such violent proceedings as had taken place in England." 3 Joseph Story, *Commentaries on the Constitution of the United States* 750-751 (Boston, Hilliar, Gray & Co. 1833); *see Gregg v. Georgia*, 428 U.S. 153, 169-170 (1976) ("The American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned * * * with proscribing 'tortures' and other 'barbarous' methods of punishment.") (citation omitted). Scholars also believe that the "root antitorture idea" is largely a Fourth Amendment concept. Amar & Lettow, *supra*, at 927.

Furthermore, it has long been recognized that "our country * * * wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed" as

an "assurance against ancient evils." *Chambers v. Florida*, 309 U.S. 227, 237 (1940); *cf. Chavez v. Martinez*, 538 U.S. 760, 796 (2003) (Kennedy, J., concurring in part and dissenting in part) ("[U]se of torture or its equivalent in an attempt to induce a statement violates an individual's fundamental right to liberty of the person.").

b. The Founders apparently were motivated by the same concern about unreliability that was at the root of the torture prohibition at English common law. Those who drafted our Constitution knew full well that English courts at that time refused to rely upon coerced confessions at trial because they were not reliable. *See* Alfredo Garcia, *The Fifth Amendment: A Comprehensive and Historical Approach*, 29 U. TOL. L. REV. 209, 224 (1998). American common law courts in the years immediately following the ratification of the Bill of Rights followed the same path. *See, e.g.*, *People v. Rankin*, 2 Wheeler Crim. Cas. 467, 469 (N.Y. Oyer & Term. 1807) (excluding a confession obtained through the threat "if you do not tell all you know about the [poisoning], you will be put in the dark room and hanged" with a note from the reporter, Jacob Wheeler, explaining that "it is impossible to say whether a confession, induced by these means, is not made rather from a motive of fear or interest, than from a sense of guilt"); *State v. Hobbs,* 2 Tyl. *382, *382-*383 (Vt. 1803) (dictum) (state constitutional prohibition of compulsory self-incrimination prohibited torture and made a torture-induced confession inadmissible because of its doubtful reliability).

The Founders' aversion to torture and other impermissible coercion was also rooted in the uniquely American desire to protect the delicate balance of power between the individual and the new government, which was, after all, the very purpose of the constitutional structures that they labored mightily to craft. Because state-sponsored torture "is the antithesis of the legitimate relation between the state and those subject to its power," Kreimer, *supra*, at 298, coercive criminal justice tactics would undermine the new Republic's fragile recognition of individual liberty like few other practices then known. *Cf.*

Story, *supra*, at 751 (crediting Blackstone with "wisely" recognizing that "sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution"); *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944) (recognizing that totalitarian regimes employ "unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical and mental torture," but "[s]o long as the Constitution remains the basic law of our Republic, America will not have that kind of government").

In sum, the Founders were well acquainted with the descendants of those who had suffered at the hands of the Kings and inquisitors and, without doubt, understood the connection between torture and tyranny. *See Ullmann v. United States*, 350 U.S. 422, 428 (1956) ("Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses."); *see also* Moglen, *supra*, at 133-134 (by "treat[ing] elements of common law criminal procedure as fundamental law," the Framers "sought to protect their practices against tyrannical innovations").

B. The CSRT Panels Routinely Upheld Government Detention Of Individuals As Enemy Combatants Without Determining Whether Statements On Which They Relied Were Extracted By Torture Or Other Impermissible Coercion

Despite the longstanding and well-established condemnation of statements extracted by torture or other improper coercion that is clearly reflected in Anglo-American legal history and tradition, recurring and substantial allegations about reliance by the CSRT panels on statements extracted by such methods now cast a disturbing shadow over judicial review of the CSRT detention determinations. Reports by the government itself, as well as by others, indicate that abusive

interrogations occurred at Guantanamo and elsewhere.[8] And the CSRT panels made their detention determinations without regard to how incriminatory statements were obtained.

Amici are not in a position to evaluate the veracity of the detainees' accounts, nor do we attempt here to distinguish between torture and other impermissible coercion. We maintain, however, that under the circumstances presented here and described below, the judicial review authorized by the Detainee Treatment Act is not an adequate substitute for the common law writ of habeas corpus because it does not appear to allow the reviewing court, when it rules on the legality of the detention, to engage in the factfinding necessary to reach an accurate determination of the extent to which the CSRT panel relied on statements extracted by unacceptable and impermissible means.

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[8] *See, e.g.*, Federal Bureau of Investigation, *Detainee Positive Responses*, at Responses 10, http://foia.fbi.gov/guantanamo/detainees.pdf (an anonymous FBI agent reports entering interview rooms where the detainee had been "chained hand and foot in a fetal position to the floor, with no chair, food, or water * * * for 18, 24 hours or more. * * * On another occasion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night."); *see also id.* at Responses 11-15, 62, 63; Department of Defense, *Army Regulation 15-6: Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* 63 (Aug. 2004), http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf; Human Rights Watch, *Guantanamo: Detainee Accounts*, at 12 (2004), http://hrw.org/backgrounder/usa/gitmo1004/gitmo1004.pdf (describing interrogation techniques that led detainees to falsely confess to being with Osama bin Laden in Afghanistan at a time when they were actually in England). *See also* Jane Mayer, *The Black Sites, A Rare Look Inside the CIA's Secret Interrogation Program*, THE NEW YORKER, Aug. 13, 2007, at 49 (describing report of International Committee of the Red Cross).

1. The CSRT panels did not investigate or exclude statements allegedly extracted through the torture or coercion of the detainee under review

a. The rules that govern the CSRT, which were promulgated by the Navy after the establishment of the CSRT by the Department of Defense established the CSRT in July 2004, stated that "a panel of three neutral commissioned officers" would determine in the context of "a non-adversarial proceeding," whether DOD had properly classified each detainee as an "enemy combatant." Memorandum from Secretary of the Navy, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba*, Enc. 1 (CSRT Rules) at 1 (¶¶ B, C(1)) (July 29, 2004).[9] The CSRT Rules make clear that a CSRT panel "is not bound by the rules of evidence such as would apply in a court of law." *Id.* at 6 (¶ G(7)). Rather, the panel is allowed to consider all "reasonably available" information that, in its own view, is "relevant and helpful" to its decision. *Id.* at 3, 4, 6 (¶¶ E(2), E(3), F(6), G(7)). Moreover, there is a "rebuttable presumption" that evidence against a detainee in the "possession of the U.S. government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant" is "genuine and accurate." *Id.* at 3, 6 (¶¶ E(3), G(11)). By contrast, exculpatory evidence, even if submitted to a CSRT panel by the government, is not entitled to the same presumption. *See id.* at 7 (¶ H(4)).[10]

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[9] http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

[10] These CSRT Rules governed the petitioners' CSRT proceedings. When Congress subsequently enacted the DTA, it directed the Department of Defense to establish new rules to ensure that future CSRT panels "to the extent practicable, assess—(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and (B) the probative value (if any) of any such statement." DTA at § 1005(b)(1). The rule promulgated pursuant to that directive, which has no effect on the instant case, merely restates

(Continued on following page)

Since the implementation of the CSRT Rules, the government has consistently maintained that the CSRT panels were authorized to make detention determinations in reliance upon statements extracted by torture or other impermissible coercion. The Principal Deputy Associate Attorney General explained unequivocally to a district court that if "reliable" information "came to the CSRT's attention that was obtained through a non-traditional means, *even torture by a foreign power*," nothing "would prevent the CSRT from crediting that information for purposes of sustaining the enemy combatant class."[11]

According to the government, this is so even if, *arguendo*, the individual detainee has fully enforceable constitutional rights: "[T]o answer your Honor's question very clearly, if the CSRT were to determine that evidence of a questionable providence *[sic]*, the result of torture perhaps, was reliable, I don't think there is anything in the due process clause as it would pertain to these Petitioners that would prevent the evidence from being relied upon."[12]

b. The actions of the CSRT panels confirm that they, too, did not view the question whether statements presented by the government were extracted by torture or other impermissible means to be relevant to the question of whether they could rely on that evidence. Indeed, CSRT panels have upheld the detention of hundreds of individuals without any apparent regard for whether the information presented was extracted by torture as alleged.

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the statutory text without further elaboration or guidance. *See* Memorandum from Gordon England, Deputy Secretary of Defense, to Secretaries of the Military Departments, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba*, Enc. 10 (July 14, 2006), http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf.

[11] Tr. of Mot. Hr'g at 84:15-22, *Boumediene v. Bush*, No. 1:04-cv-1166 (D.D.C. Dec. 2, 2004) (emphasis added).

[12] *Id.* at 86:19-24.

For example, the unclassified evidence recounted by the Recorder at the CSRT proceeding of Mamdouh Habib consists entirely of alleged admissions by the detainee.[13] Mr. Habib's government-appointed personal representative—a non-lawyer appointed to each detainee—explained to the CSRT panel that Mr. Habib maintained that "all of the information" he previously provided "was given under duress and torture" in Pakistan and Egypt prior to his arrival at Guantanamo.[14] The CSRT panel simultaneously determined that the allegations of abuse were *credible enough to warrant investigation* and upheld Mr. Habib's detention as an enemy combatant.[15] Regrettably, Mr. Habib's case is not unique.[16]

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[13] Unclassified Summary of Basis for Tribunal Decision, Tribunal Panel #6, *available at Habib v. Bush*, No. 1:02-cv-01130-CKK, Dkt. No. 32, Exh. A at 9 (D.D.C. Oct. 6, 2004). According to Mr. Habib's habeas counsel, the evidence against Mr. Habib derived entirely from purported "confessions" he made after he was tortured for six months. http://www.law.northwestern.edu/macarthur/documents/guantanamo/Written_Testimony_of_J_Margulies.pdf, at 4.

[14] Unclassified Summary of Basis for Tribunal Decision, Tribunal Panel #6, *supra*, at 9. Mr. Habib's habeas counsel reported that Mr. Habib had informed him that was, *inter alia*, beaten, suspended from hooks on the wall, and kept in a room with an extremely low ceiling where he could only stoop and which the guards slowly filled with water. Decl. of Joseph Margulies dated Nov. 23, 2004, *available at Habib v. Bush*, Dkt. No. 1:02-cv-01130-CKK, Dkt. No. 83, Exh. 2 at ¶¶ 10-11 (D.D.C. Jan. 5, 2005); Aff. of Joseph Margulies dated April 27, 2005, *available at Habib v. Bush*, Dkt. No. 112 at ¶ 4 (D.D.C. Apr. 29, 2005). The State Department has long condemned the use of torture by state security agents in Egypt and Pakistan. *See, e.g.*, Department of State, *Country Reports on Human Rights Practices—2006* (Mar. 6, 2007) http://www.state.gov/g/drl/rls/hrrpt/2006/78851.htm (Egypt); http:www.state.gov/g/drl/rls/hrrpt/2006/78874.htm (Pakistan).

[15] *Id.* at 11. Mr. Habib has since been released and is living in Australia.

[16] *See, e.g.*, Unclassified Summary of Basis for Tribunal Decision, Tribunal Panel #20, *available at Tumani v. Bush*, No. 1:05-cv-00526-RMU, Dkt. No. 13, Exh. 2 at 9 (D.D.C. Aug. 18, 2005) (referring torture allegations for investigation while simultaneously upholding continued detention).

In another specific instance, the CSRT panel apparently relied upon a videotape made by the Taliban in which the detainee, Abdul Rahim Al Ginco, volunteered to be a "suicide martyr."[17] Mr. Ginco, who had been imprisoned by the Taliban from May 2000 to January 2002, explained that the confession on the video, in which he also claimed to have been a spy for the United States, was coerced and made in response to three months of torture by the Taliban.[18] He also explained that his alleged association with an alleged al Qaida weapons specialist took place in the Taliban prison: "They beat me and tortured me[.] I couldn't handle it, and [I] told them he's with me, that we are both American spies."[19] Nonetheless, although it appears that Mr. Ginco had been imprisoned by the Taliban from well before September 11, 2001, to the time the Taliban regime collapsed, the CSRT panel upheld the government's detention of Mr. Ginco as an enemy combatant.[20]

An analysis of recently released CSRT transcripts and documents found that 18% of the Guantanamo detainees alleged torture, but the available record does not indicate that the CSRT panels resolved allegations of torture before

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[17] Summarized Unsworn Detainee Statement (Unclassified/FOUO) ("Ginco Statement"), ISN #489, at 3629, http://www.dod.mil/pubs/foi/detainees/csrt/set_51_3490-3642_Revised.pdf at 3620-33. *See also* Tim Golden, *Expecting U.S. Help, Sent to Guantanamo*, N.Y. TIMES, Oct. 15, 2006, at 26; Carol D. Leonnig, *Coerced Confession Traps Detainee, Lawyers Say*, WASH. POST, Oct. 14, 2006, at A17.

[18] *Ibid.* Mr. Ginco reported that the Taliban subjected him to beatings, electric shock, being hung from the ceiling, water torture, striking the bottom of his feet with clubs, and sleep deprivation. Mot. for Partial Summ. J. at 8-9, *Ginco v. Bush*, No. 05-cv-1310-RJL (D.D.C. Oct. 10, 2006).

[19] Ginco Statement, *supra*, at 3630.

[20] Mr. Ginco apparently is housed in the psychiatric ward, in part because other detainees believe he is a spy for the Americans. *Id.* at 3622.

upholding the detention of such individuals.[21] Rather, "in each case, the panel proceeded to decide the case before any investigation was undertaken." Mark Denbeaux & Joshua W. Denbeaux, *No-Hearing Hearings,* Seton Hall Public Law Research Paper No. 951245, at 36 (Dec. 2006), http://ssrn.com/abstract=951245.

2. A detainee had no means of knowing when a CSRT panel relied on statements extracted from others by impermissible coercion

Even more difficult procedural problems are manifest in a case where, unbeknownst to the detainee, a third party was allegedly tortured or otherwise subjected to inhumane treatment and incriminated the detainee as a result. Because the CSRT panels often relied on classified information, it is impossible for *amici* to know how many times a CSRT panel upheld the detention of an individual as an enemy combatant in reliance on such evidence, and, of course, a detainee in custody at Guantanamo who must represent himself without counsel before a CSRT panel is at even a worse disadvantage in terms of access to information.

Consider, for example, the Department of Defense statement that the interrogation of detainee Mohammed al Qahtani produced "detailed information about 30 of Osama Bin Laden's bodyguards who are also held at Guantanamo."[22] According to an interrogation log obtained by a journalist, Mr. al Qahtani was subjected to questioning for approximately 20 hours per day for seven weeks after his arrival at Guantanamo, during which period he was kept in isolation, and subjected to sleep and sensory deprivation

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[21] *Amici* do not have access to the classified evidence presented in any individual case.

[22] Department of Defense, *Guantanamo Provides Valuable Intelligence Information* (June 12, 2005), http://www.defenselink.mil/releases/2005/nr20050612-3661.html.

and other abuses.[23] Under standard CSRT procedures, the 30 men whom Mr. al Qahtani accused would never be told who was the source of the statement that they were Osama Bin Laden's bodyguards or under what circumstances the accusation had been extracted, and Mr. al Qahtani's statements would be presumed genuine and accurate.

This concern is not hypothetical. The available CSRT record for Faruq Ali Ahmed, for example, does not contain any allegations of abusive interrogation, and indicates that the detainee was not informed of the source of the allegations against him.[24] The fortuitous publication of the interrogation log enabled Mr. Faruq's habeas counsel to determine that the source of the allegations against Mr. Faruq had been a detainee who was "abused and coerced into making statements inculpating other men."[25]

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[23] Department of Defense, *Interrogation Log, Detainee 063* (Nov. 23, 2002 to Jan. 11, 2003), at 27, www.time.com/time/2006/log/log.pdf. The FBI reported that Mr. al Qahtani's treatment left him "evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a corner of the cell covered with a sheet for hours on end)." Letter from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, FBI, to Major General Donald J. Ryder, Department of the Army, Criminal Investigation Command, at 2, ¶ 3 (July 14, 2004), *attached to* Letter from Marc D. Falkoff, Covington & Burling, to Administrative Review Board, Guantanamo Bay Naval Station regarding Faruq Ali Ahmed (Feb. 5, 2005) (on file with author).

[24] Decl. of James R. Crisfield, *available at Abdah v. Bush*, Dkt. No. 1:04-cv-1254-HKK, Dkt. No. 30, Exh. A at final page (D.D.C. Oct. 12, 2004) (attaching record). Mr. Faruq's personal representative at the CSRT took the unusual step of labeling part of the evidence implicating Mr. Faroq as "unreliable" on the grounds that it was derived from an informant who "has lied about other detainees to receive preferable treatment." There is no indication that he realized that other evidence had been derived from the coercive interrogation of another detainee. *Ibid.* The CSRT nonetheless upheld Mr. Faruq's detention as an enemy combatant.

[25] Letter from Falkoff, *supra*, at 3; *see also* Letter from Robert Knowles, Covington & Burling, to Administrative Review Board, Guantanamo Bay Naval Station regarding Sadeq Mohammed Said

(Continued on following page)

Even when detainees suspected that the accusations against them resulted from the torture of another detainee, it was impossible for them to prove it. For example, Ibrahim Zidan told the CSRT that he believed another person—Anwar Abu Faris—had made false statements about Zidan receiving training in Afghanistan because Faris had been rendered to Jordan and tortured.[26] The publicly available record of Mr. Zidan's CSRT proceeding does not indicate any effort by the CSRT to determine the truth of this allegation.

3. The CSRT record is woefully incomplete regarding the accuracy of allegations of torture or other coercion

As described above, even when the CSRT panels were aware of substantial allegations that statements used against detainees had been extracted by torture or other impermissible coercion, those allegations appear to have had no effect on the panels' decisions regarding whether those individuals were properly detained. The CSRT's failure to question the reliability of the evidence allegedly extracted by torture might be attributable to the government's view that it is not the CSRT's role to investigate allegations of abuse.[27]

That result might also be explained, at least in part, by the fact that CSRT panels might not have been provided with information that would enable them to evaluate whether statements had been extracted by

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Ismail, at 1-2 (June 3, 2005) (on file with author). As a detainee, Mr. Faruq himself is not permitted access to news publications.

[26] Summarized Sworn Detainee Statement (Unclassified/FOUO) ISN #761, at 1175-1176 http://www.dod.mil/pubs/foi/detainees/csrt/set_11_1145-1178.pdf. The State Department has reported on the use of torture to obtain confessions in Jordanian prisons. *See* Department of State, *Country Reports on Human Rights Practices—2006* (Mar. 6, 2007) at §1c, http://www.state.gov/g/drl/rls/hrrpt/2006/78855.htm (Jordan).

[27] Tr. of Mot. Hr'g, *supra*, at 85:20.

torture, even if they had been inclined to do so. Lieutenant Colonel Stephen Abraham of the U.S. Army Reserve, who was assigned to the Office for Administrative Review of the Detention of Enemy Combatants from September 11, 2004 to March 6, 2005 (the time period in which most of petitioners' CSRT proceedings were held) recently testified before Congress that a CSRT panel "would not be advised as to whether information [it received from the government] had been provided under duress." *Upholding the Principle of Habeas Corpus for Detainees: Hearing Before the House Armed Services Comm.*, 110th Cong. (July 26, 2007).[28]

Lieutenant Colonel Abraham further testified that a CSRT panel was given only "distilled summaries" of information about a detainee gathered from intelligence agencies and prepared for the panel by "case writers." *Id.* at 6. And he explained that "a summarized document might say that a detainee 'is a member of Al Qaeda' but would not include any information about * * * whether the source was paid for the information, [or] whether the source was detained or subjected to coercive interrogation techniques." *Ibid.*

The gap between the information provided to the CSRT panels and the facts relating to the coercive circumstances under which statements may have been obtained could not be filled by the detainee himself. Detainees were permitted only to hear an unclassified summary of the evidence—a summary that the CSRT itself described as "conclusory."[29] The detainee was unassisted by counsel, and could neither examine the classified evidence against him nor conduct independent factfinding. Consequently, the detainee could not develop a

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[28] Prepared statement of Lt. Col. Stephen E. Abraham, at 7, http://armedservices.house.gov/pdfs/FC072607/Abraham_Testimony072607.pdf.

[29] *See, e.g.*, Unclassified Summary of Basis for Tribunal Decision, Tribunal Panel #20, *supra*, at 8; *see also* Denbeaux, *supra*, at 1, 19.

record to challenge the provenance or reliability of any accusation.[30]

C. The DTA Does Not Appear To Authorize A Court To Engage In The Factfinding Necessary To Rule On The Legality Of The Executive Detention And, As Such, Is An Inadequate Substitute For The Common Law Writ Of Habeas Corpus

The Detainee Treatment Act (DTA) authorizes the United States Court of Appeals for the District of Columbia Circuit to "determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." Pub. L. No. 109-148, tit. X, § 1005(e)(2)(A), 119 Stat. 2680, 2739 (2005). Unlike other statutes that address the authority of federal courts to assess whether an individual is properly detained in government custody, however, the DTA does not purport to authorize a court to hear and determine the underlying facts. *Compare* 28 U.S.C. § 2243 (federal habeas statute providing that "[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require").

As such, the DTA does not appear to permit an adequate inquiry into whether inculpatory statements are unreliable because extracted by torture or other impermissible coercion, an inquiry that is essential to a meaningful judicial review of the validity of a CSRT detention determination, particularly under the circumstances presented here. CSRT panels chronically failed to identify and root out evidence extracted by torture or other impermissible coercion as detailed above, and the system provides no meaningful opportunity for the detainee himself to make such a record. Thus, there can be no assurance that the record presented to the court of appeals will provide the information necessary to enable it to assess whether, and to what extent, the detainee's

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[30] Denbeaux, *supra*, at 2, 24-33.

detention is based upon such evidence. This is so no matter how broadly the "record" is defined. *Cf. Bismullah v. Gates*, Nos. 06-1197, 06-1397, 2007 WL 2067938 (D.C. Cir. July 20, 2007).

Consequently, the court of appeals would be unable to make a meaningful decision about the legality of the detention. Instead, the court would be forced to rule without having before it the judicial factfinding necessary to make an accurate assessment of the circumstances under which the challenged evidence was obtained. (Upon further review of such a case, *this* Court would be placed in a similarly untenable position.)

As documented at the outset of this brief, common law courts would have refused to rely upon statements extracted by torture or other forms of inhumane treatment because such evidence is inherently unreliable, because torture is contrary to human dignity, and because the judiciary has never condoned such abhorrent practices nor allowed the judicial process to be corrupted by them. Ordinarily, federal courts would have the power to vindicate these values by conducting a probing inquiry into the factual and legal bases for a detention by the government. *See* 28 U.S.C. § 2243; *Boumediene v. Bush*, 476 F.3d 981, 1009 (D.C. Cir. 2007) (Rogers J., dissenting) ("Throughout history, courts reviewing the Executive detention of prisoners have engaged in searching factual review of the Executive's claims."). Forcing judges to proceed to adjudicate the validity of an Executive detention without such inquiry and based on statements extracted by torture or other impermissible coercion contravenes legal history and degrades the legal system. It is also a clearly inadequate substitute for the common law writ of habeas corpus.

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of the court of appeals and remand the cases for further proceedings.

Respectfully submitted,

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AUGUST 24, 2007

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(20) (26)

Nos. 06-1195 & 06-1196

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

KHALED A.F. AL ODAH, NEXT FRIEND OF FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* CANADIAN PARLIAMENTARIANS AND PROFESSORS OF LAW IN SUPPORT OF REVERSAL

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Shafiq v. Australia, U.N. Hum. Rts. Comm., Communication No. 1324/2004, U.N. Doc. CCPR/C/88/D/1324/2004 (2006) 14

Treaty for the Prohibition of Nuclear Weapons in Latin America, *opened for signature* Feb. 14, 1967, 1968 U.N.T.S. 326. 7

Vuolanne v. Finland, U.N. Hum. Rts. Comm., Communication No. 265/87, U.N. Doc. Supp. No. 40 (A/44/40) at 311 (1989) 15

U.N. Hum. Rts. Comm., *Concluding Observations: United States*, advance unedited version, 87th Sess. (July 10-28, 2006) 16

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Paul Wolfowitz, Deputy Secretary of Defense, *Memorandum for the Secretary of the Navy re: Order Establishing Combatant Status Review Tribunal* (July 7, 2004) 24

Zaoui v Attorney-General (No 2), [2006] 1 N.Z.L.R. 289 (N.Z.S.C.) 4-5

Amici curiae support reversal of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in these consolidated cases. 476 F.3d 934 (D.C. Cir. 2006).[1]

INTEREST OF THE *AMICI CURIAE*

Amici are Canadian parliamentarians and Canadian professors of law with an interest in international and public law and, in many cases, expertise in the areas of public and international law implicated in these cases. Their names and affiliations are listed in the Appendix to this brief.

These cases raise matters of particular relevance to Canadian lawmakers and law professors. First, Canada is a staunch ally of the United States and has deployed soldiers in Afghanistan alongside U.S. troops. Canadian lawmakers and law professors have, therefore, a strong interest in an outcome in these cases that corresponds closely to existing doctrines of international law applied by Canada and other allied nations.

Second, one of the detainees affected by these cases, Omar Khadr, is a Canadian citizen who has been detained at Guantánamo Bay since 2002, following his capture by U.S. forces in Afghanistan. He has been charged with various offences and is in proceedings before the Military Commission. Canadian lawmakers and law professors have a strong interest in urging treatment of Canadian citizens that

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[1] All parties have consented to the filing of this brief. Counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part and that no person, other than *amici*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

meets internationally-recognized standards, not least those established in customary international law as described below.

Third, the international context of these cases imprints this Court's deliberations with precedential significance that extends beyond the United States. The United States' contribution to the rule of law and human rights has been exceptional and in many cases foundational. There are principles at stake in this appeal that transcend the interests of any Petitioner. How this Court construes the obligations of the United States in relation to the treatment and prosecution of alien detainees in an inchoate and potentially indefinite campaign against terrorism will affect how other nations understand their own, identical obligations in this campaign and in future conflicts. The interests of the United States and the global community are best served by an approach that hews closely to existing standards of customary international law. An approach inconsistent with doctrines of international law will generate uncertainty about the scope of international norms and could redound to the detriment of the United States and its allies (such as Canada) by encouraging similar practices by states antagonistic to the United States and its allies. In this arena, the interpretation of the U.S. legal principles at issue in these cases should, in the words of Justice Harry A. Blackmun, "be informed by a decent respect for the global opinions of mankind."[2]

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[2] Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 48 (1994) (referring specifically to the Eighth Amendment).

SUMMARY OF ARGUMENT

Petitioners in these cases are foreign nationals who have been detained indefinitely at a military facility controlled by the United States at Guantánamo Bay. The Military Commissions Act of 2006 ("MCA") denies non-citizens the right to petition an impartial and fair judiciary for a writ of habeas corpus.[3] This Court is asked to decide whether the MCA violates the Suspension Clause of the U.S. Constitution. The application of constitutional provisions to non-citizens should be decided in the context of the United States' obligations under customary international law. Those obligations apply to detainees at Guantánamo Bay because it is under exclusive and comprehensive U.S. control. As a result, customary international law should inform this Court's decision on the constitutionality of the MCA.

By restricting non-citizen detainees' meaningful access to any independent and impartial tribunal to challenge the basis for their confinement — *i.e.*, by prohibiting relief akin to habeas corpus — the MCA violates customary international law. In particular, the MCA fails to meet the minimum standards set by customary international rules on the treatment of aliens, including during times of armed conflict. The MCA falls far short of those minimum standards because it (1) deprives aliens of core protections afforded by customary international norms and (2) impermissibly discriminates between citizens and non-citizens by denying non-citizens internationally-recognized legal rights to which citizens and non-citizens are both entitled.

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[3] Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36 (2006).

ARGUMENT

I. CUSTOMARY INTERNATIONAL LAW SHOULD INFORM THIS COURT'S DECISION ON THE CONSTITUTIONALITY OF THE MILITARY COMMISSIONS ACT UNDER THE SUSPENSION CLAUSE

On numerous occasions, this Court has looked to international precedent and practice to inform its position on constitutional issues.[4] This Court's practice is consistent with other common law jurisdictions with written bills of rights.[5] It is also an important approach on issues that

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[4] *See, e.g., Roper v. Simmons*, 543 U.S. 551, 575-78 (2005) (looking to international practice and treaties in interpreting the Eighth Amendment's application to the juvenile death penalty); *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003) (invoking the laws and practices of other countries, international treaties, and decisions of the European Court of Human Rights, in determining applicability of the Due Process Clause of the Fourteenth Amendment on state power to proscribe private sexual conduct between consenting adults); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved" in determining whether the practice transgresses the prohibition against cruel and unusual punishment); *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (contemplating world opinion and practice in determining whether the Constitution would permit execution of criminals under the age of 16).

[5] *See, e.g., R. v. Hape*, 2007 SCC 26 ¶¶ 55-56 (Can.) (in interpreting Canada's constitutionalized bill of rights, the *Canadian Charter of Rights and Freedoms*, the court signaled the need to "ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other" and held that in "interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction"); *Zaoui v Attorney-General (No 2)*,

implicate the interests of the international community.[6] These are not cases in which the Court is being asked to apply international law in its assessments of rights that touch exclusively on United States territory, persons, and interests. Rather, the subject matter of these cases concerns non-citizens who were captured outside the territories of the United States in a conflict governed by international law,[7] and who are detained at a military facility whose status is, in part, governed by an international agreement. In deciding whether the MCA violates the Suspension Clause, therefore, the Court should consider whether the United States' obligations to non-citizens under customary international law include the obligation to provide relief akin to habeas corpus to allow them to challenge their indefinite detention.

A. The Application Of Constitutional Provisions To Non-Citizens Should Be Decided In The Context Of The United States' Obligations Under Customary International Law

Not long after the right to petition for a writ of habeas corpus was enshrined in the U.S. Constitution, this Court recognized customary international law as part of U.S. law. The earliest cases interpreting the status of customary

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[2006] 1 N.Z.L.R. 289, ¶ 90 (N.Z.S.C.) (interpreting the New Zealand Bill of Rights in keeping with the International Covenant on Civil and Political Rights).

[6] *See R. v. Hape*, *supra* note 5, ¶ 33 (observing that, where the application of the *Charter* "implicates interstate relations, the tools that assist in the interpretation exercise include Canada's obligations under international law and the principle of the comity of nations").

[7] *See Hamdan v. Rumsfeld*, 548 U.S. ___, 126 S. Ct. 2749, 2795-98 (2006) (applying the Geneva Conventions, and specifically Common Article 3).

international law held that international law was part of U.S. law and binding on the actions of the government. The Court explained that it is generally "bound by the law of nations which is a part of the law of the land." *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815); *see The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending on it are duly presented for their determination.").

To be sure, Congress may by statute supersede customary international law. Any such legislative enactment, of course, must be consistent with the Constitution. And, we submit, in examining whether legislation in derogation of customary international law violates a constitutional provision, the Court should apply the same rule of construction it applies to an act of Congress: the constitutional provision "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); *see also The Paquete Habana*, 175 U.S. at 700 (courts must look to "customs and usages of civilized nations" in interpreting domestic law). This approach would be consistent with that adopted by other common law jurisdictions. *See, e.g., R. v. Hape*, 2007 SCC 26 ¶¶ 55-56 (Can.) (interpreting the *Canadian Charter of Rights and Freedoms* consistently with international law). Accordingly, in determining the application of the Suspension Clause to the detainees at Guantánamo, the Court should construe the clause so as to

effectuate, not violate, the United States' obligations under customary international law.

As we show below, customary international law requires the United States to afford aliens under its control a judicial remedy that is akin to habeas corpus. The Court, therefore, should construe the Suspension Clause to guarantee aliens under U.S. control at Guantánamo access to the Great Writ. The MCA, by purporting to foreclose access to that remedy, violates the Constitution as well as the standards of customary international law.

B. U.S. Obligations Under Customary International Law Apply To Detainees At Guantánamo Bay

The United States' obligations under customary international law apply to detainees at Guantánamo Bay.

First, the United States has accepted that, as a matter of international law, the military base at Guantánamo is territory for which it is internationally responsible. In 1978, President Carter transmitted to the Senate, for its advice and consent to ratification, Additional Protocol I to the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco). This protocol commits state parties to respect certain obligations on the deployment of nuclear weapons "in Latin America in territories for which, *de jure* or *de facto*, they are internationally responsible."[8]

The Secretary of State's accompanying report to the

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[8] Treaty for the Prohibition of Nuclear Weapons in Latin America, Additional Protocol I art. 1, *opened for signature* Feb. 14, 1967, 1968 U.N.T.S. 326.

President on the Protocol, also transmitted to the Senate, observed that:

> By adhering to Protocol I, the United States undertakes to apply [certain articles] of the Treaty to territories within the zone of application [of the Treaty] for which, *de jure* or *de facto*, the United States is internationally responsible (Article 1). The territories affected by our adherence to Protocol I will include Puerto Rico, the Virgin Islands, the Canal Zone (until entry into force of the Panama Canal Treaties), and *our military base at Guantánamo*.[9]

The Senate ratified Additional Protocol I in November 1981 without attaching any understandings material to the question of the United States' international responsibility for Guantánamo Bay.[10]

As the state *de jure* or *de facto* internationally responsible for the military base at Guantánamo, the United States bears unquestionable international responsibility for actions undertaken by its officials within that territory.[11] The

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[9] *Arms Control and Disarmament*, 1978 Digest § 7, at 1616 (quoting the accompanying report to the President from Secretary of State Cyrus R. Vance on Additional Protocol I, dated May 15, 1978) (emphasis added).

[10] 127 Cong. Rec. S27,419-21 (1981); S. Exec. Rep. No. 97-23 (1981); *see also* U.S. Dep't of State, *Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco)* (summarizing the Senate understandings and reiterating that "[t]he U.S. Protocol I territories include Puerto Rico, the U.S. Virgin Islands, and the naval base at Guantanamo Bay"), *available at* http://www.state.gov/t/ac/trt/4796.htm.

[11] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. &

substantive international law standards discussed below thus attach to U.S. conduct at Guantánamo Bay.

Second, the factual circumstances at Guantánamo Bay attract application of the international human rights obligations found in the International Covenant on Civil and Political Rights ("ICCPR").[12] As noted below, ICCPR rights apply also as customary standards of minimum treatment of aliens. By its own terms, the ICCPR requires the United States "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in" the treaty.[13] A state's "jurisdiction," of course, may extend beyond its sovereign territory and protect persons within the power and effective control of the state, even outside of that state's territory.[14]

Herz. v. Serb. & Mont.), General List No. 91, 2007 I.C.J. ___, ¶ 385 (Feb. 26) (describing the "well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State").

12 *Opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

13 ICCPR art. 2(1).

14 *See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 180 (July 9); U.N. Hum. Rts. Comm., *General Comment 31*, 59 U.N. GAOR Supp. (No. 40) ¶ 10, U.N. Doc. A/59/40 (2004); *Lopez Burgos v. Uruguay*, U.N. Hum. Rts. Comm., Communication No. 52/1979, ¶ 12.3, U. N. Doc. CCPR/C/13/D/52/1979 (1981) (noting that Article 2(1)'s references to jurisdiction and territory "does not imply that the State party concerned cannot be held accountable for the violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it").

The military base at Guantánamo lies within the "exclusive jurisdiction and control" of the United States. *Rasul v. Bush*, 542 U.S. 466, 476 (2004). Under the agreement between the United States and Cuba, "the United States shall exercise complete jurisdiction and control over and within" Guantánamo.[15] An executive order[16] and federal regulations[17] control access and egress from this territory.[18] Accordingly, in its activities at Guantánamo, the United States is required to adhere to its obligations under customary international law.

II. THE MILITARY COMMISSIONS ACT IS INCONSISTENT WITH U.S. OBLIGATIONS UNDER CUSTOMARY INTERNATIONAL LAW TO PROVIDE MINIMUM STANDARDS OF TREATMENT TO FOREIGN NATIONALS

For more than a century, customary international law has recognized that states must not treat aliens in a manner that violates international "minimum standards of treatment."[19] Minimum standards of treatment include basic

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[15] Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 16-23, 1903, T.S. No. 418.

[16] Exec. Order No. 8749, 6 Fed. Reg. 2252 (May 3, 1941).

[17] 32 C.F.R. pt. 761.

[18] For example, persons may only be admitted to the Guantánamo military base with the authorization of U.S. military officials. 32 C.F.R. §§ 761.8-761.19.

[19] *See, e.g.*, Restatement (Third) of Foreign Relations Law § 711 (1987) (discussing the nature and customary status of minimum treatment); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007) (citing Frank Griffith Dawson & Ivan L. Head, *International Law National Tribunals and the Rights of Aliens* 10 (1971) (describing the "International Minimum Standard of Justice"

substantive human rights, including a right to independent and impartial review of the basis for detention. Minimum standards of treatment also preclude a state from discriminating in the application of these rights on the basis of national origin. A detention system that denies the right to seek prompt habeas-type relief from a regularly-constituted court violates these standards of international law.

The doctrine of reciprocity underlies the minimum standards of treatment. Prior to the emergence of international human rights law following World War II, the two main sources of individual protection under international law were the laws of war (later "humanitarian law") and the rules of minimum treatment (defended through the doctrine of diplomatic protection). In both instances, while the right and the correlative duty reside in states, the benefit inures to individuals. Humanitarian law and the law of minimum treatment presuppose that all states share an equal interest in the fair treatment of their citizens at the hands of foreign states, whether during conflict or peace time. Inherent in a state's desire to ensure fair treatment of its own citizens by foreign states is the corresponding obligation to treat fairly aliens over whom it has power. As U.S. jurist and State Department attorney Edwin Borchard wrote in his seminal 1915 treatise on the diplomatic protection of citizens abroad:

> The views and the principles [the United States] has declared in the exercise of its right to protect American citizens abroad have, as a

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as "the standard of substantive and procedural treatment which aliens purportedly should receive in 'civilized' States and which they thus should receive abroad under international law")).

> general rule, been tempered by the knowledge that that it must recognize as belonging to aliens within this country the same rights that it seeks to establish for its citizens abroad, the measure of its obligations being the measure of its rights.[20]

Borchard's observation remains timely almost a century later.

A. The Minimum Standards Of Treatment Guarantee The Right To Independent And Impartial Review Of The Basis For Detention

Minimum treatment standards include important substantive guarantees. Thus, the United States, like all states,

> is responsible under international law for injury to a national of another state caused by an official act or omission that violates (a) a human right that . . . a state is obligated to respect for all persons subject to its authority; [or] (b) a personal right that, under international law, a state is obligated to respect for individuals of foreign nationality.[21]

This doctrine of minimum treatment predates international human rights law.[22] The latter now incorporates protections once guaranteed exclusively by the minimum treatment standards, but does so without diminishing the content of customary minimum treatment.

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[20] Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad, or the Law of International Claims*, at viii (1915).

[21] Restatement (Third) of Foreign Relations Law § 711.

[22] § 711 reporters' note 2.

For this reason, the substantive customary minimum treatment standard is transgressed where a state violates "those rights which the state is obligated to respect for all persons subject to its authority, whether pursuant to international human rights agreements to which it is party or under the customary law of human rights."[23] Specifically, a

> state's responsibility to individuals of foreign nationality under customary law includes the obligation to respect the civil and political rights articulated in the principal international human rights instruments — the Universal Declaration and the *International Covenant on Civil and Political Rights* — as rights of human beings generally . . ., but not political rights that are recognized as human rights only in relation to a person's country of citizenship, such as the right to vote and hold office, or the right to return to one's country.[24]

In this manner, most of the rights guaranteed in the ICCPR are a material component of customary minimum treatment standards and are properly at issue in these cases.

1. Minimum standards of treatment require that non-citizens have access to independent judicial review of the basis for arrest and detention

The provision of the ICCPR most material to these cases, Article 9(4), provides that: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may

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[23] § 711 cmt. b.

[24] § 711 cmt. c (emphasis added).

decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[25] This provision was inspired by the common law writ of habeas corpus,[26] and is designed to relieve persons of arbitrary detentions in violation of Article 9(1).[27]

Compliance with Article 9(4) requires "review of the substantive justification of detention."[28] This review must "include the possibility of ordering release" where the detention is arbitrary or otherwise violates the ICCPR and must not be limited to a review of "mere formal compliance of the detention with domestic law governing the detention."[29]

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25 ICCPR art. 9(4).

26 Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* 330 (2d ed. 2004). Article 9(4) acts to preserve a remedy akin to habeas corpus. For instance, the U.N. Human Rights Committee has held that a law that restricted the possibility of seeking habeas corpus relief with respect to persons under investigation, in that case for the offence of terrorism, violated Article 9(4). *Carranza Alegre v. Peru*, U.N. Hum. Rts. Comm., Communication No. 1126/2002, ¶¶ 3.3, 7.3, U.N. Doc. CCPR/C/85/D/1126/2002 (2005); *see also Bandajevsky v. Belarus*, U.N. Hum. Rts. Comm., Communication No. 1100/2002, ¶¶ 10.3-10.4, U.N. Doc. CCPR/C/86/D/1100/2002 (2006) (Article 9(4) violated where an individual was arrested pursuant to a law that did not allow a challenge to that detention before a court).

27 Article 9(1) reads: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

28 *Bakhtiyari v. Australia*, U.N. Hum. Rts. Comm., Communication No. 1069/2002, ¶ 9.5, U.N. Doc. CCPR/C/79/D/1069/2002 (2003).

29 *Shafiq v. Australia*, U.N. Hum. Rts. Comm., Communication No. 1324/2004, ¶ 7.4, U.N. Doc. CCPR/C/88/D/1324/2004 (2006); *see*

The review also must be by a "court," even in cases involving military detentions.[30] The ICCPR guarantees that any tribunal determining a criminal charge or any "rights and obligations in a suit at law" must be "competent, independent and impartial."[31] A determination of a habeas corpus right before a court is a suit at law determining a right; this judicial body must, therefore, be "competent, independent and impartial."[32]

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also A v. Australia, U.N. Hum. Rts. Comm., Communication No. 560/1993, ¶ 9.5, U.N. Doc. CCPR/C/59/D/560/1993 (1997) ("While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release 'if the detention is not lawful,' article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant."); *Bakhtiyari v. Australia*, *supra* note 28, at ¶ 9.4 (concluding that Article 9(4) was violated where the prolonged detention of a non-citizen in immigration matters depended entirely on a determination of whether that person was an alien with proper papers and there was "no discretion for a domestic court to review the justification of her detention in substantive terms"); *Baban v. Australia*, U.N. Hum. Rts. Comm., Communication No. 1014/2001, ¶ 7.2, U.N. Doc. CCPR/C/78/D/1014/2001 (2003) (same); *C. v. Australia*, U.N. Hum. Rts. Comm., Communication No. 900/1999, ¶ 8.3, U.N. Doc. CCPR/C/76/D/900/1999 (2002) (same).

30 *See Vuolanne v. Finland*, U.N. Hum. Rts. Comm., Communication No. 265/1987, ¶ 9.6, U.N. Doc. CCPR/C/35/D/265/1987 (1989).

31 ICCPR art. 14(1).

32 *See Bandajevsky v. Belarus*, *supra* note 26, at ¶¶ 10.3-10.4 (concluding that Art. 9(4) was violated where there was no possibility of challenging the lawfulness of a detention before a court and noting, in a discussion incorporated into its conclusion on Art. 9(4), that "it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with"); *Rameka v. New*

The habeas-type relief must be timely. Citing international instruments[33] and pointing to this Court's decisions,[34] the Supreme Court of Canada recently ruled that denying a detained suspected terrorist access to the courts for a period of 120 days violated Canada's constitutional right to habeas corpus and the bar on arbitrary detention.[35] The United Nations Human Rights Commission has underscored that detainees at Guantánamo are entitled under Article 9 "to proceedings before a court to decide *without delay*" the legality of the detention.[36]

2. Minimum standards of treatment protect non-citizens against denials of justice

A state may prosecute a non-citizen for crimes committed in circumstances where it has jurisdiction over the crime and the accused. In so doing, however, the state

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Zealand, U.N. Hum. Rts. Comm., Communication No. 1090/2002, ¶ 7.4, U.N. Doc. CCPR/C/79/D/1090/2002 (2003) (suggesting that Art. 9(4) would have been violated in a parole release context if the parole board had been "insufficiently independent, impartial or deficient in procedure for these purposes").

33 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 221.

34 *Rasul*, 542 U.S. 466; *Zadvydas v. Davis*, 533 U.S. 678 (2001).

35 *Charkaoui v. Canada*, 2007 SCC 9, ¶¶ 90-94 (Can.).

36 U.N. Hum. Rts. Comm., *Concluding Observations: United States*, advance unedited version, ¶ 18, 87th Sess. (July 10-28, 2006), *available at* http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.USA.CO.pdf (emphasis added).

must not violate customary minimum treatment standards by engaging in a "denial of justice."[37]

The concept of "denial of justice" in customary international law is defined as an injury "consisting of, or resulting from, denial of access to courts, or denial of procedural fairness and due process in relation to judicial proceedings, whether criminal or civil."[38] By the beginning of the last century, it was established that:

> Undoubtedly the absence of any impartial tribunal from which justice may be sought, the arbitrary control of the courts by the government, the inability or unwillingness of the courts to entertain and adjudicate upon the grievances of a foreigner, or the use of the courts as instruments to oppress foreigners and deprive them of their just rights may each and all be regarded as equivalent to a denial of justice.[39]

By the end of the last century, it was established that a state is responsible

> if it fails to provide to an alien remedies for injury to person or property, whether inflicted

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37 *See, e.g., United States v. Romano*, 706 F.2d 370, 375 (2d Cir. 1983) ("In the absence of a denial of justice, as that concept is understood in public international law, no principle of international law is violated by a state which prosecutes and punishes an alien for a crime committed in its own territory.").

38 Restatement (Third) of Foreign Relations Law § 711 cmt. a; *see also Romano*, 706 F.2d at 375 ("In international law an alien may assert a denial of justice only upon a demonstration of grave or serious defects, such as a refusal to grant rights reasonably to be expected by an accused in a criminal trial.").

39 Borchard, *supra* note 20, at 335-36 (footnotes omitted).

> by the state or by private persons in circumstances in which a remedy would be provided by the *major legal systems of the world*. That such remedy might not be available because under domestic law the state or an official is immune from suit does not diminish the state's responsibility under international law.[40]

It is indisputable that the major legal systems of the world recognize a right to habeas corpus or similar relief.[41]

3. The Military Commissions Act violates these minimum standards of treatment

By denying non-citizens a right to habeas corpus relief before the regularly-constituted courts of the United States,[42] the MCA violates the standard of minimum

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[40] Restatement (Third) of Foreign Relations Law § 711 cmt. e (emphasis added).

[41] The writ of habeas corpus features in the legal systems of common law countries. *See, e.g.*, David Clark & Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (2000) (examining the habeas writ in the states of the British Empire and Commonwealth). Under different names, it is also found in civil law jurisdictions. *See, e.g.*, *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8, ¶¶ 32-43 (Jan. 30, 1987), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_08_ing.pdf (noting the prevalence of the habeas-like remedy of "amparo" and habeas itself in Latin America and discussing the habeas protections in the American Convention on Human Rights); *see also* European Convention, *supra* note 33, art. Art 5(4) (guaranteeing a habeas right in the 46 European state parties to that instrument).

[42] *See* MCA § 3(a), 120 Stat. at 2623-24 (codified at 10 U.S.C. § 950j(b)) ("[N]o court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever . . . relating to the prosecution, trial, or judgment of a military commission under

treatment under customary international law expressed in human rights law and captured in the concept of denial of justice. Indeed, the Supreme Court has previously recognized that the deprivation of full and complete access to the courts is a form of punishment.[43] This is precisely what the MCA does by limiting detainees' access to the courts for habeas corpus petitions.

The MCA regime's reliance on the Combatant Status Review Tribunal ("CSRT") is no substitute for habeas corpus relief because it does not meet the competent, impartial and independent tribunal standard required under international law. These tribunals are not independent of the executive. As Petitioners and other *amici* set forth in greater detail, the form of appellate review in the D.C. Circuit limits the grounds of review available to Petitioners and is too cramped to overcome the infirmities of the CSRT.[44] These limitations would not exist on habeas corpus review.

Because the habeas-stripping provisions of the MCA also purport to remove habeas authority over Military

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this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter."); § 7(a), 120 Stat. at 2636 (codified at 28 U.S.C. § 2241(e)(1)) ("No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.").

[43] *Pierce v. Carskadon*, 83 U.S. 234, 237-39 (1872) (holding that a West Virginia law limiting access to the courts for former Confederate sympathizers was an unlawful attainder).

[44] Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2)(C), 119 Stat. 2680, 2742 (scope of review for CSRT determinations).

Commissions, the consequence of upholding the MCA would be to permit criminal trial and punishment — including the death penalty — of detainees by the executive, without meaningful recourse to a competent, impartial, and independent tribunal as required by international law. The D.C. Circuit's scope of appellate review of military commission decisions is circumscribed in exactly the same manner as its review of CSRT determinations.[45] Thus, contrary to this Court's ruling in *Hamdan v. Rumsfeld*,[46] detainees would not be able to raise pre-trial challenges before an independent tribunal on such fundamental questions as whether the commission has subject matter jurisdiction over offenses defined *ex post facto,* such as conspiracy;[47] whether evidence obtained through coercion is admissible;[48] or whether hearsay evidence may be used to secure a conviction resulting in the death penalty.[49]

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[45] *Compare* MCA § 3, 120 Stat. at 2622 (codified at 10 U.S.C. § 950g(c)) (scope of review for military commissions) *with* Detainee Treatment Act § 1005(e)(2)(C), 119 Stat. at 2742.

[46] *See* 126 S. Ct. at 2788 (finding it "appropriate" to review military commission procedures prior to a final decision).

[47] *See* MCA § 3, 120 Stat. at 2630 (codified at 10 U.S.C. § 950v(b)(28)) (defining conspiracy as a crime triable by military commission).

[48] *See* MCA § 3(a), 120 Stat. at 2607 (codified at 10 U.S.C. § 948r(c), (d)) (permitting the admission of a statement obtained by coercion so long as the military judge deems the statement reliable, the interests of justice would be served by its admission, and, for those statements obtained after the enactment of the Detainee Treatment Act, the methods used do not qualify as "cruel, inhuman, or degrading treatment" under that Act).

[49] *See* MCA § 3(a), 120 Stat. at 2608-09 (codified at 10 U.S.C. § 949a) (providing the Secretary of Defense with wide latitude to establish pretrial, trial and post-trial procedures, including the admission of

B. The MCA Violates Minimum Standards Of Treatment Guaranteeing Non-Discriminatory Treatment Of Non-Citizens With Respect To Core Civil Rights

Minimum standards of treatment under customary international law also indisputably incorporate non-discrimination obligations, which bar treatment of non-citizens in certain ways that fall below the treatment for citizens. The MCA violates the principle of non-discrimination.

1. Minimum standards of treatment bar discrimination based on national origin with respect to access to habeas-type relief

The minimum treatment standards preclude discriminatory treatment that favors citizens over non-citizens:

> Internationally recognized human rights generally apply to aliens as to nationals. . . . Discrimination against aliens in matters that are not themselves human rights may nonetheless constitute a denial to the individual of the equal protection of the laws.[50]

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hearsay evidence); Mil. Comm'n R. Evid. § 304(g)(1) ("An oral confession or admission of the accused may be proved by the testimony of anyone who heard the accused make it, even if it was reduced to writing and the writing is not accounted for.").

[50] Restatement (Third) of Foreign Relations Law § 711 cmt. f; *see also West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 832 (9th Cir. 1987) (noting. in a case concerning an alleged taking by Mexico of foreign-owned property that "[i]nternational law requires that aliens

While this limitation on discriminatory treatment does not apply to all civil and political rights,[51] it does preclude denials of justice reflecting discrimination between citizens and non-citizens: "It is a wrong under international law for a state to deny a foreign national access to domestic courts. . . . That is the central meaning of 'denial of justice.'"[52]

Under the minimum treatment standard, non-citizens enjoy basic human rights "equally with the state's own nationals."[53] Indeed, by its own terms, the ICCPR emphatically prohibits discriminatory application of rights between nationals and non-nationals. In Article 2, it requires "[e]ach State Party to the present Covenant . . . to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as . . . *national or social origin*."[54]

As noted, this requirement of non-discrimination on the basis of national origin is relaxed for certain political rights that are reserved for "citizens."[55] And, of course, "aliens" may be expelled from national territories.[56] Discrimination on the basis of nationality, however, is

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not be discriminated against or singled out for regulation by the state").

51 For example, see those listed in Restatement (Third) of Foreign Relations Law § 711 reporters' note 2(C).

52 § 711 reporters' note 2(B).

53 § 711 cmt. b.

54 ICCPR art. 2(1) (emphasis added).

55 *See id.* art. 25.

56 *See id.* art. 13.

impermissible in relation to core legal rights. Thus, the habeas-type protections in Article 9 of the ICCPR apply to "anyone." Article 26 confirms that:

> *All persons* are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . *national or social origin*.[57]

Article 14 underscores that:

> *All persons* shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, *everyone* shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[58]

2. The Military Commissions Act violates the non-discrimination principle

The MCA eliminates the availability of habeas relief in the federal courts for *alien* enemy combatants alone.[59] Indeed, the entire military commissions system established by the MCA applies exclusively to "alien unlawful enemy combatant[s]."[60] Alien unlawful enemy combatants are persons who are not citizens of the United States and who

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[57] *Id.* art. 26 (emphasis added).

[58] *Id.* art. 14(1) (emphasis added).

[59] 28 U.S.C. § 2241 (effective Oct. 17, 2006).

[60] 10 U.S.C. § 948c.

(1) have engaged in or "purposefully and materially supported hostilities against the United States or its co-belligerents" but are not lawful enemy combatants or (2) have "been determined to be [] unlawful enemy combatant[s]" by the CSRT.[61] The CSRT is itself constituted to determine the status only of foreign nationals detained at Guantánamo Bay naval base.[62]

U.S. citizens who in all respects other than their nationality meet the definition of unlawful enemy combatants are subject to a very different legal system. Citizens charged with crimes identical to those faced by non-citizens detained at Guantánamo Bay are subject to the jurisdiction of civilian courts or courts-martial, where they are afforded full procedural due process protections, including the right to habeas corpus. The rights protected by the standards of minimum treatment in customary international law (including those expressed in the ICCPR) are not enjoyed equally by aliens and U.S. citizens in a system that extends greater rights to similarly-situated citizens than to non-citizens.

C. U.S. Obligations Under Customary International Law Apply During Times Of Armed Conflict

That some Guantánamo prisoners have been seized in a situation of armed conflict is irrelevant to this analysis. First, both non-citizens and U.S. citizens have been detained

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[61] § 948a(1), (3).

[62] Paul Wolfowitz, Deputy Secretary of Defense, Memorandum for the Secretary of the Navy re: Order Establishing Combatant Status Review Tribunal (July 7, 2004).

by the United States as combatants, yet U.S. citizens are not subject to the habeas repeal or to the military commissions process. The fact of alienage neither exacerbates nor distinguishes the alleged culpability of alien combatants in relation to citizen combatants. Second, in a situation of armed conflict, international humanitarian law is the *lex specialis* — that is, a specialized body of law that applies in lieu of conflicting, general rules. An armed conflict, however, displaces more general rules of international law only where a principle of international humanitarian law is irreconcilably inconsistent with the regular law.[63]

There is no principle of international humanitarian law that would be offended by the application of minimum treatment in these cases. Nor is there any practical objection to the habeas relief these rules of minimum treatment require. Petitioners are not being held in exigent circumstances in battlefield conditions. On the contrary, they are far removed from any theater of conflict and have been held in the clear and uninterrupted custody of the United States for as long as six years during an inchoate and potentially interminable campaign against terrorism. In these unique and unprecedented circumstances, there is no persuasive, practical objection to Petitioners being provided

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[63] *See Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. (No. 10) at 358, U.N. Doc. A/56/10 (2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (discussing the application of the doctrine of *lex specialis*, and noting: "For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.").

full recourse to the courts of the United States by way of a writ of habeas corpus.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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APPENDIX

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Nos. 06-1195 & 06-1196

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

LAKHDAR BOUMEDIENE, et al.,

Petitioners,

v.

GEORGE W. BUSH, et al.,

Respondents.

KHALED A.F. AL ODAH, et al.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts. Because the instant cases raise vital questions about the Great Writ of habeas corpus and separation of powers principles, the case is of central concern to the Cato Institute.

STATEMENT OF THE CASE

After the terrorist attacks of September 11, 2001, the President dispatched U.S. armed forces to Afghanistan to attack al-Qaeda base camps and to subdue the Taliban regime. Since the invasion of Afghanistan, the U.S. military has taken thousands of prisoners. Most have been imprisoned at U.S. facilities in that theatre, while others have been transferred to the U.S. Naval Base at Guantanamo Bay, Cuba. The President has determined that the Guantanamo prisoners are not entitled to prisoner-of-war status under the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 75 U.N.T.S. No. 972.

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[1] The parties consent to the filing of this *Amicus* brief have been lodged with the Clerk of this Court. In accordance with Rule 37.6, *Amicus* states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *Amicus*, has made a monetary contribution to the preparation of this brief.

In 2002, several relatives of certain prisoners filed habeas corpus petitions in the U.S. District Court for the District of Columbia challenging the legality of their imprisonment at Guantanamo. These prisoners did not challenge the authority of the President and the military to take suspected members of hostile forces into custody, but they did allege that they had never been a combatant against the U.S. and that they had been denied access to counsel and access to the civilian court system. The Government responded to those claims by urging the District Court to summarily dismiss the petitions. According to the Government, recognizing jurisdiction over the prisoners' habeas claims would "intrude" on the power of both the Executive and the Congress. This Court heard this controversy in 2004. In *Rasul v. Bush*, 542 U.S. 466 (2004), this Court held that the federal habeas statute, 28 U.S.C. §2241, extends to prisoners held by the U.S. military at the Guantanamo Bay facility.

After *Rasul*, Congress modified §2241 by enacting the Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600. That law deprives courts of jurisdiction to consider habeas claims. Petitioners maintain that such deprivation is unconstitutional. The Government, in turn, renews its argument that the courts cannot "intrude" on the power of the Executive to prosecute a war or Congress's power to delineate the jurisdiction of the federal courts. Thus, this Court must now confront grave questions concerning separation of powers principles and the boundaries of the constitutional provision for the writ of habeas corpus.

SUMMARY OF ARGUMENT

To resolve the grave issue at stake in this case, this Court should start with first principles. To begin with, the Constitution does guarantee the existence of the habeas writ. Second, the writ does extend to prisoners in facilities that are not on U.S. soil. Third, this Court can and should review the validity of any act of Congress that expressly or impliedly invokes one of the exceptions to the constitutional rule against the suspension of the writ of habeas corpus.

Congress does have the power to prescribe rules affecting the writ of habeas corpus. To prevent forum shopping, for example, Congress designated a particular court to consider habeas petitions from the prison facility at Guantanamo Bay. The Constitution, however, limits Congress's power over the writ of habeas corpus. The Suspension Clause limits the revocation of habeas corpus to times of rebellion or invasion. Congress has not invoked those exceptions. Thus, the Military Commissions Act, which purports to withdraw the jurisdiction of federal courts over the Petitioners' habeas claims, is unconstitutional.

ARGUMENT

I. THE WRIT OF HABEAS CORPUS IS GUARANTEED BY THE CONSTITUTION.

This Court should begin with first principles. The writ of habeas corpus is guaranteed by the Constitution. Unfortunately, the Government seems to deny this fundamental proposition. It is not the Government's central contention in this case, to be sure, but that contention is nonetheless lurking in the background. In cryptic testimony

before the Senate Judiciary Committee, Attorney General Alberto Gonzales observed "[T]here is no express grant of habeas in the Constitution. There is [only] a prohibition against taking it away." Testimony of Attorney General Alberto Gonzales, Hearing of the Senate Judiciary Committee; Subject: Oversight of the U.S. Department of Justice (January 18, 2007). The Attorney General may well subscribe to a viewpoint that was expressed in a dissenting opinion in this Court several years ago. *See INS v. St. Cyr*, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting).[2] In any event, such a cramped interpretation of the constitutional text is woefully misguided.

Article I, section 9 of the Constitution provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." This Court should not waver from the proposition that the habeas writ is grounded in the Constitution itself. This Court should approach the text of the Suspension Clause in light of its purpose. Consider, for example, the consequences for freedom of the press if one were to jump to the conclusion that taxation is not censorship. Special newspaper taxes could be justified with the argument that the taxes do not prohibit anyone from saying anything. The Government might also attempt to suppress the ideas expressed in newspapers by interfering with the ability of writers, reporters, and newspaper owners to coordinate and disseminate their ideas by restricting the production and delivery process.

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[2] Note also the presidential proclamation that purports to deny prisoners access to the courts. "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," Section 7(b)(2), 66 Fed. Reg. 57833.

Fortunately, this Court has interpreted the First Amendment broadly in response to such threats. *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65, n. 6 (1963) ("The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication . . . "); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (invalidating selective taxation of the press).

Consider also the double jeopardy provision of the Fifth Amendment, which states: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The "life or limb" proviso might conceivably be read in such as way as to permit multiple prosecutions and punishments in all of the situations in which people are facing criminal allegations that would result in "mere" imprisonment, but the courts have properly resisted such a construction as contrary to the central purpose of the provision. *See Bedlinger v. Commonwealth of Virginia*, 3 Call. 461, 468 (1803) (opinion of Roane, J.); *People v. Goodwin*, 1 Wheeler C.C. 470, 18 Johns. 187 (N.Y. Sup. 1820); *Stout v. State*, 36 Okla. 744, 130 P. 553, 557 (Okla. 1913); *Williams v. Commonwealth*, 78 Ky. 93 (1879).

Text aside, it is true that four of the state ratifying conventions objected to the proposed Constitution because the charter failed to affirmatively guarantee a right to habeas corpus, *St. Cyr*, 533 U.S. at 337 (Scalia, J., dissenting), but such historical material ought to constitute the *starting point* of an inquiry into the original understanding of the Constitution. The crucial point is to discern how the defenders of the proposed Constitution *responded* to such objections. That is, did the Federalists admit and defend the absence of a guarantee, or did they seek to rebut Antifederalist objections as unfounded or mistaken? If the latter, the appropriate conclusion is that the drafters and ratifiers of the Constitution approved the construction

offered in response. *See Missouri v. Jenkins*, 515 U.S. 70, 126-127 (1995) (Thomas, J., concurring).

Professor Gerald L. Neuman has investigated this question and he found that the Federalists "repeatedly assured their opponents that the Suspension Clause protected the writ legally, not just politically." *See* Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 Colum.Hum.Rts.L.Rev. 555, 579 (2002). To begin with, when James Madison discussed trial by jury, he specifically addressed Antifederalist objections to the lack of a constitutional provision for trial by jury in civil cases. Among other things, he reasoned:

> But I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the habeas-corpus act, seems therefore to be alone concerned in the question. *And both of these are provided for, in the most ample manner, in the plan of the convention.* The Federalist No. 83 (emphasis added).

Other Federalists made similar representations. During the Virginia Convention, Governor Randolph stated, "That [habeas] privilege is secured here by the Constitution, and is only to be suspended in cases of extreme emergency." *See* Neumann, *supra*, at 579 n. 109 (citation omitted). During the Pennsylvania Convention, James Wilson observed that "the right of habeas corpus was secured by a particular provision in its favor." Paschal, *The Constitution and*

Habeas Corpus, 1970 Duke L.J. 605, 611, n. 23 (citing 2 Elliot's Debates at 454-455).

As Professor Neuman has noted, it would have been incongruous for the Framers of the Constitution to have designed a habeas safeguard against the majoritarian abuse of temporary suspension, while "trusting the political process to police the more egregious abuse of permanent total or partial abrogations." Neuman, *supra*, at 579 n. 109. In sum, the Attorney General's oblique contention that the Constitution does guarantee the existence of the habeas writ is without merit.

II. THE WRIT OF HABEAS CORPUS EXTENDS TO PERSONS WHO ARE IMPRISONED OUTSIDE OF THE UNITED STATES.

The Government argues that the habeas writ does not extend to persons imprisoned outside of the United States. This claim is also erroneous. It is generally true that the safeguards of the American Bill of Rights do not apply to noncitizens who are not on U.S. soil, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), but it is simply incorrect to analyze the issue in *this* case in terms of the "constitutional rights of aliens." At its core, habeas is a separation of powers principle. To be sure, habeas actions involve the prisoner, but only indirectly. The real action is between the judicial branch and the executive branch of the American government.[3] Thus, when the writ has not been suspended, a prisoner must have an opportunity to present a petition to a court that his incarceration is mistaken or

[3] *See* Richard A. Epstein, "Produce the Body," Wall Street Journal, October 7-8, 2006.

unlawful. Here, the President and the Secretary of Defense are the custodians. The fact that the prisoners are noncitizens is beside the point. So too is the location of their jail cell.[4]

This idea is hardly a novel innovation in the law of habeas corpus. *Rasul v. Bush*, 542 U.S. 466, 478-479 (2004). Indeed, Judge Cooley emphasized the jurisdictional component of the custodian in 1867. Here is an excerpt from Judge Cooley's opinion:

> "The important fact to be observed in regard to the mode of procedure upon this [habeas] writ is, that it is directed to, and served upon, not the person confined, but his jailor. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. . . . This is the ordinary mode of affording relief, and if other means are resorted to, they are only auxiliary to those which are usual. *The place of confinement is, therefore, not important to the relief, if the guilty party is within reach of process, so that by the power of the court he can be compelled to release his grasp.* The difficulty of affording redress is not increased by the confinement being beyond the limits of the state [of Michigan], except as greater distance may affect it. The important question is, where is the power of control exercised?"

---

[4] *Amicus* will not burden this Court by reviewing the early common law precedents. That law has already been well summarized by Judge Rogers. *Boumediene v. Bush*, 476 F.3d 981 (2007) (Rogers, J., dissenting).

In re Jackson, 15 Mich. 417, 439-440 (1867) (emphasis added). In this case, the "power of control" for prisoners held by the U.S. military is in our capital city, Washington, D.C.

There are certainly legitimate *practical* issues that will arise in habeas litigation. In previous wars, there were strong incentives for enemy personnel to remain in uniform even if there was a strong likelihood of imminent capture. Staying in uniform meant qualification for prisoner-of-war status under the terms of the Geneva Convention. That legal framework kept the vast majority of cases outside of the American court system. (A few, of course, crept in. *See In re Territo*, 156 F.2d 142 (1946)). The war with the al-Qaeda terrorist network will entail a steady influx of cases in which the Government will accuse a "civilian" of actually being an enemy combatant. With the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, and the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, Congress has sought to address several *practical* legal problems, such as forum shopping by prisoners. However, insofar as the Military Commissions Act violates the core principles of habeas review, those statutory provisions are void.[5]

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[5] *Amicus Curiae* will not burden this Court by repeating arguments about the problems with the Combatant Status Review Tribunals. *See Boumediene v. Bush*, 476 F.3d 981, 1005-1007 (2007) (Rogers, J., dissenting). *See also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233-236 (1995) (distinguishing an unconstitutional statute from statutes which simply reflect and confirm the courts' own inherent and discretionary powers). Further, as Judge Rogers noted below, in addition to the habeas corpus provision there are several other structural limitations on the powers of Congress, such as the Ex Post Facto Clause and the Bill of Attainder Clause, which apply broadly. Does the Government maintain that Congress can enact a bill of attainder

(Continued on following page)

The Government's case rests upon *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *Amicus Curiae* respectfully submits that this case was incorrectly decided and ought to be overruled for the reasons set forth in Justice Black's dissent.[6]

III. ARTICLE III COURTS CAN AND SHOULD REVIEW ACTS OF CONGRESS THAT PURPORT TO SUSPEND THE WRIT OF HABEAS CORPUS.

The Suspension Clause clearly contemplates exigent circumstances in which the "public Safety" will require the Executive to move swiftly against persons who are perceived to be dangerous. In those situations, it is likely that the Executive will not be able to comply with constitutional norms for every search and arrest. The suspension of the writ will thus excuse otherwise illegal arrests and dragnet tactics because emergency circumstances can warrant such actions.

As long as the writ of habeas corpus is not suspended, however, the Executive must follow constitutional norms.[7]

---

against, say, any European, as long as that person is not on U.S. soil? If not, why not?

[6] Justice Black wrote, "The Court is fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive's illegal incarcerations." *Johnson v. Eisentrager*, 339 U.S. 763, 795 (1950) (Black, J., dissenting). *See also* Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv.J.L.Pub.Pol'y 23 (1994).

[7] To be clear, *Amicus Curiae* does not dispute the authority of the military to kill or capture potentially hostile persons in a zone of active combat.

"Thus, it has been held that in the absence of Congressional action a writ of habeas corpus cannot be denied in a proper case even in wartime. 39 Am.Jur. 2d, Habeas Corpus, §5, p. 206 (citing *Ex Parte Stewart*, 47 F.Supp. 410 (1942)).

When Congress enacted the Military Commissions Act, it did not expressly avail itself of one of the enumerated exceptions in the Suspension Clause. Since a suspension of the writ would unquestionably be among the most stupendous measures that could be considered by members of Congress, it would be wholly inappropriate for this Court to hold that the availability of the writ could turn on so thin a reed as inadvertance or an inference from a legislative scheme. *See* Tr. of Oral Arg. 57-63, *Rasul v. Bush*, 542 U.S. 466 (2004).

But even if Congress had expressly invoked one of the enumerated exceptions to the Suspension Clause, the constitutional inquiry must continue. Article III courts can and should review the *validity* of such legislation. *Contra Hamdi v. Rumsfeld*, 542 U.S. 507, 594 n. 4 (2004) (Thomas, J., dissenting). The Framers of the Constitution could have easily written a provision that would entrust the weighty decision to suspend habeas corpus to the sole discretion of the legislature. They did not craft such a provision. Instead, the Framers established limits and prohibitions on the exercise by Congress of certain specific forms of legislative power, including the circumstances in which the Great Writ could be suspended. The Suspension Clause provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in *Cases of Rebellion or Invasion* the public Safety may require it." (Emphasis added). The Framers did not consider such limitations to be mere expressions of sentiment. They were to be legally enforceable limits. As Chief Justice John

Marshall noted two centuries ago, "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury v. Madison*, 5 U.S. 137, 176 (1803). It is imperative that this Court eschew a deferential posture and stand, in words of James Madison, as an "impenetrable bulwark against every assumption of power in the Legislative or Executive." *New York Times v. United States*, 403 U.S. 713, 718-719 n. 5 (1971) (citation omitted).

CONCLUSION

The American Constitution affords our Commander-in-Chief latitude to take enemy personnel into custody in a war zone. Once the prisoners are disarmed and jailed, there is no military exigency. If the Executive elects to incarcerate a prisoner for an extended period of time, he must be prepared to persuade an Article III judge that there are good reasons for such a detention. Congress can address some of the practical problems that may arise from habeas litigation, such as forum shopping. If habeas litigation is abused or becomes excessive and burdensome, Congress can also establish a system of purely discretionary review. So long as a prisoner has the ability to petition an Article III court, and that tribunal possesses the power to review the legality of the detention, as well as the power to discharge the prisoner, the Great Writ will retain its vitality as a bulwark of liberty. *See Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Harris v. Nelson*, 394 U.S. 286 (1969).

In the instant cases, Congress overstepped the boundary established by the Suspension Clause by attempting to

withdraw federal court jurisdiction over petitions for writs of habeas corpus. For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted,

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Nos. 06-1195 & 06-1196

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, et al.,

Petitioners,

v.

GEORGE W. BUSH, et al.,

Respondents.

KHALED A.F. AL ODAH, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR AMICI CURIAE COALITION OF NON-GOVERNMENTAL ORGANIZATIONS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are public interest organizations with differing—often widely differing—political and ideological perspectives.[1] But amici are unified on one issue. They believe that the checks and balances fundamental to our government of divided powers require that an independent Judiciary meaningfully determine the lawfulness of the Executive's detentions at Guantánamo Bay, an area subject to the exclusive authority of the United States and far removed from any actual battlefield.

Amicus the **Constitution Project** is an independent think tank that brings together legal and policy experts from across the political spectrum to promote consensus solutions to pressing constitutional issues. In March 2007, the Project issued a *Statement on Restoring Habeas Corpus Rights Eliminated by the Military Commissions Act*. The bipartisan group of signers stated that, while there is a need to detain foreign terrorists to protect national security, "we do not believe repealing federal court jurisdiction over habeas corpus serves that goal. On the contrary, habeas corpus is crucial to ensure that the government's detention power is exercised wisely, lawfully, and consistently with American values."[2]

Amicus **Human Rights First** ("HRF") is a non-profit, non-partisan organization that has worked since 1978 to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. HRF supports human rights activists around the world, protects refugees in flight

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae or their counsel, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk.

[2] Statement available at www.constitutionproject.org/pdf/MCA_Statement.pdf. A list of the signatories to this statement is included in the addendum to this brief.

from persecution and repression, and helps build an international system of justice and accountability for human rights crimes. HRF works to advance effective counterterrorism laws and policies that are consistent with U.S. and international law through advocacy in the courts and with policymakers, research and reporting, and trial monitoring.

Amicus **Human Rights Watch** ("HRW") is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to bring public pressure upon offending governments and others to end abusive practices. For the past six years, HRW has worked extensively to document U.S. counterterrorism policies and practices and to promote effective and lawful responses to terrorist threats.

Amicus the **Rutherford Institute** is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated. Attorneys affiliated with the Institute have represented numerous parties before the U.S. Supreme Court. The Institute has also filed briefs as an amicus of the Court in cases dealing with critical constitutional issues. The Rutherford Institute is a staunch advocate of the Great Writ of habeas corpus.

Amicus the **American-Arab Anti-Discrimination Committee** ("ADC") is a non-sectarian, non-partisan, national grassroots and civil rights organization dedicated to defending the rights of people of Arab descent and promoting their rich cultural heritage. It was founded in 1980 by former U.S. Senator James Abourezk, has 38 chapters nationwide, and members in all 50 States. ADC is at the forefront in addressing discrimination and bias against Arab Americans

wherever it is practiced, and is committed to eradicating all forms of unlawful discrimination. ADC strives to preserve the constitutional guarantees of Due Process and Equal Protection, which form the key foundation of our nation.

Amicus the **American Freedom Agenda** is an organization dedicated to upholding the United States and 50 state constitutions and to restoring checks and balances among the three branches of government against the accumulation of power by any branch of the government. It promotes social welfare by educating the public on: (a) the nature and kind of inalienable rights secured by United States and state constitutions, and (b) the threats, abuses, denials, and dilutions of such rights.

Amicus the **American Jewish Committee** ("AJC"), a national organization of over 175,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of AJC that those rights will be secure only when the civil and religious rights of all Americans are also secure. Long before the tragic events of September 11, 2001, AJC advocated positions that give due deference to both this country's national security needs and our constitutionally guaranteed civil liberties and principles of due process of law. AJC believes that respecting both of these important interests requires preserving the "great writ" of habeas corpus and ensuring meaningful judicial review of executive detention.

Amicus the **Anti-Defamation League** ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. To that end, ADL speaks as both an advocate for civil rights and liberties and as an aggressive supporter of law enforcement and the government's important efforts to fight international terrorism. ADL believes that judicial review is fundamental to the success of these efforts.

Amicus the **Jewish Council for Public Affairs** ("JCPA"), the coordinating body of 14 national and 125 local Jewish federations and community relations councils, was founded in 1944 to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a just society. The JCPA recognizes that the Jewish community has a direct stake and an ethical imperative to assure that America remains a country wedded to the Bill of Rights and committed to the rule of law, and a nation whose institutions continue to function as a public trust.

Amicus the **Muslim Public Affairs Council** ("MPAC") is a public service agency working for the civil rights of American Muslims and for the integration of Islam into American pluralism. MPAC was created in 1988 to promote a vibrant American Muslim community and over the past two decades, MPAC has built a reputation as a consistent and reliable resource for government and media, and is trusted by American Muslims as an authentic, experienced voice. Today, MPAC sits as the most politically integrated American Muslim institution in Washington, D.C. and serves as the primary interface between the community and the U.S. Government.

Amicus the **National Association of Criminal Defense Lawyers** ("NACDL") is a non-profit corporation with more than 12,000 members, including military defense counsel, public defenders, private practitioners and law professors, as well as affiliates totaling more than 40,000 lawyers. The NACDL was founded in 1958 to disseminate and advance knowledge of the law in the area of criminal practice and to encourage the integrity, independence and expertise of defense lawyers in criminal cases, both civilian and military. Among the NACDL's objectives are promoting the proper and fair administration of criminal justice (including military justice and habeas review) and preserving, protecting and defending the adversary system and the U.S. Constitution.

Amicus the **National Association of Social Workers** ("NASW") is the largest association of professional social

workers in the world with 145,000 members and chapters throughout the United States, in Puerto Rico, Guam, the Virgin Islands, and an International Chapter in Europe. NASW supports the adoption of human rights as a foundation principle upon which all of social work theory and applied knowledge rests, including the right not to be arbitrarily detained and the right to a fair and public hearing by an independent and impartial tribunal in the determination of an individual's rights and obligations and of any criminal charge against him, as specified in the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights.

Amicus the **National Council of the Churches of Christ in the U.S.A.** ("NCC"), founded in 1950, is the leading force for ecumenical cooperation in the United States. The NCC's 35 Anglican, Orthodox and Protestant member communions include 45 million persons in 100,000 congregations in all 50 states. The NCC, as a religious organization, is interested from a moral standpoint in the right to due process, which is being denied the detainees in Guantánamo.

Amicus **Open Society Institute** ("OSI") is a private operating and grantmaking foundation created in 1993 to build vibrant and tolerant democracies whose governments are accountable to their citizens. By supporting open societies globally, OSI seeks to shape public policies that assure greater fairness in political, legal, and economic systems and safeguard fundamental rights. OSI works to implement and promote a range of initiatives to advance justice, education, public health, and independent media.

Amicus **Patriots to Restore Checks and Balances** ("PRCB") is an alliance of individuals and organizations, from across the ideological spectrum, that believes the threat of terrorism cannot be allowed to diminish or dissolve the carefully constructed civil liberties that underlie our society and are guaranteed in the Constitution and Bill of Rights. In furtherance of this underlying concern, PRCB works in many forums—government and private—and on many civil liber-

ties issues, including habeas corpus. PRCB is thus interested in preserving the writ of habeas corpus in the context of so-called military tribunals such as created by the MCA.

Amicus **People For the American Way Foundation** ("People For") is a non-partisan citizens' organization established in 1980 to promote and protect civil and constitutional rights that now has more than 1 million members and supporters nationwide. People For educates the public on our tradition of liberty and freedom and defends that tradition, including the fundamental right to challenge the legality of one's detention, through litigation and other means. Accordingly, People For has filed amicus briefs in other such cases before this Court, including *Rasul* v. *Bush* and *Hamdan* v. *Rumsfeld*. People For joins this brief to help vindicate the critical right to habeas corpus at issue in this case.

Amicus the **Union for Reform Judaism** ("URJ") encompasses 1.5 million Reform Jews in 900 North American congregations. As we strive to strike the appropriate balance between cherished, constitutionally protected freedoms and national security, we turn to Jewish law for guidance, which affirms the spark of the divine in every individual and mandates the just treatment of strangers among us. The URJ is opposed to indefinite detention and administrative rulings that designate individuals as "enemy combatants" and thus not entitled to the full range of due process rights. No matter how heinous the crime, every individual should have access to the legal system under which they are being held.

SUMMARY OF THE ARGUMENT

The Government broadly contends that Congress may grant the Executive almost unchecked authority to imprison people it labels as "enemy combatants" without ever charging them with (or presenting evidence of) offenses and without allowing any court to conduct an independent inquiry into the legality of their detentions. Petitioners, on the other hand, ask only that the Court enforce the structural guarantee of the Suspension Clause that an independent court be allowed to

make a meaningful determination of the legality of Executive detention, except in those extraordinary circumstances where Congress has lawfully suspended habeas corpus. Petitioners do not ask this Court to determine whether they have been lawfully imprisoned; they merely ask that they be allowed to seek federal court review of the legality of their detention in habeas proceedings required by the Constitution.

These cases turn on the structural requirement of separation of powers central to our form of government. The Suspension Clause is an integral component of that system of checks and balances, checking the powers of both Congress and the Executive, and balancing them with the coequal authority of an independent Judiciary. The Suspension Clause ensures that, in cases of imprisonment, an independent Judiciary will be able to determine whether the Executive has the requisite lawful basis for that detention. It also expressly limits Congress's ability to preclude the Judiciary from assessing the legality of Executive detention. Of specific relevance to this case, the Suspension Clause ensures that neither Congress nor the Executive can create "law-free" zones within the exclusive jurisdiction of the United States where the Judiciary cannot independently inquire into the legality of Executive detention. The Executive otherwise would have free rein to imprison individuals indefinitely, safe in the knowledge that no court could conduct a meaningful inquiry into the factual or legal bases for those imprisonments.

The few facts that are known about the Guantánamo Bay detainees demonstrate the grave dangers of allowing Congress to eliminate the ability of the independent Judiciary to issue writs of habeas corpus. The Executive has imprisoned individuals based on the uncorroborated hearsay of self-interested bounty hunters; it has continued to hold the vast majority of its detainees indefinitely based on the most perfunctory of reviews; and it has not allowed the detainees any meaningful opportunity to clear their names. Such Kafkaesque regimes may lawfully exist in other countries where executive power is absolute. But the Framers of our

Constitution expressly ensured that habeas corpus would be available to permit the Judiciary to check absolute Executive power except in the extraordinarily limited and precisely defined circumstances of a rebellion or invasion.

ARGUMENT

Separation of powers principles compel the conclusion that the habeas-stripping provision of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, is an unconstitutional exercise of Congressional power. The MCA attempts to prevent the Judiciary from carrying out its most basic and essential function—interpreting and applying the rule of law through the writ of habeas corpus. Simply put, "[t]he accumulation of all powers legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist No. 47* (Madison).

I. HABEAS ENSURES SEPARATION OF POWERS BY PROVIDING AN IRREDUCIBLE CHECK BY AN INDEPENDENT JUDICIARY AGAINST UNLAWFUL EXECUTIVE DETENTION.

A. The Suspension Clause Is A Vital Guarantee Of Separation Of Powers That Is Fully Enforceable Here.

"[T]he central judgment of the Framers of the Constitution [was] that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989). No provision of the Constitution more succinctly embodies this tripartite separation of powers than the Suspension Clause, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. The Clause ensures that an independent Judiciary will serve as a check on unlawful Executive detention without interference

from the Legislature except in the narrowly defined and time-limited circumstances of a rebellion or invasion.

The Suspension Clause thus guarantees that the federal courts have broad authority to inquire into the legality of Executive detentions. It implicitly recognizes that the courts are constitutionally empowered to issue the writ of habeas corpus as "an incident of judicial power." *McNally* v. *Hill*, 293 U.S. 131, 135 (1934). In the Judiciary Act of 1789, "a contemporaneous exposition of the Constitution," *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821) (Marshall, C.J.), Congress gave "this great constitutional privilege * * * life and activity," *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807), by empowering all federal courts to issue the writ in cases of detention "under or by colour of the authority of the United States." Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82. Thus, "[a]cting under the immediate influence of [the Suspension Clause]," *Bollman*, 8 U.S. (4 Cranch) at 95, the First Congress specified that the federal courts had the power to issue the writ to all "prisoners held in custody of the United States." *Stone* v. *Powell*, 428 U.S. 465, 474-75 (1976).

This Court consistently has recognized the breadth of the federal courts' power to review Executive detention. "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001); *see Brown* v. *Allen*, 344 U.S. 443, 533 (1953) ("historic purpose of the writ has been to relieve detention by executive authorities without judicial trial") (Jackson, J. concurring). "[T]his Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace." *Rasul* v. *Bush*, 542 U.S. 466, 474 (2004); *see In re Yamashita*, 327 U.S. 1 (1946) (entertaining petition challenging wartime detention in the Philippines); *Ex parte Quirin*, 317 U.S. 1 (1942) (entertaining petition of enemy aliens convicted of war crimes); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)

(entertaining petition of man who plotted attack on military installations). Thus, the Great Writ "allows the Judicial Branch to play a necessary role in maintaining [the] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality).

The Suspension Clause expressly prohibits the Legislature from eliminating the Judiciary's role in reviewing Executive detention except in cases of rebellion or invasion. The structural importance of the Suspension Clause in this regard cannot be overstated. It is the *only* provision of the Constitution that *expressly* constrains Congress's ability to abrogate the powers of an independent Judiciary. The Constitution contains other indirect and implicit restraints (*i.e.*, requiring judicial life tenure and the existence of this Court), but it contains no other provision that expressly guarantees judicial power against legislative overreaching.

The history of habeas corpus confirms that the prohibition against its suspension is a structural guarantee against Executive lawlessness. Habeas traces to the Magna Carta, but the modern writ was born in the 17th-century power struggle in England between the Crown and an increasingly independent Parliament. In 1628, Parliament presented a Petition of Right to Charles I, complaining that individuals had been

> imprisoned without any cause showed; and when for their deliverance they were brought before your justices by your Majesty's writs of habeas corpus * * * and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the lords of your Privy Council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law.

Petition of Right, 1628, 3 Car. I, c.1. It was soon thereafter, in the Habeas Corpus Act of 1679, 31 Car. II, c. 2, that Parliament ended the practice of unaccountable detention.

The Framers were well aware of this relatively recent history when they enshrined the Great Writ in our own Constitution. *See Hamdi*, 542 U.S. at 555 (Scalia, J., dissenting). The writ, as recognized in the Constitution, serves the same structural function here as it did in England—ensuring that the Executive will not be a law unto itself, free from meaningful judicial inquiry into the legality of detentions. The Suspension Clause, however, more broadly governs the allocation of powers, preserving judicial independence against attempts by Congress or the Executive to abrogate it.

The D.C. Circuit did not appreciate the Suspension Clause's structural function and concluded that this case turns on whether the Constitution "confer[s] rights on aliens without property or presence within the United States." *Boumediene* v. *Bush*, 476 F.3d 981, 991 (D.C. Cir. 2007). That structural function, however, has important consequences for these cases. Petitioners should prevail regardless of whether they have constitutional rights because, as shown below, the MCA violates separation of powers principles. The Court must "disregard" such a statute.[3] Thus, the Court should ignore the MCA's habeas-stripping provision and hold that district courts have jurisdiction over the detainees' habeas petitions under preexisting authority.[4] Because the MCA is unconstitutional, this case is governed by *Rasul*, which held

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[3] *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) (affirming refusal to reinstate judgment based on statute that violated separation of powers) (citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

[4] *See United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1872) (disregarding statute that purported to remove federal court jurisdiction in violation of separation of powers); Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1387 (1953) ("If the court finds that what is being done is invalid, its duty is simply to declare the jurisdictional limitation invalid also, and then proceed under the general grant of jurisdiction.").

that courts have jurisdiction to consider habeas petitions by foreigners detained at Guantánamo. 542 U.S. at 470.

B. Congress May Not Eliminate Habeas Review In Areas Subject To Exclusive U.S. Authority Without Complying With The Suspension Clause.

1. Separation Of Powers Prohibits "Law Free" Zones In Areas Of Exclusive U.S. Authority.

These cases present the exact threat to separation of powers the Suspension Clause seeks to prevent. As Justice Kennedy has noted in the related context of military commissions:

> Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be def[illegible]d, prosecuted, and adjudicated by executive officials without independent review. Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid.

Hamdan v. *Rumsfeld*, 126 S. Ct. 2749, 2800 (2006) (Kennedy, J., concurring) (citation omitted). In the MCA, Congress purported to authorize what are virtually "law-free" zones even in areas of exclusive U.S. authority and control, where the Executive can unlawfully detain individuals forever without meaningful judicial recourse. In so doing, Congress has upset the delicate balance of power established by the Framers.

The Suspension Clause guarantees in these circumstances what the writ of habeas corpus has always ensured: that an independent court can inquire into the legal and factual bases for the Executive's assertion of its power to imprison. This guarantee has always included a meaningful judicial evaluation of the law and facts that underlie the Executive's asserted basis to detain. Even before their general factfinding authority was expanded in 1867, *see* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, habeas courts would conduct a search-

ing inquiry into the "jurisdictional fact[s]" upon which the authority of the detaining tribunal rested. *In re Kaine*, 14 F. Cas. 84, 88, 90 (C.C.S.D.N.Y. 1852) (No. 7,598).[5] "At common law, '[w]hile habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention.'" *St. Cyr*, 533 U.S. at 301 n.14 (citation omitted). Thus, in *Lockington's Case*, Bright (N.P.) 269 (Pa. 1813), a habeas court conducted an independent inquiry into the Executive's factual assertion that the petitioner was an enemy alien. *Cf. Ng Fung Ho* v. *White*, 259 U.S. 276 (1922) (requiring habeas review of facts underlying Executive's deportation jurisdiction).

The habeas guarantee should at least ensure that petitioners receive a meaningful judicial evaluation of their factual and legal claims that they have not been detained lawfully by the Executive, either because they are not "enemy combatants" or for some other reason. Viewed in this light, the Suspension Clause preserves a judicial determination of the Executive's basis to imprison, an issue that does not depend on the existence *vel non* of individual rights.

To hold otherwise would thwart our system of checks and balances. It would allow Congress to authorize, and the Executive to operate, prisons in areas subject to exclusive U.S. authority where no court could ensure that the Executive obeys the law. It would be left to the Executive to determine for itself, without any meaningful judicial check, whether it is following the law. This Nation rightly criticizes other nations when they concentrate such absolute, unchecked power

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[5] *See also Bollman*, 8 U.S. (4 Cranch) at 125-26 (court "fully examined and attentively considered" the "testimony on which [the prisoners] were committed" in lengthy proceedings, finding insufficient evidence of treason); *United States* v. *Hamilton*, 3 U.S. (3 Dall.) 17, 17-18 (1795) (describing examination of evidence about propriety of prisoner's conduct and court's order releasing him on bail); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 986-87 (1998).

in their own executives. Our tripartite separation of powers, guaranteed by the Suspension Clause, ensures that we will not join their ranks. "To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution." *Hamdan*, 126 S. Ct. at 2780.

This guarantee of judicial review thus safeguards more than just the rights of the individual detained; it ensures the overall "preservation of liberty" entailed in our government of limited and divided power. *Mistretta*, 488 U.S. at 380. As Justice Jackson famously remarked, "[n]o penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring). Yet that is exactly the position of the Government here. Recourse to habeas corpus is required in this case not merely to protect whatever individual rights petitioners may (or may not) possess, but more broadly to ensure that the Executive does not remain beyond the reach of the law.

2. Ensuring Meaningful Judicial Review In These Circumstances Will Promote National Security.

Ensuring this traditional function of habeas for Guantánamo detainees will promote national security as well as liberty. The unconventional nature of the so-called "war on terrorism" and the circumstances of many of the Guantánamo detentions make habeas more, not less, important. Unlike in traditional conflicts, under this Executive's approach to combating terrorism there is no clearly defined enemy, no identifiable battlefield, and no foreseeable end. It appears that only a small minority of the detainees were initially taken into custody by U.S. forces, leaving information about the rest to come from people with multiple unknown motives—including promised bounties—for rendering them into U.S. custody. *See infra* note 20. Meaningful judicial review is thus essential to ensure both that the United States

is holding the right people and that people are not detained indefinitely because they were in the wrong place at the wrong time. By making certain that we are detaining the right people, habeas will promote national security and enable the United States to focus its resources appropriately.

These cases involve individuals detained indefinitely "in territory over which the United States exercises exclusive jurisdiction and control," *Rasul*, 542 U.S. at 476, thousands of miles from any battlefield. While citizens of nations with which we are at war are by definition enemy aliens—and may therefore be detained by the Executive during hostilities, *see, e.g.*, *Ludecke* v. *Watkins*, 335 U.S. 160 (1948)—the Guantánamo detainees are citizens of countries with which we are not at war. In these circumstances, preserving the traditional judicial independence guaranteed by the Suspension Clause will have no adverse impact on any legitimate Executive functions. "[I]t does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here." *Hamdi*, 542 U.S. at 535 (plurality).

While there may be "a realm of political authority over military affairs where the judicial power may not enter," *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring), these cases do not fall within it. This theoretical realm "acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs." *Id.* In *Rasul*, Justice Kennedy identified *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), as an example of a case that was "not within the proper realm of the judicial power" because the Executive had imprisoned conceded enemy aliens outside the jurisdiction of the United States and because "the existence of jurisdiction would have had a clear harmful effect on the Nation's military affairs." *Id.* Such cases concern "matters within the exclusive province of the Executive, or the Executive and Congress, to determine." *Id.*

There is no need here, however, to determine or opine upon the outer reaches of the judicial power preserved by the Suspension Clause, for these cases are well outside of any theoretical realm of exclusive Executive authority. "A necessary corollary of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated." *Id.* at 487. In other words,

> as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.

Hamdi, 542 U.S. at 530 (plurality).

In *Rasul*, the Court has already held—considering the specific circumstances of the Guantánamo detainees—that preserving the judicial power of habeas corpus in their cases is entirely consistent with the Executive's military role. *See also Hamdi*, 542 U.S. at 535-36 (plurality) (rejecting "the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts" in the enemy combatant setting). These circumstances are factually distinct from the *Eisentrager* prisoners in at least two fundamental ways: "the status of Guantánamo Bay and the indefinite pretrial detention of the detainees." *Rasul*, 542 U.S. at 487, 488 (Kennedy, J., concurring).

First, because "the United States exercises 'complete jurisdiction and control' over the Guantánamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses," *id.* at 480, the Base "is in every practical respect a United States territory, and it is one far removed from any hostilities." *Id.* at 487 (Kennedy, J., concurring). In view of this control, the Court in *Rasul* had no difficulty holding that the habeas statute—unamended in any relevant

respect since the First Congress—authorized petitions by these detainees. While Congress subsequently attempted to define Guantánamo Bay as outside the United States, *see* Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, § 1005(g), 119 Stat. 2739, 2743 (2005), this does not change the basic facts on the ground—the United States retains complete control and jurisdiction. Given *Rasul*'s holding that the judicial power extended to the Guantánamo detainees under a statute drafted by the First Congress to effectuate the Suspension Clause, there can be no credible argument that these cases, brought by the same detainees, are somehow outside the scope of Article III's judicial power.

Second, "the detainees at Guantánamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status." 542 U.S. at 487-88 (Kennedy, J., concurring). To be sure, the detainees now receive limited review by the D.C. Circuit of their status determinations by the Combatant Status Review Tribunal ("CSRT"), but as discussed below, this review provides nothing close to the independent factual and legal review that is the hallmark of habeas. The circumstances surrounding the Guantánamo detentions continue to suggest "a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus" than was present in *Eisentrager*. *Id.* at 488. "In *Eisentrager*, the prisoners were tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms." *Id.* By contrast, many of the Guantánamo detainees were not even taken from a "zone of hostilities," *id.*, making the military necessity for detaining them weak or nonexistent from the outset. Furthermore, many of the detainees have now been held for over five years, and all continue to be "held indefinitely." *Id.* at 487. "[A]s the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker." *Id.* at 488.

In these circumstances, the federal courts "maintain the power and the responsibility to protect persons from unlaw-

ful detention" through the Great Writ. *Id.* at 487. Otherwise, the Executive could preclude the courts from playing "a necessary role in maintaining th[e] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi*, 542 U.S. at 536. This "cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government." *Id.* "Striking the proper constitutional balance here is of great importance to the Nation during [a] period of ongoing combat," but "it is equally vital that [the] calculus not give short shrift to the values that this country holds dear." *Id.* at 532.

II. CONGRESS HAS NOT PROVIDED AN ADEQUATE SUBSTITUTE FOR HABEAS REVIEW.

Because there is no contention that Congress has validly suspended habeas corpus at Guantánamo, Congress's preclusion of the writ can only be sustained if it has provided an adequate and effective substitute. *See Swain* v. *Pressley*, 430 U.S. 372, 381 (1977). That it has not done. Congress has authorized review of these detentions only through CSRT determinations, with limited appellate review and no promise of release. These procedures fall far short of the constitutional minimum. They do not permit any meaningful inquiry into the facts; they do not permit the kind of review historically conducted by "superior" habeas courts of "inferior" executive tribunals; and they provide no prospect of judicially-ordered release for improperly detained prisoners.

A. Petitioners Lack Any Meaningful Opportunity To Test The Legality Of Executive Detention.

Under the historic writ of habeas corpus, a petitioner is "entitled to [a] * * * full opportunity for presentation of the relevant facts" related to his detention. *Harris* v. *Nelson*, 394 U.S. 286, 298 (1969). The CSRT procedures—which supply the factual record for D.C. Circuit review under the DTA—allow no meaningful opportunity for a detainee to contest the allegations against him. *Cf. Hamdi*, 542 U.S. at 537 ("Any

process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.").

Under CSRT procedures, a "Recorder" is supposed to find all "reasonably available" information in the government's possession that bears on a detainee's status and then present that information to the CSRT. CSRT Procedures §§ E(3), H(4) (Enc. 1), C(1) (Enc. 2) (www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf). But it is the Executive that unilaterally determines what information is or is not "reasonably available" at the CSRT. As a result, detainees rarely see more than a handful of unsupported allegations summarized from the classified file and scrubbed of nearly all meaningful content.[6] Of 102 cases reviewed in a recent report, 96% of detainees began their defense without hearing or seeing any facts upon which the Government based its enemy combatant determination other than an unclassified, conclusory summary of the evidence. *See* Mark Denbeaux & Joshua W. Denbeaux, *No-Hearing Hearings—CSRT: The Modern Habeas Corpus?* 25 (2006). By the Government's own admission, such unclassified summaries are "'not persuasive in that [they] provide[] conclusory statements without supporting unclassified evidence.'" *Id.* at 21 (quoting CSRT records) (emphasis omitted).

In fact, classified evidence is often the exclusive basis for the decision that a detainee is an enemy combatant. "In cases

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[6] *See Upholding the Principle of Habeas Corpus for Detainees: Hearing Before the H. Armed Serv. Comm.*, 110th Cong. (July 26, 2007) (testimony of Lt. Col. S. Abraham) (hereinafter "Abraham Testimony") ("[T]he information upon which CSRT decisions were based were vague, generalized, dated, and of little probative value * * *. What our Board received was not only insufficient but evidence to profound lack of credibility as to both the source of the information and the process of review."); *id.* (documents "were heavily redacted * * *. You didn't know where it came from * * * [or] whether it was the product of coercion").

where [detainees] are found to be an enemy combatant, the classified material seals their fate."[7] "[T]he only evidence that the detainees were permitted to offer in the vast majority of the cases was their own testimony" and "the only option available to the detainee was to make a statement attempting to rebut what he could glean from the summary of classified evidence that he could not see." Denbeaux, *supra*, at 6. Critical evidence, such as the names of people who have allegedly incriminated the detainee, or the alleged terrorist group with which the Government claims he is affiliated, was often withheld. For example, one detainee was told that "[a]n al Qaida leader said he knew you at a terrorist training camp." But when the detainee asked who made the allegation, the Tribunal President responded that "[t]he only information we have is that he is a leader. This Tribunal doesn't have his name. It is not available to you in the unclassified." Tr. of Summarized CSRT Testimony ("CSRT Tr."), Detainee #1016, at 1661 (all cited CSRT testimony summaries available at www.dod.mil/pubs/foi/detainees/csrt/).[8] In other cases, unclassified information would name a suspect group but state no link to the detainee. Either the information about the group was included by mistake, or the only link was in the classified information.[9]

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[7] Mark Huband, *Dock of the Bay*, Fin. Times, Dec. 11, 2004, at 16 (quoting unnamed senior CSRT officer); *see* Decl. of T. McPalmer, *Al-Joudi* v. *Bush*, No. 05-301 (D.D.C. filed July 25, 2005) (Unclassified Summary of Basis for CSRT Decision ("Basis for Decision"), Detainee #25, § 5) (unclassified summary did not "contain[] any evidence to support the Government's proposition that the Detainee should be classified as an enemy combatant").

[8] *See also* Decl. of J. Crisfield Jr. ("Crisfield Decl."), *Awad* v. *Bush*, No. 04-CV-1194 (D.D.C. filed Oct. 12, 2004) (Basis for Decision, Detainee #564, §2) (Tribunal noted that it had to rely on classified information for name of the organization with which detainee was allegedly associated).

[9] *See* Crisfield Decl., *Al Azmi* v. *United States*, No. 02-CV-0828 (D.D.C. filed Sept. 24, 2004) (Basis for Decision, Detainee

Although CSRT regulations provide that the detainee can rebut presumptions about this type of government evidence, in reality the opportunity is virtually nonexistent. The detainee can request witnesses and documentary evidence on his behalf through his non-lawyer Personal Representative. But the Tribunal determines in its discretion whether or not the requested witnesses or documents are relevant and reasonably available. *See* CSRT Procedures §§ G(9)-(10) (Enc. 1). In practice, it appears that the Tribunal has rejected all witness requests by detainees, except when they sought to call other detainees, who themselves are likely to lack credibility with the Tribunal. Denbeaux, *supra*, at 28-29.

When a detainee requested that certain witnesses testify, the Tribunal found one "not relevant" and two others "not reasonably available." Summing up the fruitlessness of the process, the detainee responded by asking "How can we get the truth if they are not here?" CSRT Tr., Detainee #975, at 2221. Another transcript tellingly evidences the same futility.[10] In yet another case, a detainee requested that five

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#571, §5.a); Crisfield Decl., *Alawi Mar'i* v. *Bush*, No. 04-CV-1254 (D.D.C. filed Oct. 12, 2004) (Basis for Decision, Detainee #577, §5); Crisfield Decl. at 11-13, *El Banna* v. *Bush*, No. 04-CV-1144 (D.D.C. Oct. 18, 2004) (Basis for Decision, Detainee #905, §5).

[10] "Detainee: [T]hese are accusations that I can't even answer. I am not able to answer them. * * * I don't have proof regarding this. What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it. * * *

Detainee: The evidence of proving I was living in Croatia, I do not know how I can get that to you. My wife can send papers or I can talk to the Ambassador about this. Maybe he can send papers that I was living in Croatia.

Tribunal President: You have the opportunity to get that information. I do not know how or what the procedure is, but you really should take the opportunity to get that information.

Detainee: How when I am in GTMO?" CSRT Tr., Detainee

men testify, but the Tribunal found four "not reasonably available." The Tribunal, however, never contacted the men or the government of France (where the men lived).[11] In other instances, the CSRT deemed witnesses unavailable because the United States had not made arrangements with foreign embassies by the time of the hearing. *See* CSRT Tr., Detainee #1000, at 2325; CSRT Tr., Detainee #890, at 2534.

By contrast, the Government's own evidence against the detainees is almost entirely comprised of hearsay. The CSRT can consider any evidence it considers "relevant and helpful," no matter how unreliable. CSRT Procedures § G(7) (Enc. 1). As the CSRT's own legal advisor stated about one hearing, "the evidence considered persuasive by the Tribunal is made up almost entirely of hearsay evidence recorded by unidentified individuals with no first-hand knowledge of the events they describe." Crisfield Decl., *Al Kandari* v. *United States*, No. 02-CV-0828 (D.D.C. filed Oct. 22, 2004) (Legal Suf. Rev., Detainee #552, §1.d). This would even include evidence obtained through torture or other coercion, practices that CSRT subjects allege have been commonplace at Guantánamo.[12] Reported mistreatment includes solitary confinement exceeding one year, sleep deprivation, exposure to extreme temperature, threats of torture, beatings, and other

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#10004, at 3926.

[11] Respondents' Factual Return to Pet. for Writ of Habeas Corpus by Petitioner Ridouane Khalid, *Khalid* v. *Bush*, No. 04-CV-1142 (D.D.C. filed Oct. 18, 2004) (Legal Sufficiency Review of CSRT ("Legal Suf. Rev.") for Detainee #173, §1.d).

[12] A publicly-released government interrogation log reveals that one detainee was interrogated for about 20 hours a day for seven weeks, during which time he was isolated, intimidated with military dogs, sexually humiliated, and subjected to sleep and sensory deprivation. Dep't of Def., *Interrogation Log: Detainee 063* at 27 (www.ifa.hawaii.edu/faculty/jewitt/interrogation.pdf). *See also* CSRT Trs., Detainee #661, at 1045, Detainee #109, at 3793, Detainee #522, at 3954, 3957, Detainee # 332, at 3378-80, 3385.

harsh physical treatment such as short-shackling, sexual harassment and abuse, and religious harassment and abuse.[13] The International Committee of the Red Cross has bluntly characterized the treatment of Guantánamo detainees as "tantamount to torture." Neal A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. Times, Nov. 30, 2004, at A1. According to the Government, however, it is not the CSRT's role to investigate allegations of torture, and a CSRT could consider evidence obtained through torture if deemed reliable. Tr. of Oral Arg. at 84-85, *Boumediene* v. *Bush*, No. 04-1166 (D.D.C. Dec. 2, 2004).

In sum, the procedural guarantees for these proceedings are so minimal as to be effectively meaningless. As a study of 393 CSRT transcripts revealed, the Government did not produce a single witness during any proceeding; all requests by detainees to present witnesses other than fellow detainees were denied; detainees were presented only with a "summary" of classified evidence, which in every instance was so conclusory as to preclude any rebuttal; the tribunal found in every case that the Government's classified evidence was reliable and valid; no counsel were allowed at hearings; and in most cases, the detainee's non-lawyer "personal representative" met with the detainee only once, for no more than 90 minutes including time for translation, only a week before the hearing. Denbeaux, *supra*, at 2-6.

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[13] Mem. from W. Haynes to D. Rumsfeld (Dec. 2, 2002) (www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf); Mem. from D. Rumsfeld to Commander USSOUTHCOM (Jan. 15, 2003) (www.washingtonpost.com/wp-srv/nation/documents/011503rumsfeld.pdf); Mem. from D. Rumsfeld to Commander USSOUTHCOM (Apr. 16, 2003) (www.washingtonpost.com/wp-srv/nation/documents/041603 rumsfeld.pdf); Letter from T.J. Harrington to Major Gen. D. Ryder (July 14, 2004) (www.aclu.org/torturefoia/released/FBI_4622_4624.pdf); Physicians for Human Rights, *Break Them Down: Systematic Use of Psychological Torture by U.S. Forces* (2005).

Simply put, the CSRT procedures are not an adequate substitute for the searching factual review guaranteed by habeas corpus. And like the military commission system struck down in *Hamdan*, these procedures "raise concerns" that the CSRT's "decisionmaking may not be neutral." *Hamdan*, 126 S. Ct. at 2807 (Kennedy, J. concurring).[14]

B. DTA Judicial Review Is Inadequate.

The narrow review of the Executive's authority provided by the DTA is inadequate under any construction of the writ of habeas corpus. The guarantee of habeas ensures that petitioners will at least receive a meaningful judicial evaluation of their claims that the Executive lacks legal authority to detain them. Regardless of the merits of their claims or their rights under the Constitution, the detainees at Guantánamo are entitled to an independent judicial determination of the factual and legal issues upon which the Executive's lawful authority depends.

1. Habeas Review Ensures That A Judicial Tribunal Can Meaningfully Review The Legality Of A CSRT's Exercise Of Authority To Detain.

The core purpose of the Great Writ is to ensure that the Executive acts only within its lawful sphere of jurisdiction when detaining individuals. *See Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 203 (1830) (at common law commitment was lawful only if it rested on the judgment of a tribunal acting

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[14] In at least three cases, initial tribunals found that detainees were not enemy combatants, but new tribunals reversed those findings. *Id.* at 3, 37. *See also* Decl. of Lt. Col. S. Abraham ("Abraham Decl.") ¶¶ 22, 23, App. to Reply to Opp. to Pet. for Reh'g, *Al-Odah* v. *United States*, No. 06-1196 (S. Ct., filed June 22, 2007); Abraham Testimony, *supra* note 6 ("When we found no evidence to support an enemy-combatant determination, we were told to leave the hearing open. When we unanimously held the detainee not to be an enemy-combatant, we were told to reconsider. And ultimately, when we did not alter our course * * * a new panel was selected that reached a different result.").

within its jurisdiction). The writ ensured that any "inferior" tribunal of limited authority—such as a police court, court-martial, or other executive body[15]—was subject to the inquiry of a "superior" tribunal, *i.e.*, an independent Article III court, *Watkins*, 28 U.S. at 203, 207. "The judgments or orders of these tribunals of special and limited jurisdiction did not carry the same presumption of validity as the judgments of a superior court." Neuman, *supra* note 5, at 982. Rather, an inferior tribunal's determination of its own authority could be reexamined on habeas, and the Executive was required to expressly demonstrate to the superior court that it had acted within its jurisdiction. *Id.* at 982-83. *See also* Dallin Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 456-57 (1965-66).

Habeas' central role of ensuring that the executive officer or inferior tribunal did not exceed its limited authority to detain was paramount in military matters.[16] In that context, habeas corpus ensured that the Executive did not act outside its limited realm in conducting courts-martial.[17] As the Court held in *In re Grimley*, 137 U.S. 147 (1890), "the civil courts may *in any case* inquire into the jurisdiction of a court-

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[15] *See id.* at 209; *Ex parte Randolph*, 20 F. Cas. 242, 251 (C.C.D. Va. 1833) (Marshall, C.J.); William S. Church, *A Treatise in the Law of Habeas Corpus* 38-43 (1886).

[16] *See, e.g., In re Stupp*, 23 F. Cas. 296, 303 (C.C.S.D.N.Y. 1875) (No. 13,563) (considering "whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute"); *Randolph*, 20 F. Cas. at 251 (considering "whether the person and subject matter are such as to bring the case within the provisions of the act of congress").

[17] *See, e.g., McClaughry* v. *Deming*, 186 U.S. 49, 62 (1902) ("A court-martial is the creature of statute, and * * * must be convened * * * in * * * entire conformity with the provisions of the statute, or else it is without jurisdiction"); *Meade* v. *Deputy Marshal*, 16 F. Cas. 1291, 1293 (C.C.D. Va. 1815) (No. 9,372) (examining appointment of court-martial and legality of its procedures).

martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence. * * * *The single inquiry, the test, is jurisdiction.*" *Id.* at 150 (emphases added). Thus, in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Court granted habeas corpus to prevent a civilian from being tried by military commission where the commission lacked legal authority to do so.[18]

Because this jurisdictional inquiry allowed the habeas court to examine "all issues relating to the legality of the detention," *St. Cyr*, 533 U.S. at 301 n.14 (quotation omitted), habeas ensured that the independent Judiciary could always restrict the Executive to its limited, lawful realm. Habeas thus serves not merely to enforce individual rights, but also to enforce the separation between the Executive and Judicial branches. As noted in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality), although the Executive's Article II power over military trials and the Judiciary's Article III power do not overlap, "this Court has been alert to ensure that Congress does not exceed the constitutional bounds and bring within the jurisdiction of the military courts matters beyond that jurisdiction, and properly within the realm of 'judicial power.'" *Id.* at 66 n.17 (plurality) (quoting U.S. Const. art. III). And as in *Northern Pipeline*, enforcing that guarantee does not require proof that the affected party possesses individual legal rights. There, the Court held that Congress cannot authorize non-Article III

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[18] *See also Wise* v. *Withers*, 7 U.S. (3 Cranch) 331 (1806) (court-martial lacked power to punish justice of the peace where federal law exempted him from militia duty); *Yamashita*, 327 U.S. at 8 ("Congress conferred on the courts no power to review [the] determinations [of military tribunals] save only as it has granted judicial power 'to grant writs of habeas corpus for the purpose of an inquiry into the cause of the restraint of liberty.' The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner.") (citation omitted); *Lee* v. *Madigan*, 358 U.S. 228 (1959) (court-martial lacked power to try defendant for crime committed "in time of peace").

courts to exercise judicial power over common law claims, even though the party prevailing on that separation-of-powers argument denied the validity of the merits of the underlying common law claim. Here, too, petitioners can enforce the structural guarantee of the Suspension Clause without proving in advance the merits of their underlying claims of unlawful imprisonment. Those are matters for the habeas court, not this Court, to decide in the first instance.

2. DTA Review Is Not An Adequate Substitute For The Review Available Under Habeas Corpus.

The DTA permits the D.C. Circuit to review only (1) whether the CSRT's determination was consistent with Defense Department procedures, and (2) "whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States" as applicable. DTA § 1005(e)(2)(C)(ii). This limited review is insufficient because it does not permit the D.C. Circuit to consider the fundamental question whether there is a factual and legal basis to support the detention—the searching review of "inferior" executive tribunals historically conducted by "superior" courts on habeas corpus.

The D.C. Circuit recently rejected the Executive's assertion that that court could only review (with deference) the Record of Proceedings as compiled by the Recorder. *Bismullah* v. *Gates*, __ F.3d __, 2007 WL 2067938 at *6 (D.C. Cir. 2007). Yet, the court's review is still predicated on whatever "Government Information" is collected by the Executive. *Id.* This review does not pass constitutional muster because it does not permit a thorough review of the legal sufficiency of the inferior tribunal's enemy combatant determination.[19]

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[19] For similar reasons, the Government's understanding of what review is provided under the DTA also does not pass constitutional muster. The Government contends that the DTA review should be predicated on the subset of the evidence collected by the Recorder that was presented to the CSRT—an even narrower body of evidence than the D.C. Circuit decided it could review.

As shown above, the "Government Information"—let alone the subset CSRT record—is necessarily incomplete. It was compiled without affording detainees a meaningful opportunity to rebut the allegations against them. The detainees were prohibited from supplementing even the CSRT record with evidence of innocence or evidence that incriminating statements were obtained through torture or monetary inducements,[20] all of which is crucial in enabling the detainee to rebut the presumption of the CSRT rules that evidence is correct and accurate. As a result, there is simply insufficient evidence for the D.C. Circuit to make the critical determination about whether lawful authority to detain exists.

This limited review also cannot cure the defects caused by the use of unrebuttable secret evidence based on hearsay, coerced confessions, and self-interested captors. Because the D.C. Circuit, even on its own view of the scope of review, cannot constrain the Government's determination of what information is reasonably available, judicial review cannot cure the one-sided evidence gathering. Absent the ability to test the veracity of the allegations and the circumstances through which certain information was obtained and to produce evidence in defense, the review is necessarily inadequate.

Decisions that witnesses or documents were not reasonably available or that evidence was not relevant also cannot be cured by a review of the Government Information as defined by the D.C. Circuit in *Bismullah*. For example, the

[20] According to a review of 102 cases, only 5% of detainees were captured by United States forces, and 86% were arrested by either Pakistan or the Northern Alliance and turned over to U.S. custody during a time when the United States offered large bounties for such prisoners. Mark Denbeaux, *et al.*, *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data* 2-3 (2006). Executive officials concede that many Guantánamo detainees came into U.S. custody because they "had been kidnapped by Afghan warlords and sold for the bounty the U.S. was offering." Nancy Gibbs & Vivica Novak, *Inside "The Wire,"* Time, Dec. 8, 2003, at 40.

Executive could prevent review of potentially exculpatory information by both detainees' counsel and the court simply by claiming the information is not "reasonably available."[21] This would also create a potential loophole that could allow the government to shield information gained through torture and other illegal interrogation techniques.

Moreover, the recent *Bismullah* ruling gives the Executive the discretion to withhold any information it unilaterally deems "highly sensitive." While the information must be provided to the court on an ex parte basis, it is not provided either to the detainee or his counsel and thus is not subject to an adversary process that ensures a full exploration of all relevant facts. That one-sided process is inconsistent with the searching judicial review required by the guarantee of habeas.

C. There Is No Effective Remedy.

The core of the historical writ of habeas corpus is the power of the court to release exonerated prisoners and thereby provide an effective remedy for detention. Indeed, that was traditionally the *only* remedy available in habeas. *See Bollman*, 8 U.S. (4 Cranch) at 136 (habeas court that finds imprisonment unjustified "can only direct [the prisoner] to be discharged"). Providing this effective remedy for unlawful detention is integral to the traditional understandings of the writ. But the DTA does not provide for release if a detainee prevails in his challenge either of his detention or of his enemy combatant status determination. *See* DTA § 1005(e)(2). Indeed, there are numerous detainees whom the Government *itself* has declared no longer to be enemy

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[21] *See* Abraham Testimony, *supra* note 6 (Abraham was "denied the ability to review relevant information or confirm the existence of exculpatory evidence." "The record that was placed before the court—as are the records and cases of every single detainee, do[es] not contain all of the information that was reasonably available. The process was never calculated to allow for, or accommodate, all of the information that was immediately or even reasonably available."); Abraham Decl., *supra*, at ¶¶ 11-15.

combatants but has continued to detain for years. Thus, the DTA's failure to expressly authorize a court to discharge a prisoner whose detention is invalid renders it an inadequate substitute for the guarantee of habeas corpus.

The government argues that the clear lack of a statutory remedy for an unlawful executive determination is of no consequence because the court may order a remand for new CSRT proceedings if it determines that the Tribunal made an error of law or failed to consider certain evidence. But a remand to the same Executive agency for an additional consideration of evidence or correction of a legal error under the current CSRT regime cannot possibly cure the established and fundamental inadequacies of those very proceedings. Moreover, nothing prevents the Executive from conducting CSRT reviews seriatim until it reaches the result it wants. Remand cannot substitute for the judicially ordered release available through habeas corpus. Instead, it permits the unlawful detentions to continue indefinitely. This is precisely what the Great Writ is designed to foreclose.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

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FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(32) (36)

Nos. 06-1195 and 06-1196

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE ET AL., *Petitioners,*

v.

GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

KHALED A. F. AL ODAH, NEXT FRIEND OF FAWZI KHALID ADBULLAH FAHAD AL ODAH, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTEREST OF THE *AMICUS CURIAE*[1]

The Commonwealth Lawyers Association ("CLA") is a body dedicated to the rule of law throughout the Commonwealth.[2]

Four signatories to this brief are practicing members of the English Bar. Colin Nicholls, Q.C., is a former President of the CLA, and he has signed the brief with the full authority of the Council of the CLA.

We understand that the central issue before the Court relates to the availability of the common law writ of habeas corpus to non-nationals detained on territory not accepted as sovereign by the detaining State. The main purpose of this brief is to set out the English law of habeas corpus and to explain the basis on which the courts of the United Kingdom have historically exercised jurisdiction in habeas corpus cases.

We hope this may assist this Court for the following reasons:

a) the writ of *habeas* corpus originated in England;

b) because of Britain's history as an imperial power, issues of territorial jurisdiction in habeas corpus have not infrequently arisen in the High Court in England in relation to territories outside the United Kingdom, including territories over which the United Kingdom did not assert sovereignty but over which, through its own executive officers, it exercised power and control;

c) in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), the Supreme Court referred to the English origins of habeas

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[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amicus curiae* and its legal counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk.

[2] The Commonwealth is a voluntary association of 53 independent sovereign states. Its 1.7 billion people account for 30 percent of the world's population. All Law Societies and Bar Associations of the 53 Commonwealth countries are institutional members of the CLA.

corpus and the harmony between the relevant laws of the two jurisdictions;[3]

d) in *Rasul* v. *Bush*, 542 U.S. 466 (2004), the Court cited a number of English authorities and concluded that "application of the habeas statute to persons detained at the base [at Guantanamo Bay] is consistent with the historical reach of the writ of habeas corpus" and that "the reach of the writ depended not on formal notions of territorial sovereignty, but rather on 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown'";[4] and

e) a significant part of the Court of Appeals majority reasoning in the instant case consists of a close analysis of the English law of habeas corpus,[5] which we respectfully submit is flawed. In particular we do not agree that "the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government" as stated by the majority.[6]

SUMMARY OF THE ARGUMENT

In the English courts neither the nationality of the detained person, nor the existence of sovereignty in the detaining State over the territory in which the person is detained, will

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[3] 339 U.S. at 779. See also *Fay* v. *Noia*, 372 U.S. 391, 399–400 (1963), where the Court, per Brennan J., spoke of the "extraordinary prestige of the Great Writ" in Anglo-American jurisprudence and its "Anglo-American" development and also stated (at 401): "It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today."

[4] 542 U.S. at 481–83 & nn. 11–14.

[5] See 476 F.3d 981, 988–91 & nn. 7 & 9. See also dissenting opinion of Circuit Judge Rogers, *id.* 994, 1000–04.

[6] *Id.* 991.

determine the availability of the writ of habeas corpus. It has, furthermore, been clear that this has been the case under English law since at least 1772.[7] The determining factors are and have been, rather, whether the respondent to the writ possesses the actual power of detention or release, whether that respondent is subject to the jurisdiction of the court and (in the case of distant territories) whether there is a local court with power to grant the remedy.

Accordingly—subject to the assumptions that

a) the petitioners are not enemy aliens;[8]

b) they are not admitted or clearly shown to be prisoners of war in terms of the Geneva Convention (III) Relative to the Treatment of Prisoners of War;[9] and

c) there is no court in Guantanamo Bay with power to grant and enforce the writ of habeas corpus—

if it were the United Kingdom and not the United States which controlled Guantanamo Bay Naval Base and held the petitioners in detention on the same basis and with the same

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[7] As we shall explain below, *Sommersett's Case*, (1772) 20 St. Tr. 1, established that habeas corpus is available to British nationals and others alike, and the Habeas Corpus Act, 1679, and *R* v *Cowle*, (1759) 2 Burr. 834, 97 Eng. Rep. 587 (K.B.), removed any doubt that the Court's jurisdiction to issue the writ extended to detentions overseas and to any place "under the subjection of the Crown of England." Subjection in this context implied no more than actual control and power, not formal or legal sovereignty: "Subjection is fully appropriate to the powers exercised or exercisable by this country [*i.e.*, the United Kingdom] irrespective of territorial sovereignty or dominion, and it embraces in outlook the power of the Crown in the place concerned." *Ex parte Mwenya*, [1960] 1 Q.B. 241, 310 (C.A.), discussed *infra*).

[8] As we shall explain in Part V below, as a matter of English law, the question whether a detained person is properly to be categorised as an enemy alien is a matter within the jurisdiction of the Court and to be determined by the Court and not by the Executive.

[9] This Convention provides its own remedies for persons held as prisoners of war, but who dispute that classification. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135.

powers as does the United States, English courts having jurisdiction over the respondents would assume jurisdiction to issue writs of habeas corpus, whatever the nationality of the petitioners. We believe that the same position would also apply before Commonwealth courts were any other Commonwealth State to be in control of the Guantanamo Bay Naval Base.[10]

ARGUMENT

I. The origins and history of the writ of habeas corpus illustrate its importance, the swift and imperative remedy it represents, and the breadth of protection it affords.

The origins of the writ of habeas corpus in England and the Commonwealth may be found in *Magna Carta*. Article 1 of *Magna Carta* states that all the freedoms set out therein were "given to all the free-men of our realm, for us and our Heirs for ever," and Article 29 provides that "[n]o Freeman shall be taken, or imprisoned, or be dispossessed of his Freehold, or Liberties, or free Customs, or be outlawed or exiled, * * * but by lawful Judgment of his Peers, or by the Law of the Land."[11] A Divisional Court of the Queen's Bench has recently endorsed the following statement as accurately reflecting the writ's present day significance in English law:

> "[*Magna Carta*] becomes and rightly becomes a sacred text, the nearest approach to an irrepealable 'fundamental

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[10] We emphasise that this is not to say that an English or Commonwealth court would necessarily set the petitioners at liberty. But it would, on the return to the writ, examine their status and the circumstances of their detention, and determine whether their detention is justified.

[11] *Magna Carta* arts. 1 & 29, 1 Stat. at Large (Runnington rev. to Ruffhead ed., London, Charles Eyre *et al.* 1786).

> statute' that England has ever had. * * * For in brief it means this, that the king is and shall be below the law."[12]

It appears that it was in the sixteenth century that the writ of habeas corpus first began to be used as a means of testing the validity of executive committals.[13]

In 1640 the English Parliament made its first express attempt to curtail the power of executive detention. Section VIII of the Habeas Corpus Act of 1640, 16 Car. 1, c. 10, provided that "any Person" imprisoned by order of the King or his Council should have habeas corpus and be brought before the court without delay with the cause of imprisonment shown. The Act was passed against the background of the first case of major constitutional importance to address the question of habeas corpus, *Darnel's Case*, (1627) 3 How. St. Tr. 1 (K.B.).[14] Although now repealed, the Act's wording is notable in that it attributes no significance to either the location of the

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[12] 1 Frederick Pollock & Frederic W. Maitland, The History of English Law Before the Time of Edward I at 173 (reprint 1923) (London, Cambridge Univ. Press 2d ed. 1898), cited and quoted with approval by Lord Justice Laws in *R (Bancoult)* v. *Sec'y of State for Foreign & Commonwealth Affairs*, [2001] Q.B. 1067, 1095 (Q.B.D. Admin. Ct.).

[13] R.J. Sharpe says in the leading textbook on the subject, The Law of Habeas Corpus at 7 (2d ed. 1989): "By the time of Elizabeth [I], it was becoming clear that the claim to a power to commit for reasons of state could be tested on habeas corpus. There are cases as early as 1567 in which habeas corpus was used by persons detained by order of the Privy Council to obtain their release on bail."

[14] In *Darnel's Case*, the King, Charles I, had imprisoned five knights as a result of their refusal to contribute to the repayment of a forced loan he had taken out. The knights sought their freedom by issue of writs of habeas corpus and, in response, the King simply asserted (at 33) that they had been detained "*per speciale mandatum domini regis*." The issue in the case was whether the Court was required to assume that that was substantive legal justification for the imprisonment or whether the failure to disclose specific grounds entitled the prisoners to be bailed pending trial. The Court ruled in favour of the King and refused to bail the Knights. The Habeas Corpus Act of 1640 in effect reversed that decision.

detained person or his nationality. The right arose purely by virtue of the detention by the King or his Council.

In 1679 a second Habeas Corpus Act, 31 Car. 2, c. 2 was passed. The background to the Act lay in practices which had grown up designed to circumvent the protection afforded by the writ. Prisoners were moved from gaol to gaol so that it was impossible to serve the proper gaoler with the writ and some prisoners were removed overseas so giving rise to practical difficulties in terms of communication (between the detained person and those acting on his behalf), service (on the relevant gaoler), and enforcement of the writ (by production of the detained person) if the writ was issued.[15] The terms of the Act were designed to counter these stratagems. They also made it clear that the territorial scope of the protection afforded by habeas corpus was intended to be broad and removed any doubt that the Court's jurisdiction

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[15] Twelve years earlier in 1667 one of the charges made against Edward Hyde, the First Earl of Clarendon and Lord Chancellor, on his impeachment was that he had attempted to preclude access to the writ of habeas corpus by sending persons "to be imprisoned against law in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law." See *Proceedings in Parliament against Edward Earl of Clarendon, Lord High Chancellor of England, for High Treason, and other High Crimes and Misdemeanours: 15 and 19 Charles II. A.D. 1663–1667*, (1668) 6 St. Tr. 291, 330, 396. It is important to note that neither Clarendon's case nor the 1679 Act suggested that there was some *formal* limit on the reach of the pre-existing writ precluding it from operating overseas. Rather the fact of detention in such locations meant that the effectiveness of the writ was being frustrated by their remoteness and that in this sense the detained persons were being deprived of the "benefit of the law." As Hallam put it in The Constitutional History of England from the Accession of Henry VII to the Death of George II, vol. 2 at 231 (New York, A.C. Armstrong & Son, 5th ed. 1893), "It was not to bestow an *immunity* from arbitrary imprisonment, which is abundantly provided in Magna Charta (if indeed it were not much more ancient), that the statute of Charles II was enacted, but to cut off the abuses, by which the government's lust of power, and the servile subtlety of crown lawyers, had impaired so fundamental a privilege."

to issue the writ extended to detentions overseas. The preamble to the Act described it as "An Act for the better securing the Liberty of the Subject, and for Prevention of Imprisonment beyond the Seas." Section XI expressly declared that the writ would run overseas by declaring that it "may be directed and run" to Jersey and Guernsey.[16] Section XII made it an offence to remove detained persons to "Scotland,[17] Ireland, Jersey, Guernsey, Tangier or into Parts, Garrisons, Islands or Places beyond the Seas which are or at any time hereafter shall be *within or without* the Dominions

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[16] This was consistent with the fact that the Courts had already recognised, or would very shortly recognise, that at common law the writ could run to the Channel Islands, Ireland, and Calais: *R* v. *Salmon*, (1669) 2 Keble 450, 84 Eng. Rep. (K.B.) (re the Channel Islands); *Anonymous*, (1681) 1 Ventris 357, 86 Eng. Rep. 230 (K.B.) (re Ireland and Calais). Jersey, for example, was described as being at the time "beyond the strict limits of the kingdom of England." See 2 Hallam, *supra*, at 232. See also Sir Robert Chambers, *infra* note 23, in respect of the symmetry between the position at common law and under statute.

[17] The English High Court had never had jurisdiction to send the writ to Scotland because of the formal distinction between the English and Scottish Crowns and the writ's status as a prerogative remedy of the English Crown. Holdsworth described the practices which the Act sought to counter as including "in the last resort [removal of the prisoner] out of the jurisdiction of the court." 9 William Holdsworth, A History of English Laws 116 (3d ed. 1944). This may be taken to be a reference to removals to Scotland and other such places and not as suggesting any wider limitation to the jurisdiction of the Court. Thus Holdsworth states (at 124): "It was a well-established principle that, though the writ could not issue into the foreign dominions of a prince who succeeded to the throne of England, and therefore not into Scotland or Hanover, it could issue into any other part of the King's dominions." Holdsworth summarises the effect of the 1679 Act (at 118) as having made "the writ of *Habeas Corpus ad subjiciendum* the most effective weapon yet devised for the protection of the liberty of the subject" and describes the success of the Act in effecting its object as being "illustrated by the desire of James II. to get it repealed." He notes (at 118 n.10) that in October 1685 Barillon wrote to Louis XIV that James "designed to obtain from the Parliament a repeal of the Test and Habeas Corpus Acts, the first of which is the destruction of the Catholic Religion, and the other of the royal authority."

of his Majesty." (Emphasis added.) Section XII also went on to state that any such imprisonments would be illegal and would give rise to an action for false imprisonment.

The Habeas Corpus Act of 1816, 56 Geo. 3, c. 100, was the next significant development. It confirmed the Court's power to inquire into the truth of facts averred in the return to the writ and, in cases of doubt as to their accuracy, to grant the detained person bail,[18] and it specified that "non-obedience" to the writ of habeas corpus was a contempt of court.[19]

Over the last four centuries, English judges and lawyers have repeatedly emphasized the importance of the writ of habeas corpus and its fundamental purpose—namely to provide a speedy and effective means to test the lawfulness of any detention and thus to protect the liberty of the individual—and the jurisdiction of the High Court in England to grant the writ has been consistently recognized as

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[18] Sections 3–4. Holdsworth describes the judges as having adopted by 1758 the practice "of making a rule that a person holding another in custody should show cause for his detention, and of discharging such person if no cause were shown. In that way the merits of the case could be gone into." 9 Holdsworth, *supra*, at 120.

[19] Section 2. Another Act passed in 1816 also owed its origins to the law of habeas corpus. It was entitled "An Act for the more effectually detaining in Custody *Napoleon Buonaparté*," 56 Geo. 3, c. 22 (Eng.), and was passed specifically to render lawful the continued detention of Bonaparte notwithstanding the end of the Napoleonic wars by deeming him to be a "Prisoner of War" and so to have no right to habeas corpus. See 1 Arnold Duncan, Lord McNair, International Law Opinions 104–07 (1956), explaining the origins of the Act and how Admiral Lord Keith (the commander in chief of the English Channel fleet) had been "'chased all day by a lawyer with a *Habeas Corpus*!'" *Id.* at 105 (citation to internal quotation omitted). It is important to note that it was not open to the Executive simply to declare Bonaparte to be a Prisoner of War; the intervention of Parliament by specific legislative enactment was required. The 1862 Habeas Corpus Act, 25 & 26 Vict. c. 20, is also significant and is referred to *infra*. Although we have addressed various 17th and 19th century *statutes* in order to give a complete picture of the English law of habeas corpus, the principal cases we cite in this brief are all founded on the *common law* of habeas corpus as it existed both before and after 1789.

extending to any part of the King's dominions. Blackstone described the writ thus:

> "[T]he great and efficacious writ in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*; * * *. This is a high prerogative writ, * * * running into all parts of the king's dominions: for the king is at all times intitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted."[20]

The breadth of the remedy was reaffirmed in the House of Lords by the Earl of Birkenhead in *Sec'y of State for Home Affairs* v. *O'Brien*, [1923] A.C. 603 (appeal taken from Eng.), when he said (at 609):

> "We are dealing with a writ antecedent to statute, and throwing its root deep into the genius of our common law. The writ with which we are concerned to-day was more fully known as habeas corpus ad subjiciendum. * * * It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege."

II. As a matter of English law the writ of habeas corpus will not be refused to any person within the jurisdiction of the Crown on the ground that he or she is an alien.

Innumerable judicial statements to the same effect as that made by the Earl of Birkenhead in the *O'Brien* case could be

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[20] 3 William Blackstone, Commentaries *131. As to the meaning of dominions see *infra* p. 14.

cited. In some of them the right to liberty which is protected by the writ has been described as a right of "the subject," "the liege," or "the citizen." It has, however, long been accepted that the remedy is equally available to aliens.[21] In the case of *Khera* v. *Sec'y of State for the Home Dep't* and *Khawaja* v. *Sec'y of State for the Home Dep't*, [1984] A.C. 74 (H.L.) (appeal taken from Eng.), Lord Scarman stated that the question of a detained person's nationality was irrelevant to his right to the writ of habeas corpus. He said (at 111–12):

> "Habeas corpus protection is often expressed as limited to 'British subjects.' Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic 'no' to the question. Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed 'the black' in *Sommersett's Case* (1772) 20 St. Tr. 1. There is nothing here to encourage in the case of aliens or non-patrials the implication of words excluding the judicial review our law normally accords to those whose liberty is infringed."[22]

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[21] Other than enemy aliens (as to which see *supra* note 8 and Section V, *infra* p. 28) and prisoners of war to whom different considerations have been held to apply (as to which see *supra* note 9).

[22] Since the decision of the Court in *Rasul*, this statement of principle has been approved by the House of Lords in the context of a case concerning the detention of foreign nationals who were suspected of involvement in international terrorism: *A* v. *Sec'y of State for the Home Dep't*, [2005] UKHL 71, [2005] 2 A.C. 68 (appeal taken from Eng.) at ¶ 48 per Lord Bingham. This case also contained a number of statements emphasising the fundamental importance of the Courts' power of review over Executive detention. See, *e.g.*, Lord Hope at ¶ 100: "It is impossible ever to overstate the impo[illegible]ce of the right to liberty in a democracy. In the words of Baron Hume, Commentaries on the Law of Scotland respecting Crimes (4th edn, 1844) vol. 2, p 98: 'As indeed it is obvious, that, by its

III. The writ of habeas corpus is a flexible remedy adaptable to changing circumstances.

Consistent with its underlying purpose, the writ of habeas corpus has always been treated as a flexible remedy. Concerning the Court's powers to issue the writ to prevent removal of a foreign immigrant seeking to challenge deportation, Lord Justice Taylor (later the Lord Chief Justice of England and Wales) observed in *R* v. *Sec'y of State for the Home Dep't, Ex parte Muboyayi*, [1992] Q.B. 244, 269 (C.A.):

> "The court must inherently have the power to prevent its decision from being pre-empted by administrative action. The great writ of habeas corpus has over the centuries been a flexible remedy adaptable to changing circumstances."

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very constitution, every court of criminal justice must have the power of correcting the greatest and most dangerous of all abuses of the forms of law,—that of the protracted imprisonment of the accused, untried, perhaps not intended ever to be tried, nay, it may be, not informed of the nature of the charge against him, or the name of the accuser.' [¶] These were not idle words. * * * [Hume] knew the dangers that might lie in store for democracy itself if the courts were to allow individuals to be deprived of their right to liberty indefinitely and without charge on grounds of public interest by the executive." Statements of principle to similar effect have also been made by the Canadian Supreme Court in *Charkaoui* v. *Minister of Citizenship & Immigration*, 2007 SCC 9 (Can. Feb. 23, 2007), also concerning detention of foreign nationals suspected of terrorism: "The overarching principle of justice that applies here is this: before the state can detain people for significant periods of time, it must accord them a fair judicial process * * *. 'It is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law, which must involve a meaningful judicial process' * * *. This principle emerged in the era of feudal monarchy, in the form of the right to be brought before a judge on a motion of *habeas corpus*. It remains as fundamental to our modern conception of liberty as it was in the days of King John." *Id.* ¶ 28 (per Chief Justice McLachlin).

IV. As a matter of English law, jurisdiction for the purposes of the writ of habeas corpus is established when a detained person is placed under the control of the Crown or enters territory under the Crown's control, whether or not the Crown claims sovereignty over that territory.

In the passage from the *Khawaja* decision quoted above (at p. 10), Lord Scarman said that the writ was available to "[e]very person within the jurisdiction." Although the *Khawaja* case related to an individual within the United Kingdom, the central question, as Lord Scarman indicated, was whether the individual seeking to invoke the remedy of habeas corpus could be said to be "within the jurisdiction" of the United Kingdom. As a matter of English law "jurisdiction" in this context is established when the individual is placed under the control of the Crown or enters territory under the Crown's control. What is determinative in habeas corpus jurisdiction is whether the officers to whom the writ is directed have effective control over the detained person, and whether those officers are themselves subject to the jurisdiction of the court. If the United Kingdom Parliament has assumed power to make laws applicable to a particular territory or if the United Kingdom executive has applied and enforced United Kingdom law there, then there is no doubt that that territory would be regarded as being within United Kingdom jurisdiction. See, *e.g.*, *R* v. *Earl of Crewe, Ex parte Sekgome*, [1910] 2 K.B. 576, 606 (C.A.), per Vaughan Williams, L.J., discussed *infra*.

That the English Courts in exercising this jurisdiction have looked to actual control over territory and not to concepts of legal sovereignty is evidenced by cases extending over two and a half centuries. We refer to the principal cases below.

***R* v. *Cowle*, (1759) 2 Burr. 834, 97 Eng. Rep. 587 (K.B.)**

The issue in this case was whether the writ of habeas corpus could issue to Berwick which had been acquired by conquest from Scotland, but not formally incorporated within England, and which remained governed by its own charter. Lord Mansfield, Chief Justice, giving the judgment of the Court did not find it necessary to determine the precise legal status of Berwick. He held as follows:

> "Writs * * * such as * * * habeas corpus * * * are restrained by no clause in the constitution given to Berwick: upon a proper case, they may issue to every dominion of the Crown of England. [¶] There is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England* * *." 2 Burr. at 855–56, 97 Eng. Rep. at 599.[23]

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[23] In A Course of Lectures on the English Law Delivered at the University of Oxford 1767–1773 (Thomas M. Curley ed. 1986), Sir Robert Chambers (the successor to Blackstone as Vinerian Professor of English law at the University of Oxford) referred to this decision and indicated that the only restraint on the Court for the purposes of the writ of habeas corpus *ad subjiciendium* was one of *propriety* on the particular facts of the case—to be measured by considerations such as the practicality of adjudication and grant of relief—and that the *power* to issue the writ extended even to places outside the ordinary jurisdiction of the courts, notwithstanding the fact that the most usual way of challenging detentions overseas would be to make complaint to the king in council. He put the matter thus (vol. 2 at 8): "[A] *habeas corpus ad subjiciendum* might always by common law, and may now by the express words of the Habeas Corpus Act, be directed to any county palatine, the Cinque Ports or any other privileged place within the kingdom of England, as well as to Wales, Berwick or the Isles of Jersey and Guernsey * * *. And so far has this principle been extended that, though the Habeas Corpus Act mentions no other places out of the ordinary jurisdiction of the courts at Westminster than those which I have enumerated, yet in a case that happened soon after that act was passed * * * the Court of King's Bench seemed to be of opinion that a habeas corpus might be sent to *Ireland* * * * in like manner as formerly to *Calais* (1 Ventris, 357). The same opinion was in a very

"Dominion" in 1759 had no technical meaning. Nor was "subjection" in this context a technical term; it implied no more than actual control and power. In *Ex parte Mwenya*, [1960] 1 Q.B. 241, 310 (C.A.), to which we shall return in more detail below, Lord Justice Sellers said of this statement of Lord Mansfield:

> "Lord Mansfield gave the writ the greatest breadth of application which in the then circumstances could well be conceived. * * * 'Subjection' is fully appropriate to the powers exercised or exercisable by this country irespective of territorial sovereignty or dominion, and it embraces in outlook the power of the Crown in the place concerned."

***Ex parte Anderson*, (1861) 3 El. & El. 487, 121 Eng. Rep. 525, 30 L.J.Q.B. 129 (Q.B.)**

In this case the English High Court issued a writ to the sheriff of the County of York in Canada, and to the keeper of the gaol of Toronto in that county, to bring up the body of an American slave, John Anderson.[24] In granting the writ Chief

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modern case delivered obiter by the Court of King's Bench, with respect to the *Isle of Man*, and the *plantations in America* as well as to *Ireland* (see Burrow, Rep. part 4 vol. 2d pa. 856). But this point has, I believe, never been judicially decided; and as was observed by Lord Mansfield in the case last cited 'Notwithstanding the *power* which the judges have, yet where they cannot judge of the cause, or give relief upon it, they would not think *proper* to interpose; and therefore in the case of imprisonments in *Guernsey*, *Jersey*, *Minorca*, or the *plantations*, the most usual way is to complain to the *king in Council*, the supreme court of appeal from these provincial governments, and to receive from that court an order to bail or discharge. Yet cases have formerly happened of persons illegally sent from hence and detained there in which a writ of *habeas corpus* would be the properest and most effectual remedy.'"

[24] This decision illustrates the broad territorial scope of the writ of habeas corpus at common law. Moreover, as Anderson was an American slave, it is evident that the use of the term "subject" was not equated with the status of citizenship. Although described in the judgment as a "British

Justice Cockburn acknowledged that the colony had both legislative and judicial independence, but continued as follows:

> "Nevertheless, it is to be observed that, in establishing a local judicature in Canada, our Legislature has not gone so far as expressly to abrogate the right of the superior Courts at Westminster to issue the writ of habeas corpus to that province * * *. [W]rits of habeas corpus have been and may be issued into all parts of the dominions of the Crown of England, wherever a subject of the Crown is illegally imprisoned or kept in custody. * * * [A]nd as the writ has issued even into dominions of the Crown in which there is an independent local judicature; we think that nothing short of legislative enactment would justify us in refusing to exercise the jurisdiction, when called upon to do so for the protection of the personal liberty of the subject." 3 El. & El. at 494, 121 Eng. Rep. at 527–28.

The Habeas Corpus Act of 1862, 25 & 26 Vict. c. 20, was passed in response to the controversy in Canada created by the decision in *Ex parte Anderson*.[25] It was described by its preamble as "An Act respecting the Issue of Writs of Habeas Corpus out of *England* into Her Majesty's Possessions Abroad." Section 1 provided that:

> "No Writ of Habeas Corpus shall issue out of *England*, by Authority of any Judge or Court of Justice therein, into any Colony or Foreign Dominion of the Crown where Her Majesty has a lawfully established Court or Courts of Justice having Authority to grant and issue the

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subject," Anderson was a slave from Missouri who had fled to Ontario. See *In re Anderson*, (1860) 20 U.C.R. 124 (Upper Can. Q.B.), *excerpted in* 5 Judicial Cases Concerning American Slavery and the Negro 345–47 (Helen Tunnicliff Catterall & James J. Hayden eds., New York, Octagon Books 1968) (1937).

[25] David Clark & Gerard McCoy, The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth 158 (2000).

said Writ, and to ensure the due Execution thereof throughout such Colony or Dominion."

The Act makes it clear that if the local courts in a British colony or "Foreign Dominion"[26] could not effectively issue and enforce the writ, the High Court in England retained the power to do so, emphasising the Crown's broad jurisdiction over habeas corpus and recognizing the fundamental need for at least one court to exist that can "ensure the due Execution" of the writ in any place under British control.

Notwithstanding the 1862 Act, *Ex parte Anderson* remains authority for the proposition that the writ is available to citizens and non-citizens alike and for cases where there is no local court capable of granting or issuing the writ.[27]

***R* v. *Earl of Crewe, Ex parte Sekgome*, [1910] 2 K.B. 576 (C.A.)**

This case related to the English Court's common law jurisdiction to issue a writ of habeas corpus to the Protectorate of Bechuanaland. The Protectorate was not part of the Crown's dominions within the meaning of the 1862 Act,[28] nor did the British Government assert sovereignty over it. It did,

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[26] "Foreign Dominion" is an unusual phrase. It has been held to mean "some territory which at some time formed part of the dominions of some foreign potentate, but which has now become, by conquest or cession, part of the dominions of the Crown of England. See *Ex parte Browne*, (1864) 5 B.&S. 280, 10 L.T.R. 458 (Q.B.), per Cockburn, C.J.; Kenneth Roberts-Wray, Commonwealth and Colonial Law 76–77 (1966).

[27] One obvious illustration of the continued importance of *Ex parte Anderson* as an authority is *Ex parte Sekgome*, to which we turn next in this brief. In his judgment Vaughan Williams, L.J., cited *Ex parte Anderson* as support for his conclusions that the writ of habeas corpus could run to "any country or place under the subjection of the Crown of England." [1910] 2 K.B. at 592, 605, 606. See also the reliance placed on *Ex parte Anderson* by Lord Evershed, M.R., and Lord Justice Sellers in *Ex parte Mwenya*, [1960] 1 Q.B. at 293–94, 308–09, discussed *infra* p. 21.

[28] See [1910] 2 K.B. at 591–92, per Vaughan Williams, L.J., and at 622–23, per Kennedy, L.J.

however, control and administer the territory. On the evidence of the Secretary of State for the Colonies it was merely a "foreign country within which [the Crown] had power and jurisdiction by treaty, grant, usage, sufferance, or other lawful means * * * [and] that it had never been acquired by settlement, or ceded to, or conquered, or annexed by His Majesty or any of his Royal predecessors * * *."[29] The writ was sought on behalf of an individual who claimed to be the chief of a native tribe but nevertheless a British subject. Counsel for the respondent (the Secretary of State for the Colonies) conceded that it was immaterial whether or not the applicant was a British subject.[30] The Court nevertheless considered that concession to have been well-founded and to accurately represent the law.[31] Moreover, the majority (Lord Justice Vaughan Williams and Lord Justice Farwell) held that the writ ran to the Protectorate, notwithstanding that it was not a British colony or dominion.[32]

Lord Justice Vaughan Williams indicated that it was the fact of presence in territory under the control of the State and the assertion of power over the individual by the State—not sovereignty or nationality based ties to the State—which triggered the protection of the writ. He said (at 592) that "the writ may be addressed to any person who has such control over the imprisonment that he could order the release of the prisoner."[33]

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[29] See [1910] 2 K.B. at 577.

[30] See *id.* at 580.

[31] See, *e.g.*, *id.* at 606, per Vaughan Williams, L.J., and at 620, per Kennedy, L.J.

[32] Kennedy, L.J, dissented on this point at 624.

[33] Later he added (at 606): "In the present case the King has every means of enforcing obedience. The Crown * * * has established laws which the dwellers in the Protectorate, whether natives or mere residents, must obey, and from which they surely must be entitled to receive protection when injured. Is the mere fact of absence of annexation and

Lord Justice Farwell also indicated that he considered the crucial issue to be control on the part of the proposed respondent rather than the precise legal status of the territory where the applicant was detained. He said the following (at 618):

> "Where a man who owes obedience to laws imposed by England is imprisoned and kept imprisoned without trial in a place maintained by England, and placed under the control of an officer of the Crown who acts under the orders of the Colonial Office, and who has acted in the particular case with the assent and approval of and is supported by the Colonial Office, I should be slow to conclude that the Secretary of State could not be called upon to make a return to the writ."

Lord Justice Kennedy (who in fact rejected the availability of the writ on different grounds[34]) stated, in terms, that he considered that the question as to whether or not the applicant was a British subject was an irrelevance, and that the key issue was whether or not he was detained under British authority. He said:

> "In my opinion the mere fact that a person in detention ought to be considered as not being in the strict sense of the term a British subject could not in itself be treated as impairing the jurisdiction of the High Court of Justice to direct the issue of the writ, if it were shewn that his custodian was detaining him within a British dominion and claiming so to detain him in the exercise of powers conferred upon him by British jurisdiction. The remedy

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theoretical possession to deprive the Crown and those who are under the law from the benefits and power of the writ of habeas?"

[34] Lord Justice Kennedy (at 624) held that the writ could not be issued beyond territories which were formally "dominions" of the Crown but in this respect, as we have already indicated, he was alone—Lord Justice Vaughan Williams and Lord Justice Farwell preferred the opposite conclusion. See *id.* at 592, 605–06, & 618.

obtainable by the writ of habeas corpus is not confined to British subjects." *Id.* at 620.

***R* v. *Sec'y of State for Home Affairs, Ex parte O'Brien*, [1923] 2 K.B. 361 (C.A.)**

In this case the applicant, O'Brien, was said to be a ring-leader of an illegal organization which had as its purpose the overthrow of the Governments in Southern and Northern Ireland and the commission of acts of violence in England. O'Brien was arrested in London and sent by the British authorities to Mountjoy Prison in Dublin in the Irish Free State where he was detained.[35] O'Brien applied to the High Court in London for a writ of habeas corpus. The writ was refused by the Divisional Court but granted by the Court of Appeal. Notwithstanding the fact that the respondent (the Secretary of State) had lost legal control over O'Brien by handing him over to the Irish Free State Government, the Court of Appeal held that there was sufficient doubt whether the Secretary of State nonetheless retained de facto control to justify the issue of the writ so that the question of control might be definitively determined on the return. Lord Justice Atkin summarized the matter in the following passage (at 397–98):

> "Having come to the definite conclusion that the order made by the Home Secretary is invalid and that the imprisonment of the applicant thereunder is unlawful, it only remains to consider whether the writ should go to the Home Secretary. I think that the question is whether there is evidence that the Home Secretary has the custody or control of the applicant. Actual physical custody is obviously not essential. 'Custody' or 'control' are the phrases used passim in the opinions of the Lords in *Barnardo* v. *Ford* [[1892] A.C. 326 (H.L.) (appeal taken

[35] The Irish Free State was then a self-governing British Dominion with its own parliament and executive.

from Eng.)[36]], and in my opinion are a correct measure of liability to the writ. It was said that the Applicant was in a dilemma, for having relied on the absence of control as constituting the invalidity of the order he is said to debar himself from asking that the writ should go to the Home Secretary as having control, and the Attorney General relied upon the absence of control as fatal to the applicant's motion for the writ. In truth there seems to be no dilemma. In testing the validity of the order [of detention] the question is as to the legal right to control; in testing the liability of the respondent to the writ the question is as to

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[36] This case concerned an application for habeas corpus in respect of a child and directed to Dr. Barnardo, the head of an institution for destitute children in which the child had been placed. It appeared that before the proceedings began Dr. Barnardo had handed the child over to another person to be taken to Canada, and he alleged that he did not know the address of that person or where the child was and that there being no relevant control there was therefore no jurisdiction for the issue of the writ. The High Court, Court of Appeal, and House of Lords nevertheless considered that the issue of the writ of habeas corpus was appropriate. The leading judgment in the House of Lords was that of Lord Herschell, who stated (at 339): "Where any tribunal believes that a person is or *may be* [emphasis added] under detention in unlawful custody, and issues a writ of habeas corpus accordingly, no Court of Appeal ought lightly to interfere with the issue of the writ. The order for its issue ought only to be set aside if there be, beyond question, no ground for it. If, for example, in the present case it had been an admitted fact that before notice of the application for the writ the appellant had ceased to have the custody of or any control over the boy alleged to be detained that might have been a ground for reversing the order of the Queen's Bench Division. But where the Court entertains a doubt whether this may be the fact [*i.e.*, whether custody or control has ceased prior to the application for the writ] it is unquestionably entitled to use the pressure of the writ to test the truth of the allegation, and to require a return to be made to it." In holding that the Court had jurisdiction to determine whether control was in fact established so as to justify the issue of the writ, the House of Lords decision also provides support for the analogous position we set out below relating to the Court's jurisdiction to determine the existence or otherwise of enemy alien status for the purposes of determining jurisdiction to issue the writ.

de facto control. In all cases of alleged unjustifiable detention such as arise on applications for the writ of habeas corpus the custody or control is ex hypothesi unlawful; the question is whether it exists in fact."[37]

***Ex parte Mwenya*, [1960] 1 Q.B. 241 (C.A.)**

This case concerned the jurisdiction of the High Court in England to issue a writ of habeas corpus to the Protectorate of Northern Rhodesia. Like Bechuanaland in *Ex parte Sekgome*, *supra*, Northern Rhodesia was described as a "'foreign country within which Her Majesty has power and jurisdiction by treaty, grant, usage, sufferance and other lawful means,'"[38] and where, for the purposes of the argument, it was assumed that there was no court in Northern Rhodesia competent to give equivalent relief.[39] The Crown submitted that the only test for the availability of the writ was one of territorial sovereignty[40] and that that test was failed on the facts of the case. Each member of the English Court of Appeal rejected this argument, concluded that the writ of habeas corpus could issue to any place under the "subjection" of the Crown, and emphasised the necessity of considering the actual nature of the Crown's control over the territory in question, and so over the detention under challenge. The following were the key passages in the judgments:

"As a matter of history and logic, the availability of the 'most efficient protection ever invented for the liberty of the subject' should not depend upon a mere label or on

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[37] See also [1923] 2 K.B. at 381, per Lord Justice Bankes, and at 391–92, per Lord Justice Scrutton. Most English lawyers would agree that these three Lord Justices constituted the most powerful English Court of Appeal of the first half of the 20th Century. The case also illustrates the willingness of the English Courts to enquire fully into any issues of fact relevant to the availability of the writ of habeas corpus.

[38] See [1960] 1 Q.B. at 265, quoting affidavit.

[39] See judgment page, *id.* at 290.

[40] See argument of Counsel for the Secretary of State, *id.* at 285.

matters of convenience. * * * [¶] [T]he jurisdiction ought not to be limited to territories, outside England, which are strictly labelled 'colonies or foreign dominions' but will extend to territories which, having regard to the extent of the dominion in fact exercised, can be said to be 'under the subjection of the Crown' and in which the issue of a writ will be regarded (in Lord Mansfield's words) as 'proper and efficient.'" [1960] 1 Q.B. at 303, per Lord Evershed, M.R.[41]

"[I]n territory which the Crown has assumed such a degree of control and power that that the protected State is to all intents and purposes a British possession and in which the writ, if issued, would certainly be effective in its results, it is difficult to see why the sovereign should be deprived of her right to be informed through her High Court as to the validity of the detention of her subjects in that territory. The contrary view would result in a subject having no redress at all if he were detained, however unlawfully, in a protectorate which was in substance a colony but which had no effective courts of its own." *Id.* at 305 per Lord Justice Romer.

"There may come times in a country's history when it may appear highly inconvenient or politically hazardous that the law should pursue its course, but in a court of law such considerations are irrelevant and cannot serve to deprive a subject of a right which an English court could give and enforce. * * *. [¶] * * * The writ is concerned with personal freedom and the emphasis in principle, it would seem, is not on where the wrongful detention is occurring but, assuming the court is satisfied that the detention is without justification whether it can, having regard to the proper interests, rights and powers of those

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[41] Lord Evershed, M.R., was here citing Lord Mansfield's judgment in *R* v. *Cowle*, *supra*. See also *id.* at 297, and Lord Justice Romer, *id.* at 305.

> governing the place of detention, make an order which can be enforced and so release an applicant who has asked for justice before it. * * *. [¶] The judges in the earliest cases had not in mind the issue which arises here, but I think it would be difficult to read into any of them * * * a refutation of the powers of the English Court to issue the writ to safeguard a subject's freedom in a territory over which this country had wide powers of jurisdiction and control, wide enough to enforce as a matter of ordinary administration any order the court might make." *Id.* at 308-09, per Lord Justice Sellers.

As was the case in *Ex parte Sekgome*, *supra*, the decision of the Court of Appeal did not rest on any statutory provision but reflected the scope of the writ at common law as it had been held to exist since at least the second half of the 18th century in *R* v. *Cowle* and *Sommersett's Case*, *supra*.[42]

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[42] Another case decided prior to 1960 and to which we should refer is *In re Ning Yi-Ching*, (1939) 56 T.L.R. 3 (K.B.). This decision by the court in vacation between terms (the judgment appears to have been given *ex tempore*) has sometimes been cited as support for the contention that the writ of habeas corpus does not run to foreigners in foreign territory. We do not, however, believe that the case was correctly decided or that it can stand for that proposition, given the Appellate decisions we refer to in this Part. The judge, Mr. Justice Cassels, purported to follow the judgment of Lord Justice Kennedy in *Ex parte Sekgome*. Mr Justice Cassels overlooked, however, the fact that Lord Justice Kennedy was in the minority in that case. Furthermore the result in *In re Ning Yi-Ching* is explicable by virtue of the facts that under the treaties governing the concession in Tientsin (*i.e.*, the municipal area in Tientsin allotted to the United Kingdom) in which the detained persons were held the British authorities had no jurisdiction over non-nationals, that there was another local court before which the detention could be challenged and that the respondent to the writ (the Foreign Secretary) was held to have no control over the detentions and to be acting in an advisory capacity only. *Id.* at 6. In any event subsequent decisions have made it clear that Mr Justice Cassels's approach was not correct and is not to be followed. In *Ex parte Mwenya*, Lord Evershed, M.R., considered Lord Justice Kennedy's judgment in *Ex parte Sekgome* and its adoption in *In re Ning Yi-Ching* and

***R (Bancoult)* v. *Sec'y of State for Foreign & Commonwealth Affairs*, [2001] Q.B. 1067 (Q.B.D. Admin. Ct.)**

This case was concerned with the availability of another prerogative writ to a territory under the Crown's "subjection."[43] The Crown submitted that the territory although a colony, enjoyed a separate and distinct sovereignty[44] and that as a result the writ of the High Court in London could not run there. Lord Justice Laws and Mr. Justice Gibbs rejected this argument. Referring to the writ of habeas corpus and to *Ex parte Mwenya*, Lord Justice Laws said:

> "[I]t is plain that the court in *Ex p Mwenya* * * * saw nothing in any earlier jurisprudence * * * to inhibit them from concluding that the writ of habeas corpus might in a proper case issue beyond the seas, 'to any place under the

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commented (at 295) "it is nonetheless clear that the other two members of this court took a different view of the matter," while Lord Justice Sellers also stated (at 310–11) that he agreed with the approach taken by Lord Justice Vaughan Williams rather than Lord Justice Kennedy. The Court of Appeal has therefore held that the views of Mr Justice Cassels and Lord Justice Kennedy did not represent English law. Mr. Justice Cassels's approach is also irreconcilable with the more recent decisions of the Divisional Court in *R (Bancoult)* v. *Sec'y of State for Foreign & Commonwealth Affairs*, [2001] Q.B. 1067 (Q.B.D. Admin. Ct.), and of the Court of Appeal in *R (on the application of Abbasi)* v. *Sec'y of State for Foreign & Commonwealth Affairs*, [2002] EWCA Civ. 1598, to which we refer in more detail below. It is also apparent that Mr Justice Cassells was prepared to consider the merits of the complaints raised, stating (at 6) that he had "to decide whether a *prima facie* case had been made out that the four Chinese were being illegally detained" but that he "had listened with great care and *had arrived at the conclusion that no such case had been made out.*" (Emphasis added.) We note also that this decision was analysed by the majority in terms consistent with these submissions in *Rasul* v. *Bush*, 542 U.S. at 483 n.14.

[43] The writ was a writ of certiorari to quash an ordinance passed by the Commissioner exercising powers over a British Indian Ocean Territory.

[44] See *id.* at 1072 & 1086 ¶ 21.

subjection of the Crown.' Indeed the weight of authority pointed firmly towards just such a conclusion."[45]

In reaching this conclusion Lord Justice Laws expressly endorsed the dictum of Lord Justice Farwell in *Ex parte Sekgome* (at 618), cited above.

***R (on the application of Abbasi)* v. *Sec'y of State for Foreign & Commonwealth Affairs*, [2002] EWCA Civ. 1598, [2002] All E.R. (D.) 70 (Nov.)**

This case was brought in the English courts on behalf of a British national captured by United States forces in Afghanistan and held at Guantanamo Bay since January 2002. He sought an order to compel the United Kingdom Secretaries of State to make representations on his behalf to the United States Government.[46]

The English Court of Appeal, presided over by the Master of the Rolls, held that the denial of access to a court in Abbasi's case was in conflict with the fundamental principles of English law and of public international law. The Court stated its belief that United States law recognized the same principles. The Court emphasised (paragraph 65) that Abbasi's detention as an alleged "enemy combatant" might prove to be justified, and that the United Kingdom also had legislation to

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[45] See *id.* at 1091 ¶ 26. Lord Justice Laws cited *R* v. *Cowle*, *supra*, amongst other authorities in this regard.

[46] His claim was founded on the contention that his "fundamental human right" not to be arbitrarily detained had been infringed because he had been denied access to a court, the U.S. District Court for the District of Columbia having dismissed, in *Rasul* v. *Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), habeas corpus applications by other British subjects held at Guantanamo Bay for want of jurisdiction. His submission was that in these circumstances the Secretaries of State owed him a duty under English law to take steps to redress the position.

deal with suspected international terrorists.[47] Nonetheless the Court said:

> "66. What appears to us to be objectionable is that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal. It is important to record that the position may change when the appellate courts in the United States consider the matter. The question for us is what attitude should the courts in England take pending review by the appellate courts in the United States, to a detention of a British Citizen the legality of which rests (so the decisions of the United States Courts so far suggest) solely on the dictate of the United States Government, and, unlike that of United States' citizens, is said to be immune from review in any court or independent forum."

The Court of Appeal held that it could not compel the Secretaries of State to intervene by diplomatic or any other means. The judgment is, however, further clear and weighty authority for the propositions that neither the nationality of the detained person nor the absence of sovereignty over the place of detention would preclude an English Court from entertaining a habeas corpus application, provided that the authority in ultimate or actual control of the detained person was subject to the Court's jurisdiction. We refer the Court to the whole of the judgment, but for convenience set out some further passages of importance:

> "59. The United Kingdom and the United States share a great legal tradition, founded in the English common law. One of the cornerstones of that tradition is the ancient writ of habeas corpus * * *. The court's jurisdiction

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[47] We understand that the petitioners deny that they are or have been enemy combatants or members of any terrorist group.

was recognised from early times as extending to any part of the Crown's dominions * * *.

"60. The underlying principle, fundamental in English law, is that every imprisonment is prima facie unlawful * * *. This principle applies to every person, British citizen or not, who finds himself within the jurisdiction of the court: "He who is subject to English law is entitled to its protection" * * *. It applies in war as in peace; in Lord Atkin's words (written in one of the darkest periods of the last war):

> 'In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.' (*Liversidge v Anderson* [1942] AC 206 at 244)

"* * * *

"63. The recognition of this basic protection in both English and American law long pre-dates the adoption of the same principle as a fundamental part of international human rights law. * * *

"64. For these reasons we do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a 'legal black-hole'."

In conclusion (at ¶ 107.iii) the Master of the Rolls said:

> "The position of detainees at Guantanamo Bay is to be considered further by the appellate courts in the United States. It may be that the anxiety we have expressed will be drawn to their attention. We wish to make it clear that we are only expressing an anxiety that we believe was felt by the Court in *Rasul*. As is clear from our judgment, we believe that the United States courts have the same respect for human rights as our own."

V. As a matter of English law the question whether a detained person is properly to be categorised as an enemy alien is within the jurisdiction of the Court and to be determined by the Court and not the Executive.

It appears to be common ground between the petitioners and the Government that the petitioners are not "enemy aliens" within the primary meaning of that term.[48] Even were this not the case, as a matter of English law such an issue would fall to be resolved by the Court on the evidence presented. It would not be open to the Executive to contend that this issue was non-justiciable and outside the Court's jurisdiction. We set out the principal authorities which show this to be the case below.

R v. *Schiever*, (1759) 2 Burr. 765, 97 Eng. Rep. 551 (K.B.)

This case related to a Swedish sailor detained in a Liverpool gaol having been captured aboard a French ship. Although England and France were at war, Sweden was a neutral power, and the applicant sought a writ of habeas corpus contending that he had been forced to serve on the French vessel under duress. Although the Reporter queried the correctness of the decision where duress was involved, the Court held that on Schiever's "own shewing" he was "clearly a prisoner of war and lawfully detained as such" and the application for the writ was refused. The Court decided the case only after consideration of the evidence presented and not on the basis of any assertion that Schiever was an enemy alien.

Anonymous—The Case of Three Spanish Sailors, (1779) 2 Black. W. 1324, 96 Eng. Rep. 775 (K.B.)

In this case three Spanish sailors asserted that they had been captured as prisoners of war on board a Spanish privateer and carried to Jamaica. They had then been persuaded to enter

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[48] *I.e.*, citizens of a state at war with the United States. *Johnson* v. *Eisentrager*, 339 U.S. at 769 n.2

into service on board a merchant vessel and promised wages and their release on the vessel's return to England. On arrival in England, however, the captain of the vessel, a Captain Lush, refused to pay the agreed wages and instead handed the men over to the commander of a naval vessel as prisoners of war. The Court refused the subsequent application for a writ of habeas corpus but, again, did so on the basis of the evidence presented. The Court rejected the application in the following terms: "[T]hese men, upon their own shewing, are alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus. The story as related by them is not much to the credit of Captain Lush; but we can give them no redress." 2 Black W. at 1324, 96 Eng. Rep. at 776.

***Ex parte Weber*, [1916] A.C. 421 (H.L.) (appeal taken from Eng.)**

The applicant in this case, Weber, was a German-born man who had left Germany in 1898 and remained abroad since that time. On the outbreak of the First World War he was interned as an enemy alien. He applied for a writ of habeas corpus contending that as a result of German legislation he had lost his German nationality and so was not an enemy alien. The High Court, Court of Appeal, and House of Lords accepted that the Court had jurisdiction to consider the issue but held, on the evidence, that it could not be said that the applicant had so divested himself of his German nationality that he could be treated as though he no longer remained a German citizen. He remained, therefore, an enemy alien, and the writ was refused on the facts.

CONCLUSION

If it were the United Kingdom, and not the United States of America, which controlled the Guantanamo Bay Naval Base and the detained persons held there, then, in accordance with English law as it has been since at least *R* v. *Cowle* in 1759

and *Sommersett's Case* in 1772, the writ of habeas corpus would be available before the English Courts regardless of the nationality of the detained persons, and it would be the English Courts and not the Executive which would be responsible for determining any issue relating to any "enemy" status alleged against the detained persons. We are, furthermore, unaware of any authority indicating that the position would be any different in any other Commonwealth State.

Respectfully submitted,

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26 pgs

Nos. 06-1195 and 06-1196

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, et al.,
Petitioners,

vs.

GEORGE W. BUSH,
President of the United States, et al.,
Respondents.

KHALED A. F. AL ODAH, next friend of
FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al.,
Petitioners,

vs.

UNITED STATES, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

The questions presented, as stated in the Government's Brief in Opposition, are:

1. Whether the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, removes federal court jurisdiction over habeas petitions filed by aliens detained as enemy combatants at Guantanamo Bay, Cuba.

2. Whether aliens detained as enemy combatants at Guantanamo Bay have rights under the Suspension Clause of Article I, Section 9, of the Constitution.

3. Whether, if aliens detained at Guantanamo Bay have such rights, the MCA violates the Suspension Clause.

4. Whether petitioners may challenge the adequacy of the judicial review available under the MCA and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, before they have sought to invoke, much less exhaust, such review.

This brief *amicus curiae* addresses Question 2.

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IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, et al., *Petitioners*,
vs.

GEORGE W. BUSH,
President of the United States, et al., *Respondents*.

KHALED A. F. AL ODAH, next friend of
FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al.,
Petitioners,
vs.

UNITED STATES, et al., *Respondents*.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance

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1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission

with the rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In arguing that the repeal of habeas jurisdiction in the Military Commissions Act is unconstitutional, Petitioners propose an excessively broad view of the Suspension Clause. Adoption of these arguments would hinder the executive and legislative branches in their efforts to combat both terrorism and ordinary crime to a much greater degree than the Constitution actually requires. Such restrictions would be contrary to the interest CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Petitioners are aliens detained at the Naval Base in Guantanamo Bay, Cuba. See Brief for Respondents in Opposition 2. The Guantanamo detainees include persons captured in war in Afghanistan and persons taken into custody in other countries. See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 446 (DC 2005); see also *Khalid* v. *Bush*, 355 F. Supp. 2d 311, 316 (DC 2005) (petitioners captured in Bosnia or Pakistan, no connection with U. S. except as detainees); see also Brief for Petitioners Al Odah, et al. 2 (Al Odah Brief) (petitioning for the *Al Odah* detainees, four petitioners from Kuwait, and the *Abdah* detainees, seven petitioners from Yemen).

Each petitioner has been judged to be an "enemy combatant in the ongoing armed conflict against the al Qaeda terrorist organization and its supporters" by a Combatant Status Review Tribunal (CSRT). See Brief for Respondents in Opposition 2. Congress has provided for review of that determination in the United States Court of Appeals for the District of Columbia. *Ibid.* Furthermore, Congress has provided that the

D. C. Circuit may hear challenges to the scope of review provided by the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Title X, 119 Stat. 2680, 2739-2744 (2005) (DTA). See DTA § 1005(e)(2), (3), amended by Military Commissions Act of 2006, § 9, Pub. L. No. 109-366, 120 Stat. 2600 (MCA).

Instead, petitioners have challenged the constitutionality of their CSRT review through habeas petitions. Specifically they challenge the constitutionality of the DTA and the MCA. See Boumediene Brief 7-8; see also Al Odah Brief 9-10; see also Brief for Petitioners El-Banna, et al. 11-12 (El-Banna Brief).

Petitioners have filed petitions for writs of habeas corpus alleging violations of the Constitution, treaties, and the common law. See *Boumediene* v. *Bush*, 476 F. 3d 981, 984 (CADC 2007). The present case is the result of appeals consolidated after the decisions of the District Court of the District of Columbia. See *ibid.*

In the "Al Odah" cases, Judge Green denied the government's motion to dismiss with respect to the claims arising from alleged violations of the Fifth Amendment's Due Process Clause and the Third Geneva Convention, but dismissed all other claims. See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d, at 481. Judge Green then certified the order for interlocutory appeal under 28 U. S. C. § 1292(b), and the government appealed. *Boumediene*, 476 F. 3d, at 984. The detainees cross-appealed. *Ibid.* In the "Boumediene" cases, Judge Leon dismissed the cases in their entirety, stating that nonresidents' rights were "subject to both the military review process already in place and laws Congress had passed defining the appropriate scope of military conduct towards these detainees." *Khalid*, 355 F. Supp. 2d, at 330.

While the appeals were pending, Congress enacted the MCA. Section 7(a) of the MCA replaced subdivision (e) of § 2241:

> "(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> "(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

Section 7(b) of the MCA expressly made the change applicable to pending cases.

In February 2007, the Court of Appeals for the District of Columbia Circuit decided the consolidated appeals. The Court of Appeals dismissed petitioner's pending habeas actions for lack of jurisdiction, *Boumediene*, 476 F. 3d, at 994, holding that the MCA "strips jurisdiction over detainee cases," including pending habeas cases. *Id.*, at 988. The Court of Appeals also rejected the constitutional attack on the MCA. *Id.*, at 991-992. The Court of Appeals reasoned that because " '[n]othing in the text of the Constitution extends' " to alien enemies who have never been in United States territory, the Suspension Clause does not grant peti-

tioners such a right. *Id.*, at 990-992 (quoting *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950)). Judge Rogers dissented.

This Court initially denied petitioners' petition for certiorari. *Boumediene* v. *Bush*, 127 S. Ct. 1478 (2007). In June 2007, this Court granted rehearing and granted the petition. *Boumediene* v. *Bush*, 127 S. Ct. 3078 (2007).

SUMMARY OF ARGUMENT

The "privilege of the writ of habeas corpus" protected by the Suspension Clause is limited to people who are part of the population of the United States, as that term is used in *The Japanese Immigrant Case*. That term is broader than just citizens; it includes resident aliens and even visitors. However, it is not so broad as to include persons who had never entered the United States or any area under its control prior to being brought in as military prisoners.

None of the historical cases cited by petitioners or supporting *amici* extended the writ to anyone in petitioners' status. *Schiever's Case* expressly denied habeas review on the ground that the petitioner was "the King's prisoner of war . . . ." Recent historical research, relied on by *amici* Legal Historians, undercuts rather than supports their position.

Unlike the Court's prior detainee cases, this case involves an unambiguous repeal of habeas jurisdiction by Congress, expressly applicable to this case. Petitioners are therefore asking the judicial branch to overrule a joint decision of both of the political branches on a question of foreign and military policy. The judiciary is not the proper forum for such issues. The detainees'

remedies are those Congress has provided plus the diplomatic efforts of their home countries.

ARGUMENT

I. The constitutional "privilege of the writ of habeas corpus" does not extend to an alien captured abroad by the military as an enemy, with no other connection to the United States, regardless of the location of detention.

Article I, § 9, cl. 2, of the Constitution provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Petitioners argue that the Suspension Clause limits Congress's ability to suspend their privilege to habeas corpus. This argument depends on the premise that petitioners are holders of the "privilege" referred to in the Suspension Clause. They are not.

A. Rasul and Place of Detention.

"It is the holdings of our cases, rather than their dicta, that we must attend . . . ." *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U. S. 375, 379 (1994). The question presented in *Rasul* v. *Bush*, 542 U. S. 466, 475 (2004), and hence the holding of the case, concerned the scope of the habeas statute as it then read. The statute at that time made no distinction between citizens and aliens. See *id.*, at 481. The discussion of the rights of aliens to habeas review at common law, see *id.*, at 481-482, n. 11, is dictum.

As subsequently amended, 28 U. S. C. § 2241 now distinguishes between aliens detained as enemy combatants and other persons. See § 2241(e). Unlike the previous, short-lived amendments of Public Law 109-

148, § 1005(e)(1), 119 Stat. 2742, and Public Law 109-163, § 1405(e)(1), 119 Stat. 3477, the current habeas statute does not distinguish cases according to the place of detention. The question of whether the amended habeas statute violates the Suspension Clause should therefore begin with the distinction drawn by Congress based on the status of the alien, not the distinction based on the location of detention that is the primary basis of the Court of Appeals' opinion.

Discussions of the history of the writ often conflate issues of territorial reach with issues of the petitioner's status. See, *e.g.*, Boumediene Brief 11-15. It is important to keep the issues distinct. Cases such as *King* v. *Cowle*, 97 Eng. Rep. 587 (K. B. 1759), are relevant only to the territorial question. Whether the writ of habeas corpus could issue to various places that had come into the British Empire by various means, see Boumediene Brief 14, is a separate question from who was entitled to the "privilege" at common law.

The privilege of habeas corpus was meant only to protect those who were "part of [the] population." *The Japanese Immigrant Case*, 189 U. S. 86, 101 (1903). Aliens detained as enemy combatants, arrested overseas and detained by the military on a military base, have never become part of the population. They would not be part of the population regardless of whether they were detained in Guantanamo Bay, South Carolina, or Afghanistan. In *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 524 (2004), concerning the review available to a citizen detainee, the plurality said, "It is not at all clear why [place of detention] should make a determinative constitutional difference." There is also no good reason why it should make such a difference in the case of aliens who are not part of the population.

B. Part of the Population.

The fact that the United States has generously extended constitutional protection to aliens living within the country, to visitors, and even to those who enter illegally, does not support a conclusion that we must extend the full panoply of constitutional rights to every alien who happens to be on territory in the control of our government. The government's ability to grant or deny a right depends on whom that right was placed in the Constitution to protect. See *Johnson* v. *Eisentrager*, 339 U. S. 763, 770-771 (1950). History shows that the purpose of the Suspension Clause was to protect the people of the United States.

Eisentrager, *supra*, at 777-778, rejected a claim of a constitutional right to habeas corpus by enemy aliens. While the *Eisentrager* decision emphasized the fact that the enemy aliens were outside the United States, it did not address the territorial application of habeas corpus alone. The Court also noted, "The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Id.*, at 770. The question is where the petitioners are on that scale and where one must be to hold the privilege of the writ of habeas corpus.

In *The Japanese Immigrant Case*, the petitioner was "an alien, who has entered the country, and has become subject in all respects to its jurisdiction, *and a part of its population*, although alleged to be illegally here . . . ." 189 U. S., at 101 (emphasis added). Thus, although Ms. Yamataya, the alien subject to deportation in *The Japanese Immigrant Case*, had been in the United States for less than two weeks, *id.*, at 87, she was entitled to basic due process. See *id.*, at 101. Aliens outside the population are not entitled to basic due process. Such aliens are only afforded the process

Congress has provided to them. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 212 (1953). Thus, a would-be immigrant "on the threshold of initial entry stands on a different footing" even when he was within the territorial boundaries of the United States (Ellis Island) and deprived of his liberty by agents of the federal government. See *id.*, at 213.[2]

Petitioners argue that they have a constitutional right to habeas corpus as it existed in 1789. They base their claim on this Court's ruling in *INS* v. *St. Cyr*, 533 U. S. 289, 301 (2001). *St. Cyr* indicates that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.' "[3] However, this right exists only for those who were "part of its population," *The Japanese Immigrant Case*, 189 U. S., at 101, and who were detained under federal law. See *Felker* v. *Turpin*, 518 U. S. 651, 663 (1996) (establishing that the first Congress only extended habeas to those held "under the authority of the United States"). English decisions from the time of the Founding and earlier, as well as early American decisions, clarify the limits of constitutional protection. At best, habeas corpus " 'as it existed

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2. The Government did not contest that he could challenge his detention by habeas corpus. See *ibid.* Like the petitioners in *Rasul* v. *Bush*, 542 U. S. 466, 483-484 (2004), he was within the terms of the habeas statute, and the Suspension Clause was not at issue.

3. The need for the hedge phrase "at the absolute minimum" is unclear. The entire legitimate basis of judicial review of statutes is to protect the people's sovereign right to make the principles they put into the Constitution permanent until they choose to change them by amendment. See *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 176 (1803). An alteration of the scope of a constitutional provision by the judiciary would be every bit as much a violation of the people's "original and supreme will," *ibid.*, as would an alteration by the legislature.

in 1789' " extended to territories and not to aliens who were not a "part of its population."

In *St. Cyr*, this Court upheld the authority of federal courts to grant a writ of habeas corpus to an alien who had been "admitted to the United States *as a lawful permanent resident* in 1986." 533 U. S., at 293 (emphasis added). The Court granted St. Cyr's petition to review the legal question of whether discretionary deportation relief under Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) could apply to an alien who had pled guilty to a deportable crime before either IIRIRA or the AEDPA had been enacted. *Id.*, at 292-293. While this Court recognized that the case had the potential to raise the question "of what the Suspension Clause protects," this Court declined to address the constitutional issue. *Id.*, at 301, n.13. To inform its statutory interpretation, the Court examined the historical exercise of habeas jurisdiction in England and the United States. See *id.*, at 301. In its analysis, this Court found that "[i]n England prior to 1789, in the Colonies and in this Nation during the formative years of our Government, the writ of habeas corpus was available to *nonenemy* aliens as well as to citizens." *Ibid.* (emphasis added).

St. Cyr relied on a number of cases to support this conclusion. See 533 U. S., at 302, n.16 (citing *Sommersett* v. *Stewart*, 20 How. St. Tr. 1, 79–82 (K. B. 1772); *Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K. B. 1810); *King* v. *Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K. B. 1759); *United States* v. *Villato*, 28 F. Cas. 377 (No. 16,622) (CC Pa. 1797); *Commonwealth* v. *Holloway*, 1 Serg. & Rawle 392 (Pa. 1815); *Ex parte D'Olivera*, 7 F. Cas. 853 (No. 3,967) (CC Mass. 1813)). *Rasul*, 542 U. S., at 481, n. 11, cited largely the same

cases to support the proposition that the writ extended to "claims of aliens detained within the sovereign territory of realm," omitting the word "nonenemy." On closer examination, each case falls into one of three classifications. The first type extends habeas relief to a person who is a part of the population, even if not a citizen. The second type denies relief without distinguishing the merits from jurisdiction. The third type supports the argument that aliens captured as enemies by the military and otherwise unconnected with the country are not eligible for habeas relief.

Sommersett v. *Stewart*, 98 Eng. Rep. 499 (K. B. 1772), is a case of the first kind. Sommersett was a slave purchased in Africa and taken to Virginia, where slavery was legal. His owner, Stewart, brought him to England, where his advocates argued it was not. See *id.*, at 499. Although not originally from Britain or any of its possessions, he had been brought into the British Empire legally and permanently. He could be considered a "part of its population." The court heard his case on the merits without objection and granted relief. See *id.*, at 510.

The *Case of the Hottentot Venus*, 104 Eng. Rep. 344 (K. B. 1810) is similar.[4] Saartje Baartman, a native of South Africa and member of the Hottentot nation, was said to be "remarkable for the formation of her person" and was being exhibited to curious Londoners "under the name of the Hottentot Venus." *Id.*, at 344. Third parties, doubtless appalled by this spectacle, alleged "that she had been clandestinely inveigled from the Cape of Good Hope, without the knowledge of the British Governor, (who extends his peculiar protection

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4. This case postdates the Suspension Clause, but it is close enough to have some relevance to the understanding of habeas corpus in 1789.

in nature of a guardian over the Hottentot nation *under his government . . .) . . . .*" *Ibid.* (emphasis added). Although Ms. Baartman may not have been considered a British subject in the strict sense of the word, neither was she a stranger to the British Empire. The court evidently regarded her as a resident of a British protectorate and a person within the protection of the Crown. On motion of the Attorney General, the court appointed investigators to determine if she was a willing participant and dismissed the proceedings upon determining that she was. See *id.*, at 344-345.

Rasul, 542 U. S., at 481, n. 11, cites three early American cases as examples of habeas petitions by aliens:

> "*United States* v. *Villato*, 2 Dall. 370 (CC Pa. 1797) (granting habeas relief to Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States); *Ex parte D'Olivera*, 7 F. Cas. 853 (No. 3,967) (CC Mass. 1813) (Story, J., on circuit) (ordering the release of Portuguese sailors arrested for deserting their ship); *Wilson* v. *Izard*, 30 F. Cas. 131 (No. 17,810) (CC NY 1815) (Livingston, J., on circuit) (reviewing the habeas petition of enlistees who claimed that they were entitled to discharge because of their status as enemy aliens)."

While these cases do support the limited proposition for which *Rasul* cites them, none involves a captured enemy held by the military. *Villato* and *D'Olivera* are both routine uses of habeas corpus for pretrial review in cases of defendants held for trial in civilian courts. In both *Villato* and *Wilson*, and arguably in all three, the petitioners were part of the population of the United States within the broad meaning of *The Japanese Immigrant Case*.

Another case of this type is *Lockington's Case*, Brightly 269, 5 Am. L. J. 92 (1813). The petitioner was a resident alien who had come to reside in the United States before the war began. See 5 Am L. J., at 92. The chief justice expressly distinguished the situation of such a resident alien from a prisoner of war "brought among us by force; and his interests were never, in any manner, blended with those of the people of this country." Far from supporting a right to habeas for the petitioners in the present case, who were "brought among us by force," *Lockington's Case* refutes any such right.

The Case of the Three Spanish Sailors, 96 Eng. Rep. 775 (C. P. 1779) is a case of the second type. The three sailors were undisputedly captured as enemy aliens and prisoners of war in the first instance, but they claimed they had ceased to be such by their voluntary service on an English merchant vessel. See *id.*, at 775. The holding was that on their own showing they were enemy aliens and prisoners of war and as such the courts "can give them no redress." *Id.*, at 776. The court went on to say that if their allegations were true "it is probable they may find some relief from the Board of Admiralty." *Ibid.*

Even in the modern era, the line between jurisdiction and merits is sometimes obscure. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 112-113 (1998) (Stevens, J., concurring in the judgment). It may be clear that a party is not entitled to relief without being clear whether the reason is jurisdictional or substantive. To conclude on the basis of this sketchy report that the court actually grappled with and decided a subtle distinction is quite a stretch. The court simply decided on the pleadings that the petitioners could get no relief from the judiciary and had to ask the executive.

Judge Rogers' dissent in the Court of Appeals cites *King* v. *Schiever*, 97 Eng. Rep. 551 (K. B. 1759), to illustrate that the writ at common law would have extended to aliens under the control of the Crown. *Boumediene* v. *Bush*, 476 F. 3d 981, 1001 (CADC 2007). Schiever was a Swedish subject who claimed he had been forced into service on a French privateer before the privateer was captured by the English. See 97 Eng. Rep., at 551. He then became England's prisoner of war. In her dissent, Judge Rogers used *Schiever* to infer that courts would extend the writ to enemy aliens. "The habeas court ultimately determined, on the basis of Schiever's testimony that he was properly characterized [as a prisoner of war] and thus lawfully detained." 476 F. 3d, at 1001 (citing *Schiever*, 97 Eng. Rep., at 551-552). The report cited by Judge Rogers states, "the Court thought this man, upon his own showing, clearly a prisoner of war, and lawfully detained as such. Therefore they ¶ Denied the motion." *Ibid.* Schiever's "own showing" was the affidavit he produced to support his petition for a writ of habeas corpus. *Id.*, at 551. In this report, *Scheiver* appears to be a case of the second type, denying relief without distinguishing merits from jurisdiction.

In another report of the same case, *Schiever's Case*, 96 Eng. Rep. 1249 (K. B. 1759), there is a more extended report of the holding. From this report, it appears that *Schiever* is a case of the third type, refuting petitioners' argument.

> "He is the King's prisoner of war, and we have nothing to do in that case, nor can we grant an habeas corpus to remove prisoners of war. His being a native of a nation not at war does not alter the case, for by that rule many French prisoners might be set at liberty, as they have regiments of many

> other kingdoms in their service, as Germans, Italians, &c.
>
> "But, if the case be as this man represents it, he will be discharged upon application to a Secretary of State." *Id.*, at 1249.

In other words, the court did not adjudicate whether his detention as a prisoner of war was proper and expressed an opinion that it was not if his allegations were true, yet the court washed its hands of the case anyway. Indeed, the reluctance of the courts to interfere with the custody of military prisoners was so great that even the writ of habeas corpus ad testificandum would not issue to bring the prisoner into court to testify, deferring to the executive as to whether the prisoner would be produced. See *Furly* v. *Newnham*, 99 Eng. Rep. 269 (K. B. 1780). In short, no reported case from the Founding era or earlier supports the proposition that military prisoners with no prior connection with the kingdom were entitled to habeas review, and some cases refute that claim.

II. Recent historical research refutes rather than supports petitioners' claims to a constitutional right to habeas review.

Amici Legal Historians cite a forthcoming article, Halliday and White, the Suspension Clause: English Text, Imperial Context, and American Implications. This article is available at the Social Science Research Network, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008252. Professor Halliday has informed *amicus* CJLF that the paper will be published in next May's Virginia Law Review. The research in this article of unpublished manuscripts in habeas cases is indeed important, but it does not support the proposition that

persons in the status of the petitioners are constitutionally entitled to habeas.

The main theme of the Halliday and White article is that the writ of habeas corpus was a part of the relationship between the king and his subjects. "As we shall see, this prerogative power, whether running through the writ of habeas corpus or through the king's suspension of law [*e.g.*, by pardon], was invariably connected to his obligation to protect and further the good of his subjects." Halliday & White, *supra*, at 25.

Subjects, for this purpose, encompassed a broader class of persons than those born in England or naturalized. The term also included "local subjects." *Id.*, at 26 (quoting M. Hale, The Prerogatives of the King 54 (D. Yale ed. 1976)). This category included foreigners present in the kingdom as residents or visitors, even if they were "enemies" in the sense of being subjects of a country at war with England. *Id.*, at 26-27. Such aliens owed a duty of allegiance and were entitled to the king's protection while in the kingdom.

This is the basis for the assertion that habeas corpus was routinely available to aliens, even "enemies," usually without even raising the issue of their alienage. Halliday and White quote Hale for the proposition, " 'If any alien enemy reside or come into the kingdom, *and not in open hostility*, he owes an allegiance to the king [by reason of place].' " *Id.*, at 27 (emphasis added). They note the case of DuCastro (or DuCastre), who was accused of being a spy. *Id.*, at 27, n. 72. *Amici* Legal Historians rely on *DuCastro* for the proposition that status as a foreigner does not disentitle an alleged enemy from habeas relief. See Legal Historians Brief 6. However, *DuCastro* appears to be distinguishable from the present case. From the manuscripts relied on by the Legal Historians, it appears that a warrant was issued for DuCastro's arrest, implying he was already in

the country. Unlike Schiever, see *supra*, at 14, and unlike petitioners in the present case, DuCastro was apparently not captured abroad and brought in as a military prisoner.

Halliday and White also note cases of foreign sailors impressed into service in the navy. See Halliday & White, *supra*, at 27, n. 73. Like the cases previously discussed, a sailor on a British-flag ship was a resident of a place under British control, and he was a part of the population for this purpose.

Because the writ of habeas corpus was an aspect of the relation of king to subject, it followed British subjects to any place in the world where the power of the crown reached. This included places where English property law and most common law writs did not reach. See *id.*, at 51-52. By the time of the American Revolution, habeas corpus was a "critical marker of subjecthood," and its removal was considered a violation of the Americans' rights. See *id.*, at 52. When Parliament suspended the writ in America but not in England, Sir Edmund Burke denounced the discrimination between two classes of subjects in a pamphlet widely distributed in America. See *id.*, at 65-67.

Near the end of the article, Halliday and White criticize a statement in the Court of Appeals' opinion in the present case that in 1789 " 'habeas corpus would not have been available to aliens without presence or property within the United States.' " *Id.*, at 116 (quoting *Boumediene*, 476 F. 3d, at 990). Yet that statement is fully consistent with the theme of the article that the historical purpose of the writ was to question the custody of "subjects," as broadly defined to include aliens permanently or temporarily residing in areas under British control. The Court of Appeals' statement is not inconsistent with any case Halliday and White cite to support their thesis. An alien cap-

tured by the military in a foreign land whose only presence in British-controlled lands was as a military prisoner was not a "subject" even in the broadest possible sense of the word.

The latest historical research thus brings us back to where we started with *The Japanese Immigrant Case*. The "part of its population" criterion of that case is substantially equivalent to the broadly defined "subjects" of Halliday and White's historical analysis. *Schiever's Case*, see *supra*, at 14, remains the closest analogy to the present case. Persons who are not part of the population are not holders of the historical constitutional "privilege of the writ of habeas corpus," and Congress is well within its authority to repeal habeas jurisdiction as to such persons.

III. Where the executive and legislative branches have jointly decided a question of foreign and military policy, the judiciary should not interfere.

The present case comes to the Court in a very different posture regarding separation of powers than the previous cases. In *Rasul* v. *Bush*, 542 U. S. 466 (2004), and *Hamdan* v. *Rumsfeld*, 548 U. S. __, 126 S. Ct. 2749 (2006), there was room for doubt on interpretation of the pertinent Acts of Congress. In the present case, there is no doubt. The statutory language is as clear as words can be that Congress repealed habeas jurisdiction for these petitioners and that the repeal applies to pending cases. The Court of Appeals aptly characterized the argument to the contrary as "nonsense." *Boumediene* v. *Bush*, 476 F. 3d 981, 987 (CADC 2007).

In the previous cases, this Court determined that executive decisions regarding the conduct of the war on

terror were contrary to the law enacted by Congress. In this case, petitioners ask the Court to overrule a joint decision of the executive and legislative branches. That is a far different matter. Whatever the relative roles of the executive and legislative branches in foreign policy may be, the role of the judiciary is minimal. See *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302 (1918). This primacy of the political branches extends to the treatment of aliens. See *Mathews* v. *Diaz*, 426 U. S. 67, 81 (1976).

Certainly questions can be raised about the wisdom of current policies. The proper balance between security needs and America's relations with other countries and reputation in the world is debatable. See Al Odah Brief 2. But a court of law is not the forum for that debate. We are in a new kind of war, with a new kind of danger and a new kind of enemy. The proper response and the correct balance are political decisions for the political branches to make.

Where the statute is clear, the only justiciable question is whether it violates a permanent principle that the people have placed in the Constitution. See *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 176-177 (1803). Petitioners in this case are not holders of the "privilege of the writ of habeas corpus," U. S. Const., Art. I, § 9, cl. 2, as that privilege was understood by the people when they ratified that limit on congressional authority. The statute is not unconstitutional as applied to them. Their remedies are the reviews provided in the statutes and the diplomatic efforts of their home countries.

CONCLUSION

The decision of the Court of Appeals for the District of Columbia Circuit should be affirmed.

October, 2007

Respectfully submitted,

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Nos. 06-1195, 06-1196

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

KHALED A.F. AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF FEDERAL COURTS AND INTERNATIONAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS (GENEVA ENFORCEABILITY)

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae respectfully submit this brief to address the question whether the treaty rights Petitioners assert are enforceable in the courts of the United States. *Amici* are law professors with expertise in the federal courts and international law. They file this brief to provide the Court with an historical overview of the enforceability of treaty-based rights in U.S. courts, and a more in-depth argument concerning the applicability *vel non* of section 5 of the Military Commissions Act of 2006.[2]

SUMMARY OF ARGUMENT

One of the central questions raised by these petitions is the extent to which Petitioners may use the writ of habeas corpus to enforce their rights under the 1949 Geneva Conventions.[3] Throughout the Republic's history, the writ of habeas corpus has been available for treaty-based claims

[1] The parties' letters of consent to the filing of this brief *amici curiae* have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of the Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amici* or their counsel, has made a monetary contribution for preparing or submitting this brief. This brief was prepared with the *pro bono* assistance of Alan Tauber, Esq., a Ph.D. candidate at the University of South Carolina.

[2] For a full list of *amici*, see the Appendix to this brief.

[3] Throughout this brief, *amici* use the term "Geneva Conventions" as shorthand for the four international humanitarian treaties signed at Geneva on August 12, 1949, the third of which relates to prisoners of war, and the fourth of which relates to the protection of civilian persons during wartime. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 5(b), 120 Stat. 2600, 2632 (defining and citing the four conventions).

such as those invoked by Petitioners. This is so even if, as Respondents maintain, the Geneva Conventions are "non-self-executing." This Court has sanctioned the use of habeas corpus to enforce rights conferred by a treaty that did not itself provide a cause of action. *See, e.g.*, *Chew Heong* v. *United States*, 112 U.S. 536 (1884). Moreover, as this Court recognized in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion), and *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006), the Geneva Conventions are an integral part of the laws of war and are therefore indispensable in considering whether the government has the authority to detain Petitioners.

Although *Hamdi* and *Hamdan* support the enforceability of the Geneva Conventions in these cases, both decisions predate section 5 of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, which provides:

> No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

Id. § 5(a), 120 Stat. at 2631. Thus, these cases raise the additional question whether Petitioners may enforce their rights under the Geneva Conventions notwithstanding section 5 of the MCA.[4]

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[4] *Amici* assume, for the sake of argument, that section 7 of the MCA does not divest the courts of jurisdiction over these cases, or that it is unconstitutional to the extent that it does.

Section 5 does not apply to these cases. As a general matter, section 5 does not provide for its applicability to pending cases. Congress's silence is particularly telling, especially since Congress included effective date language in sections 6 and 7 of the MCA. Thus, the "negative inference" principle identified in *Lindh* v. *Murphy*, 521 U.S. 320 (1997), and relied upon in *Hamdan*, counsels against reading section 5 so as to apply here. Indeed, *Hamdan* based its holding that section 1005(e)(1) of the Detainee Treatment Act of 2005 ("DTA") did not apply to cases pending on the date of the DTA's enactment on this precise distinction. Relying on "ordinary principles of statutory construction," *Hamdan* concluded that the inclusion of specific language to apply sections 1005(e)(2) and (e)(3) to pending cases compelled the conclusion that section 1005(e)(1), for which there was no similar language, did not apply. The same is true here. Such a reading of section 5 of the MCA is bolstered by the constitutional avoidance canon, given the grave constitutional questions that would arise from applying section 5 to pending cases.

Even if section 5 generally applies to pending cases, there remains the specific question of whether Petitioners are invoking the Geneva Conventions "as a source of rights" within the meaning of section 5. Although Petitioners are invoking the Geneva Conventions in support of their claims, they are not relying upon the Geneva Conventions "as a source of rights," as that phrase is used in the MCA. To the contrary, the central relevance of the Geneva Conventions is as part of the laws of war, pursuant to which Respondents claim the authority to detain Petitioners. Thus, the relevance of the Geneva Conventions is not solely to provide *Petitioners* a "source of rights," but is instead as an integral part of the legal

authority – the "source of rights" – Respondents rely upon to detain Petitioners.

Finally, if section 5 applies to these cases, it is unconstitutional. First, assuming that the Suspension Clause, U.S. CONST. art. I, § 9, cl. 2, protects the Guantánamo detainees, there is no question that the Clause embraces the central claims of Petitioners in these cases – namely, that their detention is in violation of treaty. Nor is there any doubt that the remedy provided by the DTA and MCA for Petitioners' treaty-based claims does not constitute an adequate, effective substitute for habeas. *See Swain* v. *Pressley*, 430 U.S. 372 (1977). Instead, because the Suspension Clause, at the absolute minimum, protects the writ of habeas corpus as it existed in 1789, preclusion of judicial consideration of a treaty-based claim of unlawful detention is inconsistent with the Clause, and is therefore unconstitutional.

Even if section 5 does not violate the Suspension Clause, it violates the separation of powers by requiring the courts to decide these cases "in a manner repugnant to the text, structure, and traditions of Article III." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995). Specifically, the provision violates the separation-of-powers rule articulated in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), by leaving applicable substantive law intact while still commanding the courts not to consider certain legal claims. Congress has the authority to alter the applicable substantive law and to have that change apply to pending cases. *Klein* precludes Congress, however, from rendering otherwise applicable substantive law unenforceable in a defined subset of cases. Thus, if applied to these cases, section 5 would be unconstitutional.

ARGUMENT

I. As *Hamdan* Recognized, the Geneva Conventions Can Be Enforced by the Guantánamo Detainees

a. Habeas Corpus Has Historically Been Available to Individuals Detained in Violation of Treaty-Based Rights

Since their inception, the federal courts have had the power to entertain treaty-based habeas petitions. As a statutory matter, such authority was codified by Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, 385. The modern version of the Act provides that the writ of habeas corpus shall extend, *inter alia*, to petitioners alleging that they are "in custody in violation of the Constitution or laws *or treaties* of the United States." 28 U.S.C. § 2241(c) (emphasis added); *see, e.g.*, *Wildenhus's Case*, 120 U.S. 1 (1887). *See generally Felker* v. *Turpin*, 518 U.S. 651, 659-60 (1996) (summarizing the evolution of the federal habeas statute).

Well before the 1867 Act, however, both the federal and state[5] courts routinely exercised jurisdiction over treaty-based wrongful detention claims. *See, e.g.*, *United States* v. *Laverty*, 26 F. Cas. 875 (D. La. 1812) (No. 15,569a) (granting relief to detained enemy aliens on the

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[5] Prior to *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), and *Ableman* v. *Booth*, 62 U.S. (21 How.) 506 (1859), it was well established that state courts could entertain federal habeas petitions, and that the Supreme Court could review such decisions via writs of error. *See, e.g.*, ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 18 & 159 n.21 (2001); *see also* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 126-35 (1980) (arguing that the Suspension Clause was originally designed to protect against congressional interference with federal habeas petitions in *state* court).

basis of provisions in the Louisiana Purchase Treaty). Indeed, section 14 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, provided

> That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment.

Id. § 14, 1 Stat. at 82. Section 14 thereby conferred jurisdiction on the federal courts to inquire into the cause of confinement of federal prisoners raising *any* claim "agreeable to the principles and usages of law." Given the sweeping range of non-criminal detention claims that were cognizable at common law,[6] section 14 necessarily conferred upon the federal courts the power to hear treaty-based habeas claims by federal prisoners.[7] Thus, even before the 1867 Habeas Corpus Act, it was generally accepted that treaties could form the basis for habeas relief to the same extent as statutes and the federal Constitution.

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[6] *See generally* Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2522-23 & nn.103-04 (1998) (surveying the scope of the common-law writ at the time of the Founding).

[7] The significance of the 1867 Act, then, was to extend the availability of treaty-based habeas claims (as well as constitutional and statutory claims) to individuals in state custody.

The availability of habeas for treaty-based claims is entirely consistent with – and indeed compelled by – the Constitution's Supremacy Clause, which places treaties alongside statutes and the Constitution as "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2; *see, e.g.*, *Maiorano* v. *Balt. & Ohio R.R. Co.*, 213 U.S. 268, 272-73 (1909); *Owings* v. *Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348 (1809) (statement of Marshall, C.J.).

It is undisputed that the principal historical office of the writ of habeas corpus has been as a bulwark against *all* unlawful executive detention. *See, e.g.*, *Smith* v. *Bennett*, 365 U.S. 708, 712-13 (1961) ("Over the centuries it has been the common law world's 'freedom writ' by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free."). The conclusion that habeas extends as fully to treaty-based claims as it does to claims based upon the Constitution and federal statutes is beyond question.

It is true that various lower courts have concluded – often summarily – that habeas is not available to enforce rights conferred by "non-self-executing" treaties. *See, e.g.*, *Bannerman* v. *Snyder*, 325 F.3d 722 (6th Cir. 2003); *Wesson* v. *U.S. Penitentiary*, 305 F.3d 343 (5th Cir. 2002); *Hain* v. *Gibson*, 287 F.3d 1224 (10th Cir. 2002); *Garza* v. *Lappin*, 253 F.3d 918 (7th Cir. 2001). Even assuming that the Geneva Conventions are "non-self-executing,"[8] it is well

[8] *Amici* do not concede this point, and there is good reason to conclude that the Conventions – or at least their relevant provisions – *are* self-executing. *See* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions*, 90 CORNELL L. REV. 97, 123-29 (2004) (suggesting that the relevant provisions of the Geneva Conventions *are*

(Continued on following page)

established that habeas has historically been available to enforce rights under treaties that do not themselves create private rights of action. *See, e.g.*, *Chew Heong* v. *United States*, 112 U.S. 536 (1884) (granting habeas relief to a Chinese laborer based on an 1880 treaty between the United States and China where the treaty did not create a private right of action); *see also* David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in* Hamdan *and* Sanchez-Llamas, 45 COLUM. J. TRANSNAT'L L. 20, 98-99 (2006) (discussing *Chew Heong*). *See generally Ogbudimkpa* v. *Ashcroft*, 342 F.3d 207, 217-20 & n.22 (3d Cir. 2003) (discussing the availability of habeas corpus to enforce rights conferred by non-self-executing treaties in light of implementing legislation).

Further, the weight of this Court's precedents suggests that claims by petitioners in habeas cases can be analogized to claims by defendants in other civil – and even criminal – lawsuits. *See, e.g.*, *United States* v. *Rauscher*, 119 U.S. 407 (1886). In those contexts, treaties that do not create a private right of action have nevertheless been available as a substantive defense. *See, e.g.*, *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961); *Cook* v. *United States*, 288 U.S. 102 (1933); *Patsone* v. *Pennsylvania*, 232 U.S. 138 (1914); *Carneal* v. *Banks*, 23 U.S. (10 Wheat.) 181 (1825); *Orr* v. *Hodgson*, 17 U.S. (4 Wheat.) 453 (1819); *Moodie* v. *The Ship Phoebe Anne*, 3 U.S. (3 Dall.) 319 (1796); *see also* Amicus Brief of Law Professors Louis Henkin et al. at 9-13, *Hamdan*, 126 S. Ct. 2749 (No. 05-184) (discussing the significance of these cases). *See*

"self-executing" in the sense that they are the "Law of the Land" pursuant to the Supremacy Clause).

generally Sloss, *supra*, at 51-91 (exhaustively tracing the history of cases in which the Supreme Court considered the enforceability of treaties).

Thus, unless a non-self-executing treaty is not a "treaty" for purposes of 28 U.S.C. § 2241(c) and the Supremacy Clause – a proposition without any support in the case law – habeas otherwise remains available as a remedy to detainees alleging violations of their treaty-based rights.[9]

b. Even If the Geneva Conventions Are Non-Self-Executing, Congress Has, as *Hamdan* Concluded, Implemented the Obligations Relevant to Petitioners' Claims

This Court recognized in *Hamdan* that Congress has implemented the United States' obligations under the Geneva Conventions here relevant. *See Hamdan*, 126 S. Ct. at 2794 ("[R]egardless of the nature of the rights conferred on Hamdan, they are, as the Government does not dispute, part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted." (citations omitted)). Although the MCA purports to preclude the private judicial enforceability of the Geneva Conventions, *see, e.g.*, MCA § 5, 120 Stat. at 2631, various other provisions of the MCA reinforce this Court's conclusion in *Hamdan* that the

[9] Of course, as with constitutional and statutory rights, the availability of the writ to vindicate treaty-based rights can be made subject to generalized procedural limitations. *See, e.g.*, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (holding that state procedural default rules applied to preclude habeas claims brought under the Vienna Convention on Consular Relations).

Geneva Conventions are – and remain – an integral and inseparable component of the "laws of war."

In evaluating the United States' implementation of the Geneva Conventions, it cannot be overemphasized that Respondents have steadfastly maintained that it is the laws of war from which the government has derived its authority to conduct military commissions (as in *Hamdan*) and to detain "enemy combatants" without trial (as in the instant cases). Because the crux of Respondents' argument is that the detention of Petitioners is recognized and justified by the laws of war, such an argument necessarily presupposes that the Authorization for the Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), incorporates that same body of law. As Justice O'Connor summarized in *Hamdi*,

> Because the [AUMF] authorizes the use of military force in acts of war by the United States, the [government's] argument goes, it is reasonably clear that the military and its Commander in Chief are authorized to deal with enemy belligerents according to the treaties and customs known collectively as the laws of war. Accordingly, the United States may detain captured enemies, and *Ex parte Quirin* may perhaps be claimed for the proposition that the American citizenship of such a captive does not as such limit the Government's power to deal with him under the usages of war. Thus, the Government here repeatedly argues that Hamdi's detention amounts to nothing more than customary detention of a captive taken on the field of battle: if the usages of war are fairly authorized by the [AUMF], Hamdi's detention is authorized for purposes of [18 U.S.C.] § 4001(a).

542 U.S. at 548-49 (plurality opinion) (citations omitted); *see also id.* at 520 (incorporating principles of the laws of war into an analysis of the government's authority to detain "enemy combatants" until the cessation of hostilities).[10] The only question, then, is whether the MCA subsequently rejected the implementation of the laws of war enmeshed within the AUMF and recognized first in *Hamdi* and later in *Hamdan*.

The answer is "no." As this Court has emphasized, "[t]here is . . . a firm and obviously sound canon of construction against finding an implicit repeal of a treaty in ambiguous congressional action." *See Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). Nothing in the MCA explicitly repeals the Geneva Conventions. More than that, though, the statute dispels the notion that Congress even implicitly sought to override the Geneva Conventions.

For example, section 6, titled "Implementation of Treaty Obligations," sets out in painstaking detail the extent to which violations of the Geneva Conventions remain actionable pursuant to the War Crimes Act, 28 U.S.C. § 2441. Moreover, the version of section 5 – the provision purporting to restrict the enforceability of the Geneva Conventions – enacted by Congress was substantially narrower than that proposed by the Administration.

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[10] Although the MCA provides separate authorization for trials by military commission, *see* MCA §§ 2-3, 120 Stat. at 2600-02, it pointedly does not provide separate authorization for the detention of "enemy combatants" without trial. Such authorization, if it exists, must come from the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), which necessarily incorporates the laws of war. *See, e.g.*, *Hamdi*, 542 U.S. at 548-49.

See, e.g., Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73, 74 & nn.9-10, 93 & n.123 (2007). As Professor Vázquez explains,

> the provisions ultimately enacted do not purport to prohibit the "indirect" invocation of the Geneva Conventions and Protocols, and they do not purport to bar the invocation of these instruments in criminal prosecutions against citizens and lawful enemy combatants or in civil actions against private or foreign defendants. [The Administration proposal] would apparently have barred the invocation of the Conventions in all those circumstances.

Id. at 74 n.10.

In addition, new 10 U.S.C. § 948b(f) provides that "[a] military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions." MCA § 3(a), 120 Stat. at 2602. Had Congress intended in the MCA to "un-implement" or otherwise repudiate the United States' treaty obligations under the Geneva Conventions, it would not have included so many measures attempting to conform U.S. law to the myriad obligations imposed by the Geneva Conventions.

Instead, these provisions in the Act, taken together, make clear that Congress's intent was *not* to "un-execute" the Geneva Conventions, or to "un-implement" the treaty obligations that this Court identified in *Hamdan*. *See generally* Vázquez, *supra*, at 76-92. To the contrary, Congress's clear decision not to override the Geneva Conventions *en toto* suggests that the United States' treaty

obligations remain in force, subject to whatever permissible limits the MCA imposes on their enforceability.

II. Section 5 of the Military Commissions Act Does Not Apply to These Cases

a. Section 5 Does Not Apply to Pending Cases

As quoted above, the relevant portion of section 5 of the MCA purports to preclude any litigant from "invok[ing] the Geneva Conventions . . . in any habeas corpus or other civil action or proceeding . . . as a source of rights in any court of the United States or its territories." MCA § 5(a), 120 Stat. at 2631.[11] The first question the Court must decide is whether section 5's prohibition even applies to cases, such as these, pending on the date of enactment of the MCA.

i. Section 5 Is Ambiguous as to Whether It Applies to Pending Cases

Section 5 is silent as to whether it applies to pending cases.[12] This silence becomes all the more significant when

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[11] A second provision of the MCA, new 10 U.S.C. § 948b(g), also purports to preclude the judicial enforceability of the Geneva Conventions. *See* MCA § 3(a), 120 Stat. at 2602 ("No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."). Although the provision applies on its face to any "alien unlawful enemy combatant *subject* to trial by military commission," it should be read as only limiting the use of the Geneva Conventions *in* military commission proceedings themselves. *See, e.g.*, Vázquez, *supra*, at 82-92 (making this argument).

[12] This Court has long recognized a presumption against the retroactive application of a statute, absent a clear statement of intent

(Continued on following page)

contrasted with the language of its immediate successor provisions, sections 6 and 7 of the MCA. Section 6(b), which amends the War Crimes Act, 28 U.S.C. § 2441, specifies that:

> The amendments made by this subsection, except as specified in subsection (d)(2)(E) of section 2441 of title 18, United States Code, shall take effect as of November 26, 1997, as if enacted immediately after the amendments made by section 583 of Public Law 105-118 (as amended by section 4002(e)(7) of Public Law 107-273).

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by Congress to give a statute such effect. *See Republic of Austria* v. *Altman*, 541 U.S. 677, 718 (2004) (Kennedy, J., dissenting) ("The single acknowledged exception to the rule against retroactivity is when the statute itself, by a clear statement, requires it."); *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994) ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent."). Thus, statutes are presumed to apply prospectively absent some affirmative indication of congressional intent to the contrary.

Nor is it of any moment that the MCA imposes a new jurisdictional – as opposed to substantive – rule. As this Court has observed in an analogous context:

> Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all. The 1986 amendment, however, does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

Hughes Aircraft Co. v. *United States ex rel. Schumer*, 520 U.S. 939, 951 (1997) (citations omitted).

MCA § 6(b)(2), 120 Stat. at 2635. Section 7 similarly includes an express provision regarding its effective date:

> The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, *without exception*, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

Id. § 7(b), 120 Stat. at 2636 (emphasis added). Section 7 manifests Congress's intent that at least some[13] pending cases also fall within the scope of the otherwise prospective jurisdictional preclusion.

Given Congress's unequivocal intent to apply the amendments to the War Crimes Act in section 6(b) retroactively and to apply the jurisdiction-stripping provision in section 7(a) to certain pending cases, the absence of similar language in section 5 is striking, and compels the conclusion that section 5 is at best ambiguous concerning its applicability to pending cases.

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[13] *Amici* take no position as to whether section 7 applies to the instant cases. Whether or not it does, the salient point is that section 7 manifests Congress's intent to apply section 7(a) to at least *some* pending cases, intent that is nowhere evident with respect to section 5.

ii. As in *Hamdan*, "Ordinary Principles of Statutory Construction" Compel the Conclusion that Section 5 Does Not Apply to Pending Cases

The absence of an unambiguous effective date provision in section 5 is particularly telling given the extent to which that precise defect was the dispositive factor in *Hamdan*'s analysis of the Detainee Treatment Act ("DTA"), Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739-44 (2005). There, the jurisdictional issue involved section 1005(e)(1) of the DTA, which provided that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." *Id.*, 119 Stat. at 2741-42. The question in *Hamdan* was whether the DTA applied to suits (such as *Hamdan* and the instant cases) pending at the time of its enactment.

The majority's analysis focused first on language in the DTA that made sections 1005(e)(2) and (e)(3) applicable to pending cases. *See id.* § 1005(h)(2), 119 Stat. at 2743-44 ("Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act."). The Court then invoked the "familiar principle of statutory construction . . . that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." 126 S. Ct. at 2765 (citing *Lindh* v. *Murphy*, 521 U.S. 320, 330 (1997)); *see also Field* v. *Mans*, 516 U.S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory

sections originally enacted simultaneously in relevant respects."). Thus, because sections 1005(e)(2) and (e)(3) were both made expressly applicable to pending cases, the absence of similar language with respect to section 1005(e)(1) compelled the conclusion that it only applied prospectively. *See Hamdan*, 126 S. Ct. at 2766-69.[14]

The virtually identical situation is presented here. Of the three MCA provisions that could conceivably affect pending cases, two – sections 6 and 7 – include language expressing Congress's unequivocal intent to have the statute apply retroactively; the third – section 5 – does not. Critically, the MCA was enacted for the express purpose of providing the statutory authority that this Court had found lacking in *Hamdan*. *See, e.g.*, *Boumediene* v. *Bush*, 476 F.3d 981, 986 (D.C. Cir.) ("[O]ne of the primary purposes of the MCA was to overrule *Hamdan*."), *cert. granted*, 127 S. Ct. 3078 (2007) (No. 06-1195). Given that this very defect was central to *Hamdan*'s analysis of the jurisdiction-stripping provision of the DTA, the "negative inference" principle identified in *Lindh* and applied in *Hamdan* has even greater force here. Indeed, it is hard to conceive of a situation in which Congress was legislating more clearly against the backdrop of this Court's precedent.

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[14] Although section 1005(h)(1) of the DTA provided that "[t]his section shall take effect on the date of the enactment of this Act," DTA § 1005(h)(1), 119 Stat. at 2743, the Court in *Hamdan* concluded that such language was not conclusive of its applicability to *pending* cases, since "Congress deemed that provision insufficient, standing alone, to render subsections (e)(2) and (e)(3) applicable to pending cases; hence its adoption of subsection (h)(2)." *Hamdan*, 126 S. Ct. at 2766 n.9. Given that the MCA contains *no* general effective date provision, such an argument is even more persuasive in these cases.

iii. Fundamental Principles of Constitutional Avoidance Compel Interpreting Section 5 So As Not To Apply to Pending Cases

Finally, interpreting section 5 not to apply to pending cases is compelled by the constitutional avoidance canon. Cases invoking the canon make clear that this Court has consistently "avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander* v. *TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); *see also Elk Grove Unified Sch. Dist. No. 1* v. *Newdow*, 542 U.S. 1, 11 (2004). Thus, whenever this Court has been confronted with a statute subject to two plausible interpretations, one of which would raise a constitutional question and one of which would not, it has unhesitatingly adopted the latter reading. *See, e.g.*, *Hooper* v. *California*, 155 U.S. 648, 657 (1895); *Mossman* v. *Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800); *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) (Marshall, C.J.).

On top of the generalized principles of constitutional avoidance articulated by Justice Brandeis in *Ashwander*, this Court has long recognized an even stronger version of the canon in cases implicating the substantive availability of habeas corpus, given what Justice Breyer has described as the "terribly difficult and important constitutional question" of Congress's authority over the courts' habeas jurisdiction. *See* Transcript of Oral Argument at 49, *Hamdan*, 126 S. Ct. 2749, *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf.

Thus, in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court interpreted statutory provisions purporting to eliminate the availability of habeas corpus in certain immigration cases not to preclude review, not because

such provisions would be unconstitutional if so applied, but because they might be. *See id.* at 301 n.13 ("The fact that this Court would be required to *answer* the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely." (emphasis added)). *See generally Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1869). Because the potential preclusion of the enforceability of the Geneva Conventions via habeas raises similarly serious and grave questions under both the Suspension Clause specifically and the separation of powers more generally, *see* Part III, *infra*, section 5 should be construed so as not to raise the constitutional question – and as not applying to pending cases.

b. Section 5 Does Not Apply Insofar as Petitioners Are Not Invoking the Geneva Conventions as a Source of Rights

Finally, even if section 5 applies as a general matter to pending cases, the text of section 5 makes clear that the MCA does not preclude judicial application of the Geneva Conventions in all contexts. *See* Part I.b, *supra*. It merely precludes judicial application of the Geneva Conventions in situations where a "person" invokes the treaties "as a source of rights." There are certain respects in which the Petitioners are invoking the Geneva Conventions in support of their claims, but are not invoking the Geneva Conventions "as a source of rights," as that phrase is used in the MCA.

To clarify this point, it is essential to review the nature of the claims advanced by Respondents in these cases. Respondents claim that there are three sources of

legal authority that authorize Petitioners' detention: the laws of war, the AUMF, and the President's constitutional authority as Commander in Chief, *see* U.S. CONST. art. II, § 2, cl. 1. *See generally Hamdi*, 542 U.S. at 548-49 (plurality opinion). Yet, each of those sources of authority relies, to a large degree, on the laws of war.

First, in evaluating the Respondents' claim that the laws of war authorize Petitioners' detention, the Court cannot disregard the Geneva Conventions because, as recognized in both *Hamdi* and *Hamdan*, the Conventions are an integral part of the laws of war. *See, e.g.*, *Hamdan*, 126 S. Ct. at 2794. Indeed, nothing in the MCA precludes this Court from consulting the Geneva Conventions as a source of legal authority in the context of evaluating the *government's* assertion that the laws of war authorize detention of Petitioners. In this context, Petitioners are not invoking the Geneva Conventions "as a source of rights." Rather, Respondents are invoking the laws of war as a source of legal authority that allegedly authorizes the continued detention of Petitioners, and Petitioners are merely pointing out that the Court cannot evaluate such a claim without consulting the Geneva Conventions.

Second, the MCA does not preclude this Court from consulting the Geneva Conventions in evaluating the government's claim that the AUMF authorizes the continued detention of petitioners. It is a traditional canon of statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). This Court has invoked the so-called *Charming Betsy* canon not only to avoid conflicts with customary international law, but also to avoid conflicts with international agreements. *See,*

e.g., *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982). Of course, the *Charming Betsy* canon is not a constitutionally mandated rule of statutory construction. Even so, absent the MCA, this Court would presumably consider, in the context of evaluating the merits of the government's AUMF argument, whether the government's interpretation of the AUMF is consistent with the United States' international legal obligations, including its obligations under the Geneva Conventions. *See, e.g.*, *Hamdi*, 542 U.S. at 520 (looking to the laws of war in interpreting the AUMF). By stipulating in the MCA only that that "no person may invoke the Geneva Conventions . . . as a source of rights," it is clear that Congress did not intend to preclude this Court from consulting the Geneva Conventions in evaluating whether the government's proposed interpretation of the AUMF is consistent with the United States' international legal obligations.

Third, the MCA does not preclude this Court from consulting the Geneva Conventions in evaluating the government's claim that the Commander-in-Chief Clause authorizes continued detention of petitioners. There is substantial authority for the proposition that, on its own, the Commander-in-Chief Clause empowers the President to do no more than exercise the belligerent rights of the United States under the laws of war. *See, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 668-71 (1863) (holding that while the President "has no power to initiate or declare a war either against a foreign nation or a domestic State," President Lincoln "had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion"). In other words, absent legislation, which could in theory authorize the President to act in contravention of the laws of war, the President has no inherent authority as Commander

in Chief to violate the laws of war. *See, e.g.*, Jinks & Sloss, *supra*, at 176-79 (elaborating upon this point). Therefore, in evaluating the government's claim that the Commander-in-Chief Clause authorizes detention of petitioners, it is incumbent upon this Court to determine whether the laws of war – including the Geneva Conventions – authorize detention of the Petitioners.

Finally, this Court should consult the Geneva Conventions in evaluating the merits of the government's claim that the Commander-in-Chief Clause authorizes continued detention of petitioners. After all, the Commander-in-Chief Clause must be construed in harmony with the President's constitutional duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. The President's duty under the Take Care Clause includes a duty to act in conformity with U.S. treaty obligations, including U.S. obligations under the Geneva Conventions. *See* Jinks & Sloss, *supra*, at 154-64 (demonstrating that the President's duty under the Take Care Clause includes a duty to take care that treaties are faithfully executed). To fulfill its responsibilities within our system of checks and balances, this Court should ensure that the President exercises his authority as Commander in Chief in a manner that is consistent with his duty to take care that laws and treaties, including the Geneva Conventions, are faithfully executed. By precluding individuals from invoking the Geneva Conventions as a source of rights, the MCA does not preclude this Court from consulting the Geneva Conventions to ensure that the President is complying with his duty to execute U.S. treaty obligations.

III. To the Extent that Section 5 Applies to These Cases and Precludes Consideration of Petitioners' Treaty-Based Claims, It Is Unconstitutional

As this Court has repeatedly emphasized, "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed," *Cook*, 288 U.S. at 120, and "[l]egislative silence is not sufficient to abrogate a treaty," *Trans World Airlines*, 466 U.S. at 252. The MCA is not silent, however; it appears plainly to contemplate the continued force of the Geneva Conventions as U.S. law. *See* Part I.b, *supra*. Consequently, the Geneva Conventions remain treaties of the United States for purposes of the Supremacy Clause of Article VI and 28 U.S.C. § 2241(c). Section 5 of the Military Commissions Act therefore does not effect a change of the underlying substantive law, but only purports to limit its enforceability.

a. "At the Absolute Minimum," the Suspension Clause Protects Treaty-Based Habeas Claims by Federal Prisoners

Assuming, as Petitioners argue, that the D.C. Circuit's conclusion that the Suspension Clause does not "apply" to the Guantánamo detainees was erroneous, the central question becomes what, exactly, the Suspension Clause protects. This Court has traditionally sidestepped questions as to the substantive scope of the Suspension Clause. *See, e.g.*, *St. Cyr*, 533 U.S. at 301 n.13. The Court has made clear, however, that "regardless of whether the protection of the Suspension Clause encompasses all cases covered by the 1867 [Habeas Corpus Act] extending the protection of the writ to state prisoners, or by subsequent

legal developments, at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *Id.* at 300-01 (quoting *Felker*, 518 U.S. at 663-64 (citations omitted)).

"At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301. And as Chief Justice Burger wrote for himself, Justice Blackmun, and Justice Rehnquist in *Swain* v. *Pressley*, 430 U.S. 372 (1977), "at common law, the writ was available (1) to compel adherence to prescribed procedures in advance of trial; (2) *to inquire into the cause of commitment not pursuant to judicial process*; and (3) to inquire whether a committing court had proper jurisdiction." *Id.* at 385 (Burger, C.J., concurring in part and concurring in the judgment) (emphasis added); *see also Brown* v. *Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in the result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."). Thus, in protecting the writ, at bottom, "as it existed in 1789," the Suspension Clause encompasses claims by federal prisoners that their detention without judicial process is in violation of a treaty.

b. Precluding Judicial Consideration of Claims that Individuals Are Detained in Violation of a Treaty Violates the Suspension Clause

That the Suspension Clause encompasses claims by federal prisoners that their detention without judicial process is in violation of a treaty is only one question. The question remains whether section 5, in purporting to

preclude the invocation of the Geneva Conventions as "a source" for the claim of unlawful detention, violates the Suspension Clause.[15]

To ask the question is to answer it. As *Swain* suggests, the Suspension Clause compels the existence of *some* remedy for claims encompassed by the Clause, *see* 430 U.S. at 381-82, and that remedy will only satisfy the Suspension Clause if it is not "inadequate" or "ineffective," *see id.* The DTA provides a substitute remedy for Petitioners' statutory and constitutional claims, but the adequacy and effectiveness of that remedy is still very much at issue. *See, e.g.*, *Bismullah* v. *Gates*, No. 06-1197, 2007 WL 2067938 (D.C. Cir. July 20, 2007)). In any event, the DTA does not appear affirmatively to create a substitute remedy for Petitioners' treaty-based claims,[16] and section 5 of the MCA purports to preclude such a remedy altogether.[17]

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[15] Petitioners, particularly in *Al Odah*, assert a host of claims under the Geneva Conventions. *See* Brief of International Humanitarian Law Experts as *Amici Curiae* in Support of Petitioners. Some of the claims are more analogous to challenges to the conditions of the Petitioners' confinement, and not to the confinement itself. *Amici* recognize that there is an open question whether such claims, to the extent they fall outside the "core" of habeas corpus, are protected by the Suspension Clause. *Cf. Nelson* v. *Campbell*, 541 U.S. 637, 643-44 (2004) (citing *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973)). The difficulties inherent in resolving this question further bolster the argument that section 5 should be interpreted so as not to apply to these cases. *See* Part II, *supra*.

Even assuming, for the sake of argument, that the Suspension Clause protects only the Petitioners' challenge to the lawfulness of their detention, section 5's preclusion of Petitioners' challenge to the conditions of their confinement would still violate the separation of powers, as discussed below. *See* Part III.c, *infra*.

[16] Section 1005(e)(2)(C)(2) of the DTA, for example, authorizes challenges to Combatant Status Review Tribunals based upon the

(Continued on following page)

Unless section 5 is read so as not to apply to Petitioners' cases, *see* Part II, *supra*, its plain language mandates that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action . . . as a source of rights in any court of the United States or its States or territories." MCA § 5(a), 120 Stat. at 2631. This, Congress cannot do. If the Suspension Clause protects the Guantánamo detainees, and if section 5 of the MCA applies to pending cases and precludes judicial consideration of Petitioners' treaty-based unlawful detention claims, then section 5 violates the Suspension Clause.[18]

Constitution and "laws" of the United States, but *not* treaties. *See* DTA § 1005(e)(2)(C)(2), 119 Stat. at 2742.

[17] This point bears further elaboration: If the Suspension Clause *does* apply to the Guantánamo detainees, but the remedy provided by the DTA and MCA for Petitioners' statutory and constitutional claims *is* "adequate" and "effective" per *Swain*, that still leaves the question whether the MCA's preclusion of the Petitioners' treaty-based claims violates the Suspension Clause. That is to say, even if section 7 is compatible with the Suspension Clause, it is possible – and, as *amici* argue, likely – that section 5 is not.

[18] Of course, a separate argument could be made that section 5 is a constitutional suspension of habeas corpus. Such an argument, however, is a non-starter. *See, e.g.*, *Hamdan* v. *Rumsfeld*, 464 F. Supp. 2d 9, 16 (D.D.C. 2006) ("Neither rebellion nor invasion was occurring at the time the MCA was enacted. Indeed, Congress itself must not have thought that it was 'suspending' the writ with the enactment of the MCA, since it made no findings of the predicate conditions, as it did when it approved [President] Lincoln's suspension in the Civil War and each of the subsequent suspensions in Mississippi, the Philippines, and Hawaii.").

c. Precluding Judicial Consideration of the Petitioners' Treaty-Based Claims Violates the Separation of Powers

Finally, and separate from its incompatibility with the Suspension Clause, section 5 unconstitutionally infringes upon the separation of powers by requiring the federal courts to exercise their jurisdiction "in a manner repugnant to the text, structure, and traditions of Article III." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995); *cf. Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 546 (2001) (invalidating a restriction on attorney speech because, *inter alia*, the restriction "threatens severe impairment of the judicial function"). Two different types of legislation can offend the separation of powers in this manner. *See Plaut*, 531 U.S. at 546. Whereas the second category identified by Justice Scalia in *Plaut* (legislation vesting review of final Article III judgments in other branches of the federal government) is not at issue here, the first category – the prohibition on Congress's prescription of "rules of decision" first enunciated in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 146 (1872) – is squarely on point.

Justice O'Connor has summarized *Klein* as follows:

> Klein, the executor of the estate of a Confederate sympathizer, sought to recover the value of property seized by the United States during the Civil War, which by statute was recoverable if Klein could demonstrate that the decedent had not given aid or comfort to the rebellion. In *United States* v. *Padelford*, we held that a Presidential pardon satisfied the burden of proving that no such aid or comfort had been given. While Klein's case was pending, Congress enacted a statute providing that a pardon would instead be taken

> as proof that the pardoned individual had in fact aided the enemy, and if the claimant offered proof of a pardon the court must dismiss the case for lack of jurisdiction. We concluded that the statute was unconstitutional because it purported to "prescribe rules of decision to the Judicial Department of the government in cases pending before it."

Miller v. *French*, 530 U.S. 327, 348-49 (2000) (quoting *Klein*, 80 U.S. (13 Wall.) at 146) (other citations omitted)); *see also Loving* v. *Virginia*, 517 U.S. 748, 757 (1996).

In more recent cases, including *Miller*, this Court has clarified that *Klein*'s prohibition on congressional interference with judicial decisionmaking "does not take hold when Congress 'amend[s] applicable law.'" *Plaut*, 514 U.S. at 218 (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)) (emphasis in original). Such a result is fundamentally necessary and unproblematic, since Congress has the unquestioned power to define the substantive scope of sub-constitutional federal law. *Cf. Miller*, 530 U.S. at 343-45 (holding that Congress can change the substantive law underlying injunctions without violating Article III). As such, an Act that overrides or otherwise amends the Geneva Conventions would not violate the *Klein* principle; it would merely alter the substantive law at issue in the instant cases.

But, as discussed in detail above, *see* Part I.b, *supra*, the MCA does *not* "amend applicable law" because it does not override, "un-execute," or "un-implement" the United States' treaty obligations under the Geneva Conventions. Every relevant indication is that the MCA further codifies the United States' treaty obligations, rather than subverting or vitiating them, and that Congress relied upon the

laws of war (in conjunction with the AUMF) as providing underlying substantive authority for the detention of the Petitioners – something the MCA itself does not provide. This kind of bait-and-switch is precisely what *Klein* prohibits: Congress can change the applicable substantive law and have that change apply to pending cases, but Congress cannot leave the relevant substantive law intact and merely render it nugatory in a defined subset of cases. *See* Vázquez, *supra*, at 86 ("Congress may limit the jurisdiction of the courts, but it cannot give them jurisdiction and instruct them to decide the case without regard to applicable federal law.").

Instead, section 5 is the paradigm *Klein* statute, for it tells the courts what they can and cannot do *without* rewriting the underlying substantive law. Whatever lingering confusion remains as to the scope of *Klein*'s prohibition, *see generally* Lawrence G. Sager, Klein's *First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998), such non-substantive congressional interference with judicial decisionmaking must fall squarely within its bounds if it is to mean anything. *See, e.g.*, *Schiavo ex rel. Schindler* v. *Schiavo*, 404 F.3d 1270, 1272-75 (11th Cir. 2005) (Birch, J., specially concurring in the denial of rehearing en banc) (discussing *Klein*).[19] Thus, because section 5 of the MCA leaves the Geneva Conventions substantively intact as U.S. law, its preclusion of judicial review of claims under the Geneva Conventions runs

[19] This conclusion may further buttress the argument, made in far more detail by the Petitioners, that section 7 of the MCA is unconstitutional. For even if the Court of Appeals was correct that the Suspension Clause does not protect the Guantánamo detainees, there are, as *Hamdan* makes clear, no concomitant territorial limitations on the separation of powers.

directly contrary to the fundamental separation-of-powers principle articulated in *Klein*, and is therefore unconstitutional.

CONCLUSION

For the foregoing reasons, the Geneva Conventions are enforceable in the U.S. courts notwithstanding section 5 of the Military Commissions Act, and Petitioners are entitled to habeas relief if their detention is in violation thereof.

Respectfully submitted,

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August 24, 2007

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64 35P (24) (28)

Nos. 06-1195, 06-1196

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., *Petitioners,*
v.
GEORGE W. BUSH, ET AL., *Respondents.*

KHALED A.F. AL ODAH, ET AL., *Petitioners,*
v.
UNITED STATES OF AMERICA, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF *AMICUS CURIAE* OF THE FEDERAL PUBLIC DEFENDER FOR THE SOUTHERN DISTRICT OF FLORIDA IN SUPPORT OF PETITIONERS

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STATEMENT OF AMICUS CURIAE[1]

This case addresses whether Congress' limitation on federal habeas corpus jurisdiction for "enemy combatant" detainees at Guantanamo Bay violates the Suspension Clause of the United States Constitution. The Federal Public Defender for the Southern District of Florida has represented many habeas petitioners by appointment of the federal courts, including two petitioners recently before this Court in *Gonzalez v. Florida*, 545 U.S. 524 (2005), and *Dodd v. United States*, 545 U.S. 523 (2005). *Amicus* has also represented detainees at Guantanamo Bay, one of whom remains detained there.

This brief attempts to supplement with an alternative analytical framework the arguments developed by the parties regarding the scope of the Constitution's protection of the writ.

SUMMARY OF ARGUMENT

The D.C. Circuit resolved whether Section 7(a) of the Military Commissions Act of 2006 violates the Suspension Clause by focusing its analysis exclusively on habeas protections *as of 1789*. In their briefs to this Court,

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been lodged with the Clerk.

Petitioners and other *amici* conclusively demonstrate that the D.C. Circuit misapprehended the pre-1789 caselaw. But the D.C. Circuit erred for a separate reason: its exclusive focus on pre-1789 caselaw was incomplete, because pre-1789 law only encompasses the writ's constitutional protection at its "absolute minimum." The evolving body of habeas principles *after* 1789 further delineates the scope of the writ's constitutional protection, and further confirms that federal habeas jurisdiction over Petitioners' claims is constitutionally protected.

The Suspension Clause does not merely protect the writ "known to the Framers." The Framers must have been aware that the writ had evolved for centuries before, and would not have conceived of a writ frozen at a particular point in time, incapable of evolving to meet new circumstances. Further, by providing for suspension of the writ only in times of extreme crisis, *e.g.*, "Rebellion," or "Invasion," the Suspension Clause plainly implies that the writ must not be suspended in unexceptional times, and must, in fact, function in the creation of the "more perfect Union" contemplated by the Constitution.

Suspension Clause protection extends to the historical core of the writ, as it has evolved since 1789. Because this Court's decision in *Rasul v. Bush* held that habeas jurisdiction extends to persons identically-situated to Petitioners, the Suspension Clause inquiry for the instant case turns on a simple inquiry: does *Rasul* fall within the compass of the writ's evolving historical core? It does.

Rasul expressly grounded its reasoning in the historic core purpose of habeas corpus. The opinion correctly noted that, by challenging Executive detention, the petitioners invoked habeas at its "historical core," in a context where habeas protections were at their "strongest." The detainees, moreover, challenged "military custody"; *Rasul* correctly noted that the habeas remedy has long been invoked to challenge restraints in the context of military affairs. The *Rasul* petitioners were aliens; as *Rasul* noted, the writ has been available to aliens from the early days of the Republic. The *Rasul* petitioners were detained overseas; again, *Rasul* correctly observed that the writ has long reached beyond this Nation's territorial boundaries. Indeed, the claim that the territorial boundaries of the United States might limit the writ's application runs counter to the very purpose of the Suspension Clause, which is to achieve the full realization of the Constitution's guarantees of liberty – a goal that countenances no artificial territorial limits.

Some have argued that the constitutional protections of the writ cannot extend beyond 1789 developments, because no limiting principle would prevent the protections from "ratcheting up" automatically, and without limits, each time Congress amended the writ to apply in new circumstances. But the writ as it was first written by Congress in 1789 was extremely flexible, and susceptible to use in a wide variety of contexts. It is this original writ that is at stake today.

In fact, because the writ's evolution since 1789 has largely resulted not from Congress' amendment of laws,

but from judicial interpretation of the laws to meet new circumstances, the Suspension Clause inquiry turns on whether *a court's* application of the writ in a new context is tethered to the historical core of habeas corpus, and is therefore constitutionally-protected. Courts are accustomed to this type of inquiry, and can discern whether the existence of habeas jurisdiction in new circumstances falls within the compass of the evolution of habeas principles.

ARGUMENT

I. A Complete Suspension Clause Analysis Focuses On More Than "Absolute Minimum" Protections.

This Court has stated:

> [R]egardless of whether the protection of the Suspension Clause encompasses all cases encompassed by the 1867 Amendment extending the protection of the writ to state prisoners, or by subsequent legal developments, *at the absolute minimum*, the Suspension Clause protects the writ 'as it existed in 1789.'

I.N.S. v. St. Cyr, 533 U.S. 289, 300-01 (2001) (emphasis added; citations omitted) (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)). This statement that *pre*-1789 law reflected the *absolute minimum* of Suspension Clause protections suggested that *post*-1789 law delineated protections beyond this bare minimum. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2063 (2007) ("*St. Cyr*'s statement that the Suspension Clause protects 'at the absolute minimum' the scope of habeas corpus in 1789 leaves open the possibility that the clause today guarantees jurisdiction over an expanded set of claims based on expanded understandings of substantive constitutional rights.").

Indeed, in *Felker*, the precedent cited in *St. Cyr*, this Court "assume[d] . . . that the Suspension Clause refers to the writ *as it exists today*, rather than as it existed in 1789." 518 U.S. at 663-64 (emphasis added) (citing *Swain v. Pressley*, 430 U.S. 372, 384 (1977) (Burger, C.J., concurring)).

Despite *St. Cyr* and *Felker*, the D.C. Circuit resolved whether Section 7(a) of the Military Commissions Act of 2006 violates the Suspension Clause by focusing its analysis exclusively on habeas protections *as of 1789*. *Boumediene v. Bush*, 476 F.3d 981, 990-91 (D.C. Cir.) ("We are aware of no case *prior to 1789* going detainees' way, and we are convinced that the writ in 1789 would not have been available to aliens held at an overseas military based leased from a foreign government.") (emphasis added), *cert. granted*, 127 S.Ct. 3078 (2007).

In their briefs to this Court, Petitioners and other *amici* show how the D.C. Circuit misapprehended the pre-1789 habeas corpus caselaw. They demonstrate that the court erred in concluding that this caselaw turned on the status of the petitioner, or on the location of the petitioner within sovereign bounds. Their briefs show that throughout its history, the Great Writ protected against the illegal conduct of any agent acting under the Crown's authority, *wherever the jailer operated, and regardless of the detainee's alienage*, arguments that should suffice to resolve the instant case in Petitioners' favor.

Alternatively, the D.C. Circuit's analysis was flawed for a separate reason: It focused exclusively on pre-1789

law. This left its analysis incomplete, and possibly misleading, because this Court's precedents indicate that pre-1789 law only encompasses the writ's constitutional protection at its "absolute minimum." The evolving body of habeas principles *after* 1789 further delienates the scope of the writ's constitutional protection.

In *Felker*, this Court rejected a Suspension Clause challenge to restrictions on the writ of habeas corpus imposed by the AEDPA of 1996. 518 U.S. 651. This Court explained that the restrictions at issue were consistent with the "evolving body of equitable principles informed and controlled by historical usage, statutory development, and judicial decisions." *Id.* at 664 (quoting *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)). The "evolving body of equitable principles" to which *Felker* referred was habeas practice as it had developed in the United States *after 1789*. *See Felker*, 518 U.S. at 664-65 (noting that AEDPA "codifies" pre-existing holdings of the federal courts); *McCleskey*, 499 U.S. at 479-89 (analyzing 19th and 20th century legal developments). *Felker* held that the AEDPA restrictions were valid because they were "well within the compass of [the post-1789] evolutionary process [of habeas corpus practice]." 518 U.S. at 664. *Felker*'s reasoning implies that, just as the "evolving body of equitable principles [of habeas corpus]" in the United States after 1789 shed light on the restrictions to the writ which did not run afoul of the Suspension Clause, this evolution likewise delineated areas of habeas jurisdiction for which restrictions *would* run afoul of the Suspension Clause.

The same inference is implicit in Justice O'Connor's concurrence in *Demore v. Kim*, in which she concluded that habeas suits brought by aliens temporarily detained pending removal were not protected by the Suspension Clause. 538 U.S. 510, 538-40 (2003) (O'Connor, J., concurring). After canvassing *post*-1789 caselaw, she reasoned: "All in all, it appears that in 1789, *and thereafter until very recently*, the writ was not generally available [to persons in petitioners' circumtances]." *Id.* at 539 (emphasis added). Justice O'Connor's reasoning implies that, had history informed her that in 1789 "and thereafter until very recently," the writ *had* issued to aliens temporarily detained pending removal, this would have led her to a *contrary* holding, namely, that the Suspension Clause's protections extended to the petitioners. *Cf.* Fallon & Meltzer, *Habeas Corpus Jurisdiction*, 120 Harv. L. Rev. at 2039 ("the reach of the constitutional guarantee of habeas jurisdiction may simply be a function of historical practice").

A. The Suspension Clause Protects More than the Writ "Known to the Framers": It Encompasses The Historical Core of the Writ's Evolution Since 1789.

It has been said that "the writ protected by the suspension clause is the writ as *known to the framers*, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did." Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 170 (1970) (emphasis added). But

this view that the Suspension Clause only protects the writ "known to the Framers" is not, on balance, persuasive.

First, the Framers must have been aware that the writ as it stood when they drafted the Constitution had itself been the product of considerable development over time. *See Rasul v. Bush*, 542 U.S. 466, 473 (2004) (habeas corpus is "a writ antecedent to statute . . . throwing its root deep into the genius of our common law") (citation omitted); Muhammad Usman Faridi, *Streamlining Habeas Corpus While Undermining Judicial Review: How 28 U.S.C. § 2254(D)(1) Violates the Constitution*, 19 St. Thomas U. L. Rev. 361, 366-67 (2006) ("By the time habeas corpus appeared in the Suspension Clause, it had already existed as a common law right for four centuries and as a statutory right for 130 years.").

It is therefore unlikely that the Framers conceived of a writ frozen at a precise point in time -- *e.g.*, 1789 -- and incapable of evolving to meet new circumstances. *See* Henry Paul Monaghan, *Doing Originalism*, 104 Colum. L. Rev. 32, 37 (2004) (noting the writ's "organic" history prior to 1789, and concluding: "because the whole history of habeas corpus shows that the courts in England were capable of developing the writ, [the Framers] did not adopt an institution frozen as of [the date of the Constitution]"). Rather, the Framers envisaged a common law writ which would be "moldable to the exigencies of the times." *Commonwealth ex. rel. Stevens v. Myers*, 419 Pa. 1, 18, 213 A.2d 613, 623 (Pa. 1965) (discussing common law habeas in Pennsylvania).

Second, the Suspension Clause is a unique provision of the Constitution in that it steps back, and pictures our Nation not enjoying "life, liberty and the pursuit of happiness," but, instead, in a different season, enduring the bitter scourges of "Rebellion," or "Invasion." U.S. Const. art. I § 9 cl. 2. The Framers, understandably, did not dwell long on these grim scenarios. *See* Bruce Ackerman, *The Emergency Constitution*, 113 Yale L. J. 1029, 1041 (2004) (characterizing the Suspension Clause as "a *rudimentary* emergency provision") (emphasis added); *see also* Youngstown *Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649-650 (1952) ("Aside from suspension of the privilege of the writ of habeas corpus, [the Framers] made no express provision for exercise of extraordinary authority because of a crisis.").

To the limited extent the Framers contemplated a Nation in times of extreme crisis, they viewed the suspension of the writ of habeas corpus as a necessity for such times. *But this recognition of the need for suspension in exceptional times implies the necessity of non-suspension in unexceptional times.* By prohibiting suspension in unexceptional times, the Framers implied that the writ functions in the creation of the "more perfect Union" contemplated by the Constitution – indeed, that it performs an essential purpose. *See, e.g., Daniels v. Allen*, 344 U.S. 443, 448-49 (1953) (Frankfurter, J., concurring) ("It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world."); Fallon & Meltzer, *Habeas Corpus Jurisdiction*, 120 Harv. L. Rev. at 2039 (the "necessary availability of habeas corpus

review" is implicit in the Constitution's "structure," because it requires courts to determine "whether the Constitution and laws create substantive rights to judicial relief from executive detention") (citing Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362. 1372 (1953)); David L. Shapiro, *Habeas Corpus, Suspension and Detention: Another View*, 82 Notre Dame L. R. 59, 64 (2006) (concluding that the Suspension Clause contains an "affirmative guarantee" of habeas, in order to achieve the "full realization" of other constitutional guarantees); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* I.N.S. v. St. Cyr, 33 Colum. Hum. Rts. L. Rev. 555, 591 (2002) ("the Suspension Clause should be construed in the context of the Constitution of which it forms a part, and not solely by reference to the legal system that preceded the Constitution.").

Third, since 1789, this Court has recognized the availability of habeas jurisdiction in circumstances that the 1789 Congress likely could not even have contemplated. For example, in 1789, no American extradition treaties existed. The first such treaty, the Jay Treaty with Great Britain, took force in 1795, lapsed in 1807; the United States negotiated no new extradition treaty until 1842. Michael Abell & Bruno A. Ristau, *International Legal Assistance* 4 (1995).[2] Yet *In re Kaine*, 55 U.S. 103 (1852)

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[2] Extradition treaties were largely a late nineteenth century development. Ann Powers, *Justice Denied? The Adjudication of Extradition Applications*, 37 Tex. Int' L. J. 277, 281 (2002). Congress enacted the first legislation implementing extradition treaties in 1848. *Id.* at 282 n. 27.

inferred from the 1789 Act a jurisdiction to entertain habeas petitions filed by persons detained for extradition. *See Ex Parte Yerger*, 75 U.S. 85, 100 (1868) ("In *Kaine*'s case, all the judges, except one, asserted, directly or indirectly, the jurisdiction of the court to give [habeas] relief"); *see also Collins v. Loisel*, 262 U.S. 426 (1923).

Likewise in immigration cases, this Court has consistently found that alien detainees fall within the compass of habeas jurisdiction. *See, e.g., Ekiu v. United States*, 142 U.S. 651 (1892) (denying writ); *Chin Yow v. United States*, 208 U.S. 8 (1908) (granting writ); *Kwock Jan Fat v. United States*, 253 U.S. 454 (1920) (granting writ). Yet Congress did not pass the first law regulating immigration until 1875, and, consequently, habeas challenges to deportation or exclusion did not begin until the late nineteenth century. *Demore*, 538 U.S. at 538 (O'Connor, J., concurring) ("Because federal immigration laws from 1891 to 1952 made no express provision for judicial review, these challenges took the form of petitions for writs of habeas corpus."). *See* Jonathan L. Hafetz, *Note, The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2509, 2536 (1998) (noting the absence of a direct link between the writ's use at common law prior to 1789 and the contemporary deportation cases). Even so, the existence of habeas jurisdiction in immigration cases is now well-established.

The extension of habeas jurisdiction to extradition and immigration contexts exemplifies the writ's capacity to evolve. The cases involved Executive detention, a context

in which habeas protections are at their strongest. *See Rasul* 542 U.S. at 474. They involved aliens, persons protected by the writ since the early days of the Republic. *Id.* at 481 n. 11. The writ achieved its core historic purpose even as it evolved to meet new circumstances.

If, as some claim, the writ "known to the Framers" marks the outer boundaries of Suspension Clause protection, one would expect courts to have made some reference to this constitutional boundary as they extended the writ to new legal contexts, like extradition, or immigration -- contexts unknown to the Framers. *Cf. National Archives and Records Admin. v. Favish*, 541 U.S. 157, 170 (2004) (noting that a statute's privacy protection "goes beyond the common law and the Constitution") (citations omitted). The absence of any passing reference to the writ "known to the framers" in habeas contexts like extradition, or immigration, involving no direct link to the pre-1789 model, strongly suggests that the writ "known to the Framers" has not marked the outer boundaries of constitutional protection in the past, and should not do so now.

In sum, the writ that the Suspension Clause contemplates is better described as one grounded in the historical, core purpose of habeas corpus, yet "moldable to the exigencies of the times." *Myers*, 419 Pa. at 18, 213 A.2d at 623. This writ operates in tandem with the evolution of the Constitution, and the Nation. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1509-10 (1987) ("The [Suspension] Clause illustrates yet again the interplay of common law and

constitutional protections of liberty. The common law writ would furnish the cause of action that assured judicial review; the Constitution would furnish the test on the legal merits of confinement."); *Heikkila v. Barber*, 345 U.S. 229, 608 (1953) (recognizing habeas' historical function in "the enforcement of due process").

B. Petitioners Invoke Habeas Principles At Their Historical Core, and the Suspension Clause Therefore Protects the Federal Courts' Jurisdiction to Hear Their Claims.

Because the Suspension Clause protects the historical core of habeas principles as they evolve to meet new circumstances, the constitutional inquiry here turns on whether Petitioners' circumstances fall within this evolving history. Parsing habeas precedents to identify a historical core might, in some contexts, present "thorny question[s]." *See Demore*, 538 U.S. at 540 (O'Connor, J., concurring). But in the instant case, this inquiry is greatly simplified, because this Court recently held in *Rasul* that habeas jurisdiction extended to alien detainees at Guantanamo -- that is, to persons identically-situated to Petitioners. 542 U.S. 466. The constitutional inquiry can therefore focus on *Rasul*, and turn on whether its jurisdictional holding falls within the historical core of habeas corpus. It does: *Rasul*'s reasoning is firmly grounded in core habeas corpus principles.

Rasul involved a challenge to Executive detention. As the opinion recognized, this implicated habeas "at its historical core," in a context where the writ's protections

were "strongest." 542 U.S. at 474 ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and *it is in that context that its protections have been strongest.*") (emphasis added) (citing *St. Cyr*, 533 U.S. at 301).

Rasul, moreover, involved the legality of Executive custody in a context in which military affairs were implicated: the government attempted to justify the detention of persons based on their designation by the military as "enemy combatants." *Rasul*, 542 U.S. at 485. *Rasul* relied on well-established precedent in re-affirming that habeas jurisdiction is available to such persons: "Consistent with the historic purpose of the writ, this Court recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as in times of peace." *Rasul*, 542 U.S. at 475-76 (citing *Ex Parte Milligan*, 4 Wall. 2 (1866), *Ex Parte Quirin*, 317 U.S. 1 (1942) and *In re Yamashita*, 327 U.S. 1 (1946)); *id.* at 487 (Kennedy, J., concurring) ("there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention where military affairs are implicated"); *accord Ex Parte Endo*, 323 U.S. 283 (1944) (Japanese internment).

Further, *Rasul* relied on the precedents of this Court that have long recognized that habeas jurisdiction extends to persons "confined overseas." *Rasul*, 542 U.S. at 479 (citing *Burns v. Wilson*, 346 U.S. 137 (1953); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Hirota v. MacArthur*, 338 U.S. 197, 199 (1948) (Douglas, J.,

concurring)). *Rasul* correctly observed that "[n]othing" in "any" of this Court's precedents "categorically excludes aliens detained in military custody outside the United States from [the] privilege." 542 U.S. at 484. *Rasul* therefore remained well within the compass of habeas principles when it held that the writ reaches persons detained at the U.S. Naval Base at Guantanamo Bay.

In addition, as *Rasul* noted, aliens have been eligible for the writ from the "early years of the Republic." 542 U.S. at 481 n. 11 (collecting cases). Hence, *Rasul*'s conclusion that alien petitioners were eligible for the writ was, again, tethered to the writ's core history.

Finally, *Rasul* pointed out that the detainees' custodian was within the jurisdiction of the court. 542 U.S. at 483-84. This well-established jurisdictional prerequisite of habeas law, *see Rumsfeld v. Padilla*, 542 U.S. 426 (2004), was therefore also satisfied.

The *Rasul* dissent did not attach significance to the many ways, noted above, in which the decision was grounded in well-established habeas principles; instead it sought to erect a "presumption against extraterritorial application" of habeas jurisdiction. 542 U.S. at 488-89 (Scalia, J., dissenting). But this approach incorrectly presumed that strict territorial limits confine habeas jurisdiction, when, in fact, the Constitution commands an expansive protection of the writ.

When it adopted the 1789 Judiciary Act, Congress was "[a]cting under the immediate influence of [the Suspension

Clause's] injunction [and] must have felt, with peculiar force, the obligation of providing efficient means by which this great *constitutional* privilege should receive life and activity." *Ex Parte Bollman*, 4 Cranch 75, 95 (1807) (Marshall, C.J.) (emphasis added). The "peculiar force" Congress "felt" would have been a constitutional obligation to create a writ that would be sufficient to achieve the *full* realization of constitutional guarantees, and to sustain the Republic as it developed. *See* Shapiro, *Habeas Corpus, Suspension and Detention*, 82 Notre Dame L. R. at 64; Fallon & Metzler, *Habeas Corpus Jurisdiction*, 120 Harv. L. Rev. at 2038 (the "necessary availability" of habeas corpus review is "implicit in the Constitution's structure").

It was not legislative grace that caused Congress in 1789 to enact a writ that was flexible and susceptible to use in wide variety of future challenges to unlawful executive detention. Congress in 1789 was not free to enact a narrow habeas statute. The "peculiar force" of the Constitution compelled Congress to design – and thereafter, to preserve – a statute that was consistent with the commands and goals of the Constitution. *See Ex Parte Lange*, 85 U.S. 163, 166 (1873) (noting that the Court's own authority to issue a writ arose under the 1789 Act and "under the Constitution of the United States"); *see also Rasul*, 542 U.S. at 485-86 (Kennedy, J., concurring) (observing that the scope of habeas jurisdiction should be measured "against the backdrop of the constitutional *command* of the separation of powers") (emphasis added); James S. Liebman, *Apocalypse Next Time? The Anachronistic Attack on Habeas Corpus/Direct Review*

Parity, 92 Colum. L. Rev. 1997, 2062 (1992) (reviewing 19th century habeas precedents and concluding that the 1789 habeas statute gave federal prisoners "a remedy of habeas corpus review of [a variety of] fundamental (typically constitutional) legal claims").

This would explain why, in 1867, when Congress revised the habeas statute in view of implementing the commands of the Fourteenth Amendment, *see* Brennan, *Federal Habeas Corpus*, 7 Utah L. Rev. at 426, it wrote legislation "of the most comprehensive character [that] brought within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws" – creating jurisdiction that would be "impossible to widen." *Ex Parte McCardle*, 73 U.S. 318, 325-26 (1867).

The *Rasul* dissent was mistaken, therefore, when it sought to erect a presumption against the extraterritorial limitation of habeas jurisdiction. If the Constitution mandates a habeas remedy fully capable of protecting fundamental guarantees of liberty, the territorial reach of habeas jurisdiction should extend as far as necessary around the globe to keep pace with potentially illegal Executive detentions. *Compare United States v. Youssef*, 327 F.3d 56, 111 & n. 45 (2d Cir. 2003) (no cases invalidate a federal prosecution on the ground that it exceeded the Constitution's extra-territorial limits) (citing Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217, 1263 n. 12 (1992)); *id.* at 86 ("[i]f it chooses to do so, [Congress] may legislate with respect to

conduct outside the United States, in excess of the limits posed by international law.") (citation omitted), *with* Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 Geo. L. J. 1497, 1551 (2007) (analyzing recent cases involving assertions of the writ by United States citizens overseas, and concluding that extraterritorial limitations on habeas jurisdiction are increasingly called into doubt, or deemed inapposite). A presumption against extraterritorial application of the writ, moreover, is manifestly ill-suited to the exigencies of a world in the midst of rapid globalization. *Cf.* Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, The New Yorker, Feb. 14, 2005 (chronicling human rights violations committed overseas by the United States government, with the complicity of foreign governments).

C. The "Ratcheting Up" Critique Of Suspension Clause Protection Is Misplaced.

Some object that the Suspension Clause could not possibly expand to encompass post-1789 developments, because this would mean that habeas protection expands each time Congress adopts a new legal context for the writ, thereby creating a limitless constitutional protection, a "one-way ratchet that enshrines in the Constitution every grant of habeas jurisdiction." *St. Cyr*, 533 U.S. 289, 341-42 (Scalia, J. dissenting); *accord Lindh v. Murphy*, 96 F.3d 856, 868 (7th Cir. 1996) ("Any suggestion that the Suspension Clause forbids every contraction of the powers bestowed [by Congress subsequent to 1789) is untenable.

The Suspension Clause is not a ratchet."), *rev'd on other grounds*, 521 U.S. 320 (1997). Tellingly, however, this "ratcheting up" contention is not based on the actual text of the Clause, or on an explanation of the Framers' intent, but is simply a result-oriented critique of a constitutional protection that seems limitless.

The "ratcheting up" critique raises the concern that every Congressional expansion of the writ might be automatically constitutionalized. But this concern largely falls away once one recognizes that the federal writ of habeas corpus was flexible *as it was first written in 1789*, and has not required much in the way of amendment by Congress. In reality, the evolution of habeas law has been more the work of the courts, not of Congress. *See* Friendly, *Is Innocence Irrelevant?*, 38 U. Chi. L. Rev.at 170 (emphasis added) (judicial interpretations of statutes, rather than Congressional amendments of these statutes, "more pertinently" explain the writ's expansion). Indeed, the habeas remedy was so broadly written into the first United States Code that, if anything, it has required more judicial containment than expansion. *See Reed v. Farley*, 512 U.S. 339, 356 (1994)(Scalia, J., concurring) ("This Court has long applied equitable limitations to narrow the broad sweep of federal habeas jurisdiction.").[3]

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[3] To be sure, the 1867 extension of the writ to state prisoners, subject to commitment by state courts, is regarded as a significant expansion of the writ. *See Felker*, 518 U.S. at 659 ("Congress greatly expanded the scope of federal habeas corpus in 1867"). But the true extent of the 1867 expansion remains a matter of controversy. *See* Fallon & Meltzer, *Habeas Corpus Jurisdiction*, 120 Harv. L. Rev. at 2096 n. 262 (noting controversy on this point); Gerald L. Neuman,

The instant case involves the application of the writ "at its historical core," *Rasul*, 542 U.S. at 474, to persons detained under *federal* authority, by the *Executive* Branch – a matter plainly encompassed by the 1789 statute, which

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Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 987 (1998) (noting habeas inquiries into "jurisdictional facts" which predated the 1867 Act); Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. Rev. 503, 562-63 (1992) (objecting that the "growth of habeas corpus caused by resistance to the Fugitive Slave Act in the antebellum period" undermines the view that "the issues cognizable in habeas corpus began to expand only after Congress passed the 1867 Act"). Moreover, since state prisoners, from the inception of the Republic, had access to the Supreme Court's appellate jurisdiction, the 1867 Act only hastened their access to relief through habeas corpus, without necessarily expanding their standing to vindicate their rights. *Cf.* James S. Liebman, *Apocalypse Next Time? The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 Colum. L. Rev. 1997, 2062 (1992) (noting state prisoners' access to the Supreme Court via a writ of error under the 1789 Act).

The 1867 amendments can be viewed as part of the natural interplay between the writ and the Constitution, in this instance the Civil War Amendments. *See* Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 7.2d, at 378 (5th ed. 2005) (arguing that state prisoners enjoy the habeas right based on the Suspension Clause and the Fourteenth Amendment); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 Mich. L. Rev. 862, 868 (1994) (arguing the same); William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 Utah L. Rev. 423, 426 (1961) (Congress broadened habeas corpus in 1867 to broaden understandings of the 14th Amendment). In any event, the 1867 amendments are not directly at issue here.

broadly authorized courts to inquire into the "cause of commitment" of federal prisoners. Act of September 24, 1789, c. 20, s. 14, 1 Stat. 81-82. This mandate proved broad enough to encompass a "wide variety" of inquiries into the legality of confinement, *Rasul v. Bush*, 542 U.S. 466, 475-76 (2004) (citing, *inter alia*, cases involving wartime detention), based on the widest spectrum of sources of law. *See Felker*, 518 U.S. at 659 n.1 (noting that Section 14 of the 1789 Judiciary Act was a "direct ancestor" of the text of a current habeas statute, 28 U.S.C. § 2241, which authorizes inquiry into whether the prisoner "is in custody in violation of the Constitution or laws or treaties of the United States").

The flexibility and continuity of the 1789 statute is evident in *Ex Parte Yerger*, a habeas case in which Congress had deliberately eliminated this Court's jurisdiction, by repealing habeas jurisdiction it had recently conferred. 75 U.S. at 108. Nevertheless, this Court's jurisdiction over the case remained unaffected -- because the repeal did not affect the broad habeas jurisdiction originally conferred in 1789. *See Felker*, 518 U.S. at 659 (explaining *Yerger*); Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 Am. U. L. Rev. 497, 526 (1983) (noting that Congress' 1868 repeal of a portion to the 1867 Habeas Corpus Act "[did] no more than return[] the Court's jurisdiction to its earlier status under the Judiciary Act. No new area or subject matter was removed from the scope of the Court's review, and the Court's jurisdiction over the subject matter of habeas corpus remained intact.").

Once one recognizes that it is the Judiciary, not Congress, that has accounted for much of the evolution of habeas law (whether by expansion or contraction), the "ratcheting up" critique falls away, because the Suspension Clause inquiry focuses on whether a *court's* application of habeas jurisdiction in a new context is sufficiently tethered to the "historical core" of habeas precedent to merit constitutional protection. This inquiry into the connection between a given new case and past evolving caselaw is the type of inquiry to which courts are accustomed – as it happens, especially in the habeas context. *See, e.g., Panetti v. Quarterman*, __U.S.__, 127 S.Ct. 2842, 2855 (2007) (habeas petitioner was entitled to relief because the state court's ruling "constituted an unreasonable application of . . . clearly established law as determined by this Court"); *Whorton v. Bockting*, __U.S.__, 127 S.Ct. 1173, 1180 (2007) (to determine whether a habeas petitioner may benefit from the retroactive application of a rule of law under *Teague v. Lane*, 489 U.S. 288 (1989), courts must distinguish between an "old rule" and a "new rule").

The constitutional protection of the Suspension Clause does not expand *ipso facto*, and without limits, each time a federal court finds statutory habeas jurisdiction to exist in a new legal context. Constitutional protection exists only if this new legal context is tethered to habeas' historical core, as reflected in the "evolving body of equitable principles informed and controlled by historical usage, statutory development, and judicial decisions." *Felker*, 518 U.S. at 664. *See also Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) (noting

the need, in constitutional areas, for "continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society.").

Thus, when, in the past, new limitations on habeas rights took effect, *see, e.g.*, *Stone v. Powell*, 428 U.S. at 518-19 (Brennan, J., dissenting) (arguing that the majority's holding "overruled" prior decisions which had recognized "the unrestricted scope of habeas jurisdiction"); *Williams v. Taylor*, 529 U.S. 362, 387 n. 14 (2000) (opinion of Stevens, J.) (noting that AEDPA "wrought substantial [procedural] changes in habeas law"), these new limitations did not automatically "ratchet down" the scope of constitutionally-protected habeas jurisdiction. The limitations merely signaled that habeas law had changed direction, while remaining within the constitutional compass.

Admittedly, it may sometimes prove difficult to establish whether a habeas principle is deeply-rooted and therefore well-integrated within the fabric of the law. A bright line may not always delineate with exactitude the scope of constitutional protection. *See Demore*, 538 U.S. at 538-40 (2003) (O'Connor, J., concurring) (observing that the degree to which the Constitution protects the writ as it has evolved in immigration caselaw after 1789 presented a "thorny question"); *cf. O'Dell v. Netherland*, 521 U.S. 151, 173 (1997) ("Distinguishing new rules from those that are not under our post-*Teague* jurisprudence is not an easy task.").

But, even if it yielded few bright lines, a test focused on evolving habeas principles is well-suited to the Suspension Clause. First, though the test may be untidy, in actual practice there ought to be few occasions to apply it. *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion) ("Only in the rarest circumstances has Congress seen fit to suspend the writ."). Second, it might be desirable for the test to be unclear at its margins. The Framers certainly did not intend to encourage Congress to encroach on the liberties protected by the writ of habeas corpus. A test that left Congress wary of coming close to invading Suspension Clause boundaries would be consistent with the structure of the Constitution. *Cf.* Charles L. Black, Jr., *Law As An Art* in *The Humane Imagination* 17, 33 (1986) (pointing out that "exact definition" is not always desirable in the law, because "exact definition would simply point out ways of immunity, and, to the birds of prey, make the law 'their perch and not their terror.'") (quoting William Shakespeare, *Measure for Measure*, Act 2, Scene 1). Finally, of course, the inquiry remains focused where it should be: on the core values that have animated the writ from the early days of the Republic.

II. CONCLUSION.

For the foregoing reasons, *amicus curiae* Federal Public Defender for the Southern District of Florida request that the Court expand its analytical framework for its Suspension Clause analysis, and reverse the decision below.

Respectfully submitted,

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August 2007

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(34)

Supreme Court, U.S.
FILED
AUG 24 2007
OFFICE OF THE CLERK

No. 06-1196

IN THE

Supreme Court of the United States

October Term, 2007

KHALED A. F. AL ODAH, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE*

Amici Curiae are scholars who have studied and taught the history of our government and Constitution. Our studies have convinced us that the Constitution incorporated the Great Writ of habeas corpus as a fundamental protection against the passions of the legislative and executive branches. We offer our understanding of the history of the habeas guarantee because of the importance of the issues framed in this Court's Order of June 29, 2007, and particularly because the court of appeals' ruling in this case largely ignored the historical roots of the constitutional habeas guarantee. Because it ignored those historical roots, the decision below failed to protect the habeas guarantee that is so essential to our system of checks and balances.[1]

SUMMARY OF ARGUMENT

The court of appeals' interpretation of the Military Commissions Act of 2006 and of the habeas guarantee would undermine the Great Writ, perhaps fatally, as a check on unlawful government conduct. In this brief, we demonstrate that the Framers precluded the government from suspending the writ of habeas corpus except in narrowly limited circumstances ("invasion" or "rebellion") which the government has not argued are presented by this case. We derive this conclusion from the deliberations of the Philadelphia Convention of 1787 and the state ratifying conventions, from the placement of the guarantee in Article I, Section 9, and from the constitutional text itself. These factors underscore that the constitutional habeas guarantee was carefully insulated from manipulation by the

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* All parties consent to the filing of this *Amicus Curiae* brief.

[1] Pursuant to Rule 37.6, the *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief.

government. Consistent with this original purpose, the courts have been firm in their enforcement of the fundamental constitutional constraints established by the habeas guarantee in Article I, Section 9.

ARGUMENT

I. The Framers Intended The Habeas Guarantee As An Essential Check On The Federal Government's Power.

For the fifty-five delegates to the Philadelphia Convention in 1787, the principal goal was to replace a charter of government that was far too weak. Under the Articles of Confederation in the 1780's, the United States was more of an alliance than a nation. States had their own currencies, their own trade policies, and fought border wars with one another.[2] Each state cast a single vote in Congress, which was the only organ of national government. The Articles established neither a national executive nor national courts. In late 1786, George Washington lamented "the consequences of lax or inefficient government," adding, "[t]hirteen sovereignties pulling against each other, and all tugging at the federal head, will soon bring ruin on the whole."[3]

Still, after bitter experience with British rule the Convention delegates also knew that a strong government

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[2] Letter from James Madison to Thomas Jefferson (Aug. 12, 1786), *reprinted in* 9 PAPERS OF JAMES MADISON 93, 96-97 (Robert A. Rutland & William M.E. Rachal eds., 1975); Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *reprinted in id.* at 317-321; ALLAN NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775-1789 570, 603-604, 659 (1969, originally 1924). *See generally* RICHARD B. MORRIS, THE FORGING OF THE UNION, 1781-1789 (1987).

[3] Letter from George Washington to James Madison (Nov. 5, 1786), *reprinted in* 4 THE PAPERS OF GEORGE WASHINGTON 331, *available at* http://gwpapers.virginia.edu/documents/constitution/1784/madison2.html.

can become a tyranny that makes short work of individual liberties. As James Madison wrote, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[4] To balance their desire for a vigorous government against their fear of governmental power, the Framers developed a government of enumerated, rather than general, powers. The writ of habeas corpus was an important element in striking that balance. At the same time, however, the Framers were intent upon laying claim to all the rights of English subjects, central among which was the ancient Writ of Habeas Corpus, which Parliament enacted into a statute in 1679.[5]

During the first ten weeks of deliberations, the delegates adopted broad powers for the new legislature: "to legislate in all cases for the general interests of the Union, and also in those cases to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."[6] They then moved consistently to constrain that legislative power. Indeed, while still in the first week of debate, John Rutledge of South Carolina, had insisted on an "exact enumeration" of legislative powers, a demand he renewed on July 16.[7] His protests were supported by other

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[4] THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

[5] James Otis, The Rights of the British Colonies Asserted and Proved, (1764), *reprinted in* 1 PAMPHLETS OF THE AMERICAN REVOLUTION 444 (Bernard Bailyn, ed. 1965) (Otis wrote in 1764 that every colonist was "entitled to all the natural, essential, inherent, and inseparable rights of our fellow subjects in Great Britain.").

[6] 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (1911).

[7] 1 FARRAND, at 53; 2 FARRAND, at 17.

South Carolinians, including Charles Pinckney and Pierce Butler.

At the end of July, Rutledge gained the opportunity to implement his objection to broad congressional powers. While the Convention took an eleven-day recess, a five-member Committee of Detail was appointed to assemble a draft constitution based on the nineteen skeletal resolutions the delegates had approved. Rutledge was chair of the committee, which promptly jettisoned the broad grant of general legislative power. In its place, Rutledge and his committee inserted a list of eighteen enumerated, specific powers.[8] Though some have proved over the years to be extensive, the message was plain that the new legislature should have only defined powers.[9]

When the delegates reconvened on August 6, 1787, this fundamental transformation of legislative powers drew no comment. Indeed, it survived to the final Constitution, while through the last five weeks of the Convention the delegates explored additional ways to control the powers of the new government. That exploration included the addition of the habeas guarantee.[10]

Habeas corpus had first been mentioned at the Convention in Charles Pinckney's "Draught of a Federal Government," which was submitted on May 29, 1787, four

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[8] U.S. CONST. art. I, § 8.

[9] *See McCulloch v. Maryland*, 17 U.S. 316, 405 (1819) (Marshall, C.J.) ("This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which it enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.").

[10] Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFFALO L. REV. 451, 459-460 (1996).

days after the Convention was called to order. Although Pinckney's proposal was put to the side, and never specifically discussed by the delegates, it had been shared with other delegates and submitted to Rutledge's Committee of Detail.[11] The Convention specifically referred the habeas issue to the Committee of Detail on August 20, the day on which Pinckney proposed on the Convention floor that:

> The privileges and benefits of the Writ of Habeas corpus shall be enjoyed in this Government in the most expeditious and ample manner; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited period not exceeding . . . months.[12]

The Committee of Detail never reported on the habeas issue. Instead, Pinckney raised it again by motion eight days later, in a simplified version. Rutledge was not satisfied with it. Declaring that the individual's right to the habeas writ should be "inviolable," he criticized that part of Pinckney's motion that would have allowed suspension of the habeas guarantee "on the most urgent occasions, and then only for a limited time, not exceeding twelve months."

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[11] WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 127-128 (1980); 3 FARRAND, at 595 (APPENDIX D THE PINCKNEY PLAN). After the Convention, Pinckney issued two different versions of his plan. One was published in late 1787, and the other was submitted in 1818 to the then-Secretary of State John Quincy Adams when the latter was assembling the government's archive of Convention-related documents. Madison said that both Pinckney drafts varied from the one presented at the Convention, an objection borne out by an apparent version of the actual Pinckney plan that was found in papers of James Wilson of Pennsylvania. All three versions, though, include a habeas corpus guarantee. 3 FARRAND, at 602-604.

[12] 2 FARRAND, at 341.

Rutledge could imagine no justification, ever, for a nationwide suspension of habeas corpus.[13]

Gouverneur Morris of Pennsylvania attempted to bridge the gap between Pinckney's proposal and Rutledge's demand for an even stronger habeas provision. Morris offered an amendment that would narrow the right to suspend habeas to "cases of rebellion or invasion."[14] James Wilson of Pennsylvania sided with Rutledge, arguing that there would never be a need to permit "suspension" of the habeas guarantee on a general basis, since judges would decide the merits of any individual prisoner's case.[15] The habeas guarantee itself was approved unanimously. The clause permitting suspension of habeas, even in Morris's narrower language, passed by a 7-3 margin. The dissenting states (South Carolina, North Carolina, and Georgia) evidently opposed granting any authority for Congress to suspend the writ.[16]

The location of the habeas guarantee in the Constitution also is significant. Pinckney proposed to add the habeas guarantee to the judiciary provision (then Article XI) of the draft constitution that had been produced by the Committee of Detail.[17] In early September, Gouverneur Morris reorganized the draft as a member of the Committee of Style. Morris placed the habeas guarantee in Article I, Section 9, with several other restrictions on Congress that

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[13] *Id.* at 438.

[14] *Id.*

[15] *Id.*

[16] *Id.* Although the majority ignored this drafting history, Judge Rogers cited it correctly in her dissent. *Boumediene v. Bush*, 476 F.3d 981, 998 (D.C. Cir. 2007). The history demonstrates, as Judge Rogers noted, that the Framers intended the habeas guarantee to provide a limited ability to suspend the writ in very specific circumstances not presented in this case.

[17] DUKER, at 128; Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 609-610.

had been added in the late weeks of the Convention, including the prohibitions against export taxes, bills of attainder, and ex post facto laws.[18] The placement of the habeas guarantee thus reflected the Convention's resolve that the right to habeas corpus would not be defined by Congress. Rather, it is an inherent right of the people *against* Congress, and thus it relies particularly on the judiciary to enforce it.[19] Morris's final language, never amended, provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[20]

This review of the Convention's deliberations reinforces the importance of the habeas guarantee in two respects. First, the habeas guarantee was part of the delegates' central determination that the new government would be one of enumerated, not general, powers. Indeed, that determination was spurred by the same delegates from South Carolina – Rutledge and Pinckney – who were the most aggressive advocates of the habeas guarantee. Second, the delegates narrowed the circumstances in which the habeas guarantee might be suspended to only two: rebellion

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[18] 2 FARRAND, at 596.

[19] *Id.* at 435; DUKER, at 131-132; *United States v. Lovett*, 328 U.S. 303, 314 (1946) (recognizing that the Court's exercise of jurisdiction over Congressional action is essential) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)). In her dissent below, Judge Rogers acknowledged the importance of *Lovett* in noting that this Court has long held that the limitations on Congressional power found in Article I, Section 9, create justiciable controversies. *Boumediene*, 476 F.3d at 996. The dissent understood that the placement of the habeas guarantee alongside the bill of attainder and ex post facto clauses was intentional and a "conscious determination of a limit on Congress's powers," which the judiciary must enforce, much like the Commerce Clause. *Id.* at 998. By dismissing the dissent's reference to *Lovett* as "particularly baffling," the majority missed the point. *Id.* at 993.

[20] U.S. CONST. art. I, § 9, cl. 2.

or invasion. Those triggering events may readily be determined and enforced by the courts.

This latter point emerged in the ratification debates in Massachusetts. Worcester County delegate John Taylor objected that there was no limit on the length of time that the writ might be suspended. In response, Judge Francis Dana stressed the narrowness of the suspension clause: "[The] safest and best restriction arises from the nature of the cases in which Congress are authorized to exercise that power at all, namely, in those of rebellion or invasion. These are clear and certain times, facts of public notoriety, and whenever these shall cease to exist, the suspension of the writ must cease also." [21]

The habeas guarantee also figured in post-Convention debates over the need for a Bill of Rights, an omission from the Constitution that was roundly criticized by many. From his posting in France, Thomas Jefferson raised that objection in a letter to Madison, insisting that liberty depended on "the eternal and unremitting force of the habeas corpus laws."[22] In reply to such critics, Hamilton pointed in *The Federalist* to the habeas guarantee, noting that Blackstone "is everywhere peculiarly emphatical in his

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[21] 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1359 (John P. Kaminski & Gaspare J. Saladino eds., 1984); DUKER, at 133-134 (citing 2 J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 108 (1845)).

[22] Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 250. Indeed, during the ratification debates, Jefferson expressed hope that the Constitution would be amended "by a declaration of rights . . . which shall stipulate . . . no suspensions of the habeas corpus." Letter from Thomas Jefferson to Alexander Donald (Feb. 7, 1788), *reprinted in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 354. Though the suspension clause was not amended, Jefferson's views, like the derivation of the clause during the Philadelphia Convention, underscore its narrow parameters.

encomiums on the habeas-corpus act, which in one place he calls 'the BULWARK of the British Constitution.'"[23]

Hamilton also emphasized the placement of the habeas guarantee in Article I, Section 9, next to prohibitions against bills of attainder, ex post facto laws, and titles of nobility.[24] He denounced ex post facto laws as "formidable instruments of tyranny,"[25] and both he and Madison feared bills of attainder for the same reason.[26] Hamilton left no doubt, however, of the primary importance of the habeas guarantee, observing that "the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny."[27] The Framers included all of these prohibitions and then grouped them in Article I, Section 9, to prevent the government from enacting arbitrary and vindictive legislation,[28] from encroaching on individual

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[23] THE FEDERALIST NO. 84, at 510-512 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Overall, there was virtually no agitation for a specific Bill of Rights amendment protecting the right to habeas corpus, probably because the habeas guarantee in Article I, Section 9 was deemed adequate to ensure access to the writ. *See* Eric M. Freedman, *Milestones in Habeas Corpus Part I, Just Because John Marshall Said It, Doesn't Make It So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 555 (Winter 2000) (noting "the fact that (with one minor exception) the states had not proposed any further protection for [the writ of habeas corpus]. A fair conclusion is that the ratification debates had convinced all parties that the Clause as proposed would satisfy the aims that they shared: to protect the liberties of those who might fall afoul of the organs of power.").

[24] THE FEDERALIST NO. 84, at 511-512 (Hamilton).

[25] *Id.* at 512.

[26] *United States v. Brown*, 381 U.S. 437, 444 (1965) (quoting Hamilton); THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961).

[27] THE FEDERALIST NO. 84, at 512 (Hamilton).

[28] *Weaver v. Graham*, 450 U.S. 24, 29 (1981); *Stogner v. California*, 539 U.S. 607, 611 (2003).

rights, and from usurping the power of other branches of government.[29] All of those constitutional guarantees, Hamilton proclaimed, were "great[] securities to liberty and republicanism."[30]

The importance of the habeas guarantee to the founding generation was reinforced a decade after ratification, during the dispute over the Alien and Sedition Acts.[31] In 1798, Madison argued that those statutes worked an unconstitutional suspension of the Great Writ. In his Report on the Virginia Resolution Concerning the Alien and Sedition Laws, he noted that under the Alien Act the writ of habeas corpus could be suspended even though there was no rebellion or invasion:

> In the administration of preventive justice, the following principles have been held sacred: that some probable ground of suspicion be exhibited before some judicial authority; . . . . *that [a prisoner] may have the benefit of a writ of habeas corpus, and thus obtain his release if wrongfully confined*; and that he may at anytime be discharged from his recognizance, or his

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[29] *See Cummings v. State of Missouri*, 71 U.S. 277, 286 (1867) (explaining that the guarantee against ex post facto laws is one of the critical protections against federal as well as state power); *Brown*, 381 U.S. at 442 (explaining that the Bill of Attainder clause was included in the Constitution to implement the separation of powers and prevent the "legislative exercise of the judicial function."); *see also Stogner*, 539 U.S. 607 at 615; *Carmell v. Texas*, 529 U.S. 513, 520 (2000).

[30] THE FEDERALIST NO. 84, at 511 (Hamilton).

[31] The Acts collectively known as the Alien and Sedition Acts are as follows: The Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired Mar. 3, 1801); The Alien Act, ch. 58, 1 Stat. 570 (1798) (expired June 25, 1800); The Naturalization Act, ch. 54, 1 Stat. 566 (1798) (repealed by Act of Apr. 14, 1802, ch. 28, § 5, 2 Stat. 153, 155); The Alien Enemies Act, ch. 66, 1 Stat. 577 (1798).

> confinement, and restored to his former liberty and rights, on the order of the proper judicial authority, if it shall see sufficient cause.[32]

Madison argued the Alien Act wrongfully permitted the President to suspend the writ of habeas corpus, "although the Constitution ordains that it shall not be suspended unless when the public safety may require it, in case of rebellion or invasion,--neither of which existed at the passage of the act."[33] Likewise, Thomas Jefferson characterized the statute as "palpably in the teeth of the Constitution."[34] The protests against the Alien Act stirred such public uproar against any suspension of habeas corpus that President Adams never enforced the law.[35] Judges in later eras joined the denunciation of the statute.[36]

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[32] JAMES MADISON: WRITINGS 622 (Jack Rakove ed., 1999); 4 J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (2d ed. 1836) (emphasis added).

[33] 4 J. ELLIOT, at 555; J.W. RANDOLPH, THE VIRGINIA REPORT OF 1799-1800: TOUCHING THE ALIEN AND SEDITION LAWS 204 (1850).

[34] Letter from Thomas Jefferson to James Madison (June 7, 1798), *reprinted in* 8 THE WORKS OF THOMAS JEFFERSON 431, 434 (Paul Leicester Ford ed., 1904).

[35] *See, e.g.*, Frederick A.O. Schwarz, Jr., *The Constitution Outside the Courts*, 14 CARDOZO L. REV. 1287, 1298 (April 1993); *see also* JAMES GRANT, JOHN ADAMS: PARTY OF ONE (2005); STANLEY ELKINS AND ERIC MCKITRICK, THE AGE OF FEDERALISM (1993); 3 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE 71.01[1] (rev. ed. 1997) (the Alien Act "was never enforced"); Letter from John Adams to Thomas Jefferson (June 14, 1813), *reprinted in* 2 THE ADAMS-JEFFERSON LETTERS 329 (Lester J. Cappon ed., 1959) (stating that the Act "was never executed by me in any instance").

[36] *See CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 156-157 (1973) (Douglas, J., concurring) ("The Alien and Sedition Acts, 1 Stat. 566, 570, 596, passed early in our history were plainly unconstitutional, as Jefferson believed."); *Fong Yue Ting v. United States*, 149 U.S. 698, 746-750 (1893) (Field, J., dissenting) (The Alien Act was "severely

II. The Habeas Clause Creates A Judicially Enforceable Guarantee Which Congressional Action Cannot Eliminate.

Unlike the court of appeals, the Framers understood that the courts must protect the habeas guarantee if it is to serve as an effective check on government power. Hamilton in *The Federalist* insisted on the judicial role, asserting that "trial by jury in criminal cases, aided by the habeas corpus act . . . [i]s provided for, in the most ample manner."[37] Courts, including this Court, have implemented the Framers' intent that the habeas clause not be undermined by statute. This Court's decisions have noted carefully that the constitutional right to habeas corpus stands independent of those rights created by statute, though the Court has had no occasion to define the scope of the constitutional right.[38] Indeed, this Court has given a narrow reading to habeas-restricting statutes in order to avoid such constitutional questions, effectively affirming that the constitutional right stands separate from any enabling statute.[39]

The court of appeals held that the Military Commissions Act of 2006 completely eliminates the

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denounced by many of [America's] statesmen and jurists as unconstitutional and barbarous.").

[37] THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[38] *See, e.g., Rasul v. Bush*, 542 U.S. 466, 477 (2004) (acknowledging the separate status of the habeas constitutional right); *INS v. St. Cyr*, 533 U.S. 289, 305 (2001) (rejecting a statutory interpretation that would strip the courts of habeas jurisdiction in violation of the Constitutional habeas guarantee); *McNally v. Hill*, 293 U.S. 131, 135 (1934) (Court acknowledged that use of writ as an incident of federal judicial power is implicitly recognized by Constitution, but failed to specify scope of writ); *Ex parte Milligan*, 71 U.S. 2, 130-31 (1866) (discussing the distinction between a suspension of the privilege of the writ and suspension of the writ itself).

[39] *See, e.g., St. Cyr*, 533 U.S. at 305.

Petitioners' right to bring a habeas corpus proceeding, concluding that Congress has the right to "clearly eliminate[] all 'jurisdiction to hear or consider an application for a writ of habeas corpus' by a detainee, whatever the source of that jurisdiction."[40] This extreme view conflicts with the Framers' plain intent (as explained above) to provide a critical restraint on government powers, and with the courts' consistent view of that restraint.

The court of appeals pointed to *Ex parte Bollman* as authority for the proposition that the right to habeas corpus derives only from statute, and not from the Constitution or the common law.[41] Yet this Court has made clear that the *Bollman* dicta cited by the court below – that the writ would be suspended if Congress enacted no parallel statute – does not define the constitutional habeas guarantee.[42]

But this case does not require the Court to address *Bollman*'s highly controversial dicta. As was true in *Bollman*, Congress has complied with its obligation to provide a remedy (albeit an inadequate one) through the Military Commissions Act. The question for decision is the adequacy of that remedy. In using *Bollman*'s dicta to support its holding, the court of appeals cites *Bollman* for a proposition wholly irrelevant to the resolution of this case.

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[40] *Boumediene*, 476 F.3d at 988 n.5 (quoting 28 U.S.C. § 2241(e)(1)).

[41] *Id.* (citing *Ex parte Bollman*, 8 U.S. 75, 95 (1807)). The court of appeals also cited *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982), for the proposition that Congress may eliminate by statute habeas jurisdiction without invoking the habeas guarantee. But that case had nothing whatsoever to do with habeas jurisdiction; rather, it stands for the unremarkable proposition that Congress may define generically lower courts' subject matter jurisdiction. It did not take into account the impact of the habeas guarantee.

[42] *St. Cyr*, 533 U.S. at 304 n.24 (rejecting the dissent's reading of *Bollman* and asserting that Chief Justice Marshall did not mean to suggest that Congress could erase the habeas guarantee through inaction).

In *Bollman*, this Court had to decide whether it had the power to grant a writ of habeas corpus to Dr. Erick Bollman and Samuel Swartwout, who had allegedly conspired with Aaron Burr in 1806 and 1807 to separate certain western territories from the United States. In a closed session, the Senate passed legislation to suspend the writ of habeas corpus and ensure the continued confinement of Swartwout and Bollman. The House, however, rejected the legislation overwhelmingly, by a vote of 113-19. The prisoners then sought habeas relief from this Court.[43]

Chief Justice Marshall determined that the Court had jurisdiction to consider the case through the Judiciary Act of 1789, properly looking to a statutory source of jurisdiction before considering any constitutional basis. Marshall then offered some further comments. In dicta, he addressed whether a statutory grant of jurisdiction over habeas corpus proceedings was required, and answered that it was. With no support or explanation, he asserted "the power to award the writ by any of the courts of the United States, must be given by written law."[44]

Since *Bollman*, each time this Court has been presented with a statute that came dangerously close to denying the constitutional habeas guarantee, the Court has construed the statute to avoid any constitutional violation, refusing to reach *Bollman*'s dicta that Congress might alter the constitutional habeas guarantee.

This Court has "constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme,"[45] recognizing that the habeas

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[43] Freedman, 51 ALA. L. REV. at 559-561; ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 20-21 (2001); Paschal, 1970 DUKE L.J at 623-624.

[44] *Ex parte Bollman*, 8 U.S. at 94.

[45] *Johnson v. Avery*, 393 U.S. 483, 485 (1969).

guarantee provides a "safeguard against invasion of the basic civil rights of the individual."[46] For that reason, *Johnson v. Avery* invalidated a state prison regulation that prohibited inmates from helping one another prepare habeas petitions, thereby foreclosing habeas relief to poor prisoners.[47] Before reaching its conclusion, the Court noted that "there is no higher duty than to maintain [the writ] unimpaired."[48] Because of this high duty, the Court has eschewed formalism in its habeas decisions. In *Ex parte Mitsuye Endo*, the Court found that an American citizen of Japanese ancestry was entitled to unconditional release from a Relocation Center (Internment Camp) even though the petitioner had subsequently been removed from the territory in which she filed her petition.[49] In *Rasul*, this Court rejected the government's argument that the facility at Guantanamo Bay was beyond the reach of the courts.[50]

In direct contrast to the decision under review, this Court's rulings have consistently acknowledged the constitutional nature of the habeas right and the courts' central role in determining when the right is unconstitutionally abrogated. *Jones v. Cunningham* stated that the "jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available."[51] Lest this comment be interpreted to mean that the writ could be eliminated in the absence of statute, the Court warned in *Sanders v. United States* that statutory

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[46] *Ex parte Mitsuye Endo*, 323 U.S. 283, 299 (1944); *see also In re Burrus*, 136 U.S. 586, 589 (1890) (noting that the inclusion of the habeas guarantee in the constitution "added to the exalted estimate in which that writ has always been held in this country and in England").

[47] *Johnson*, 393 U.S. at 485, 487.

[48] *Id.* at 485 (quoting *Bowen v. Johnston*, 306 U.S. 19, 26 (1939)).

[49] *Ex parte Mitsuye Endo*, 323 U.S. at 307.

[50] *Rasul*, 542 U.S. at 481-482.

[51] *Jones v. Cunningham*, 371 U.S. 236, 238 (1963).

changes that "derogate from the traditional liberality of the writ . . . might raise serious constitutional questions."[52] In *Jones*, the Court refused to limit the habeas right to instances of traditional confinement, holding that a habeas petition was the proper medium for a parolee to contest restrictions on his liberty. The Court explained that the Great Writ "is not now and [has] never been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose-the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."[53]

INS v. St. Cyr illustrates the power of the habeas guarantee. In that case, the Court considered the effect of two statutes on the U.S. Attorney General's ability to waive deportation for aliens who had committed aggravated felonies. The government argued that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the Antiterrorism and Effective Death Penalty Act of 1996 removed the Attorney General's discretion to waive deportation, even for those aliens who had committed felonies before the laws were passed. The government also asserted that the laws left no judicial forum to evaluate this interpretation. This Court flatly rejected both assertions.[54] According to the Court, the government's position on jurisdiction "would entirely preclude review of a pure question of law by any court," and thus raised a serious constitutional question under the habeas guarantee in Article I, Section 9.[55] The Court insisted on a narrow statutory reading that preserved the Court's jurisdiction over habeas petitions, emphasizing the importance of the constitutional guarantee: "[a]t its historical core, the writ of habeas corpus

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[52] *Sanders v. United States*, 373 U.S. 1, 11-12 (1963) *abrogated on other grounds McClesky v. Zant*, 499 U.S. 467 (1991), superseded by statute.

[53] *Jones*, 371 U.S. at 243.

[54] *St. Cyr*, 533 U.S. at 298-300.

[55] *Id.* at 300.

has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest."[56]

This Court's repeated reluctance to apply *Bollman*'s dicta has been entirely warranted. Indeed, that dicta might be seen to contradict the habeas guarantee itself, which plainly states that Congress may suspend the writ only upon "rebellion or invasion." That provision makes clear that mere Congressional inaction cannot cancel the habeas guarantee; rather, the guarantee can be suspended only by some positive act of government. The text confines the suspension of the habeas guarantee to situations of "invasion" or "rebellion": nowhere does the provision permit the suspension of the writ for "inaction." It would surely be anomalous if such a restriction on congressional power could be nullified by Congress's failure to enact a parallel statute.[57]

By providing that the writ "shall not be suspended," the constitutional text does not direct Congress to establish

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[56] *Id.* at 301.

[57] The puzzling character of the *Bollman* dicta may be explained by the complex politics of the times, and of the Burr conspiracy. Marshall had written just a few years earlier in *Marbury v. Madison* that no statute of Congress was needed to give the federal courts authority to remedy essential common law rights. *Marbury v. Madison*, 5 U.S. 137 (1803) (recognizing that actions to protect common law rights must be cognizable by the courts); 6 THE PAPERS OF JOHN MARSHALL 486 n.11 (Charles F. Hobson, et al. eds. 1990) (recognizing that the courts had jurisdiction over common law issues not addressed by statute). His contradictory dicta in *Bollman* may have been crafted to appease the federal government. Because the release of Dr. Bollman and Swartwout was likely to anger the President and Congress, the dicta might have been intended to mitigate that reaction by suggesting that Congress still had power over the habeas jurisdiction of the Court. This approach was the inverse of his strategy in *Marbury*, where he upheld the jurisdiction of the courts, but his substantive ruling favored the President. *Marbury*, 5 U.S. 137.

the writ by statute.[58] Moreover, the Framers surely knew how to give Congress discretion, and in numerous places they provided Congress the power, but not the obligation, to act. For instance, the Congress has "the power to" exercise all of the prerogatives listed in Article I, Section 8,[59] while Article III, Section 1, provides that Congress "may from time to time ordain and establish" inferior courts, if it so chooses.[60] But the habeas guarantee grants Congress discretion to suspend the writ only under very narrow circumstances. Nothing in that provision supports the conclusion that Congress may extinguish the availability of the writ through its own inaction.

The *Bollman* dicta, therefore, in no way alters the force of the habeas guarantee. Indeed, within months of writing *Bollman*, Marshall himself acknowledged that other dicta in the opinion did not have the force of binding precedent: he departed from the definition of treason set forth in *Bollman*, finding it both wrong and "extrajudicial."[61]

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[58] *Compare* U.S. CONST. art. I, § 9, cl. 2, *with* U.S. CONST. art. I, § 4, cl. 2 (providing that the Congress "shall assemble at least once in every Year"); *id.* § 5, cl. 3 (requiring the House to keep a journal of proceedings).

[59] U.S. CONST art. I, § 8 ("The Congress shall have the power to..."); *see also McCulloch*, 17 U.S. at 421 (describing the discretion the Constitution vests in Congress in exercising its enumerated powers).

[60] U.S. CONST. art. III, § 1; *see also* 1 FARRAND, at 125 (Madison's notes state that he and James Wilson proposed the Article III language, and together "[t]hey observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the legislature to establish or not establish them"); THE FEDERALIST NO. 82, at 492 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that there would only be "as many subordinate courts as Congress should think proper to appoint").

[61] *In re Burr*, 8 U.S. 470, 10-11 (1807) ("It may not be proper to notice the opinion of the Supreme Court in the case of the *United States against Bollman and Swartwout*. It is said that this opinion, in declaring that those who do not bear arms may yet be guilty of treason, is contrary to law, and is not obligatory, because it is extrajudicial, and was delivered

Courts also began ignoring other dicta in *Bollman* – regarding jurisdiction over state prisoners – shortly after the decision was rendered.[62]

Moreover, Marshall's comment, unadorned by citation to precedent, announced a starkly illogical position. On the one hand, Marshall stated that the Constitution required Congress to pass a jurisdictional statute allowing habeas petitions. On the other, and without explanation, he recognized no judicial remedy if Congress violated that constitutional obligation. This Court has consistently declined to adopt this flawed line of reasoning; the present case offers no occasion for the Court to do so now.

At bottom, the question before the Court is whether Congress has met its "obligation of providing efficient means by which this great constitutional privilege should receive life and activity." [63] Towards this end, "resort may unquestionably be had to the common law."[64] As the brief of the parties and other amici fully demonstrate, the procedures provided by the Detainee Treatment Act of 2005 fall far short of those inherent in the writ at common law.

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on a point not argued. This court is, therefore, required to depart from the principle there laid down.").

[62] Freedman, 51 ALA. L. REV. at 595-600 (In which three courts exercised habeas jurisdiction over state prisoners despite Marshall's comment that there was no statutory authority for such jurisdiction.) (citing *Daze v. The Keeper of the Debtors Apartment*, (D. Pa. May 22, 1814), *Jouet v. Jones*, (C.C.S.D.N.Y. Apr. 7, 1800), and *United States v. Desfontes & Gaillard*, (2d Cir. Feb. 12, 1830)).

[63] *Ex parte Bollman*, 8 U.S. at 95.

[64] *Id.* at 93-94.

CONCLUSION

"Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves."[65] The Military Commissions Act of 2006 is a vivid example of this unfortunate tendency. This Court should vindicate the core habeas right that the Framers valued so highly that they specifically and unequivocally incorporated it in the Constitution.

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[65] *Brown*, 381 U.S. at 444 (quoting JOHN C. HAMILTON, HISTORY OF THE REPUBLIC OF THE UNITED STATES 34 (1859)).

APPENDIX A

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Nos. 06-1195, 06-1196

In The Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*

KHALED A.F. AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF ON BEHALF OF FORMER FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici curiae will address the following question, which bears on the first question presented in *Boumediene v. Bush*, No. 06-1185, and the second and fourth questions presented in *Al Odah v. United States*, No. 06-1186:

> Whether federal judicial review under the Detainee Treatment Act (DTA), Pub. L. No. 109-148, tit. X, 119 Stat. 2680, 2739 (2005), of a final decision by the Combatant Status Review Tribunal (CSRT) that an individual is properly detained by the government as an enemy combatant is an adequate substitute for the common law writ of habeas corpus, when the CSRT may have relied on statements extracted by torture or other impermissible coercion and the DTA does not appear to authorize the court to make factual determinations regarding such reliance in ruling on the legality of the detention.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former federal judges who dedicated their judicial careers to promoting the rule of law:

Hon. William G. Bassler (appointed to the United States District Court, District of New Jersey, by President George H.W. Bush; served 1991-2006);

Hon. Michael Burrage (appointed to the United States District Court, Western, Northern and Eastern Districts of Oklahoma, by President Clinton; 1994-2001);

Hon. Edward N. Cahn (appointed to the United States District Court, Eastern District of Pennsylvania, by President Ford; served 1974-1998);

Hon. Susan Getzendanner (appointed to the United States District Court, Northern District of Illinois, by President Carter; served 1980-1987);

Hon. Shirley Hufstedler (appointed to the United States Court of Appeals for the Ninth Circuit by President Johnson; served 1968-1979);

Hon. Nathaniel R. Jones (appointed to the United States Court of Appeals for the Sixth Circuit by President Carter; served 1979-2002);

Hon. Thomas D. Lambros (appointed to the United States District Court, Northern District of Ohio, by President Johnson; served 1967-1995);

Hon. Timothy K. Lewis (appointed to the United States District Court, Western District of Pennsylvania, by George H.W. Bush; served 1991-1992; appointed to the United States Court of Appeals for the Third Circuit by President George H.W. Bush; served 1992-1999);

---

[1] Letters from all parties consenting to the filing of this brief are being filed with the Clerk of this Court, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief.

Hon. James K. Logan (appointed to the United States Court of Appeals for the Tenth Circuit by President Carter; served 1977-1998);

Hon. H. Curtis Meanor (appointed to the United States District Court, District of New Jersey, by President Nixon; served 1974-1983);

Hon. Abner Mikva (appointed to the United States Court of Appeals for the District of Columbia Circuit by President Carter; served 1979-1994);

Hon. William A. Norris (appointed to the United States Court of Appeals for the Ninth Circuit by President Carter; served 1980-1997);

Hon. Robert J. O'Conor, Jr. (appointed to the United States District Court, Southern District of Texas, by President Ford; served 1975-1984);

Hon. Stephen Orlofsky (appointed to the United States District Court, District of New Jersey, by President Clinton; served 1995-2003);

Hon. Raul A. Ramirez (appointed to the United States District Court, Eastern District of California, by President Carter; served 1980-1989);

Hon. Stanley J. Roszkowski (appointed to the United States District Court, Northern District of Illinois, by President Carter; served 1977-1998);

Hon. H. Lee Sarokin (appointed to the United States District Court, District of New Jersey, by President Carter; served 1979-1994; appointed to the United States Court of Appeals for the Third Circuit by President Clinton; served 1994-1996);

Hon. William S. Sessions (appointed to the United States District Court, Western District of Texas, by President Ford; served 1974-1987);

Hon. Patricia M. Wald (appointed to the United States Court of Appeals for the District of Columbia Circuit by President Carter; served 1979-1999);

Hon. Alfred M. Wolin (appointed to the United States District Court, District of New Jersey, by President Reagan; served 1987-2004).

These consolidated cases raise an issue that goes to the heart of the process of judging and poses a significant threat to the integrity of the federal judicial process.

The Detainee Treatment Act, Pub. L. No. 109-148, tit. X, 119 Stat. 2680, 2739 (2005), authorizes limited judicial review of an Executive Branch decision that an individual is properly detained by the government as an enemy combatant, but does not appear to authorize the court, when it rules on the legality of that detention, to determine whether statements upon which the detention is based were extracted by torture or other impermissible coercion. Such review cannot be considered an adequate substitute for the common law writ of habeas corpus.[2]

SUMMARY OF ARGUMENT

The English common law and our Nation's fundamental traditions condemn judicial reliance upon statements extracted by torture or other impermissible coercion. There are substantial allegations, however, that Combatant Status Review Tribunal (CSRT) panels have

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[2] The court of appeals denied, over dissent, leave to file a brief as *amici curiae* by several former federal judges (including some of the instant *amici*) on the ground that it was inappropriate for the proposed *amici* to describe themselves as "retired federal judges." C.A. Order (Dec. 29, 2006). This Court, however, has accepted for filing, and has relied upon, *amicus* briefs that have been submitted by former federal and state judges in other cases. *See, e.g.*, *Hamdan v. Rumsfeld*, 546 U.S. 1166 (2006) (mem.) ("The motion of former Federal Judges Shirley M. Hufstedler and William A. Norris for leave to file a brief as *amici curiae* [is] granted."); *Smith v. Robbins*, 528 U.S. 259, 282 n.13 (2000) (citing "Brief for Retired Justice Armand Arabian et al. as *Amici Curiae*").

relied on such statements to uphold the detention of individuals by the United States as enemy combatants. Those allegations cast a disturbing shadow over judicial review of the CSRT panel decisions. Unless the Detainee Treatment Act (DTA) authorizes the court to determine whether, and to what extent, an Executive detention is based on statements extracted by torture or other impermissible coercion when the court rules on the legality of the detention, judicial review under the DTA cannot be an adequate substitute for the common law writ of habeas corpus.

A. Torture has been illegal under English common law for more than 350 years. Even the notorious Star Chamber used torture rarely, and its willingness to do so was one of the reasons that it was abolished.

Common law judges did not admit as evidence against a defendant statements that had been extracted by torture because they recognized that such evidence is inherently unreliable and that it degrades the dignity of humanity and justice when judges acquiesce in such cruelty. The applicable common law rules of evidence also excluded confessions that had been coerced through means less cruel than torture.

Our Nation's founders shared the common law's revulsion for torture and other impermissible coercion. The Fifth Amendment's protection against self-incrimination was enacted as a direct response to the historical experience of the Star Chamber and was intended to prohibit extreme methods of coercion, including torture, as well as judicial reliance on statements extracted by such methods. Additionally, the prohibitions against unreasonable searches and seizures and cruel and unusual punishments, and also the guarantee of due process, reflect the Founders' antipathy to government cruelty and undue coercion within the justice system.

Like the common law courts, our Founding Fathers viewed statements extracted by impermissible coercion also as unreliable. They also prohibited the government from relying on such tactics as a means to protect individual

liberty, to guard against tyranny, and to preserve the balance between the state and the individual that lies at the core of the American system of government.

B. The public record reveals that CSRT panels routinely made detention determinations without investigating torture allegations or excluding statements allegedly extracted through impermissible coercion, and the government maintains that the CSRT panels were authorized to rely on evidence extracted through such means. The CSRT panels typically proceeded as though it was not their role to assess whether statements offered as evidence were extracted by impermissible coercion. The information presented to the panels might also have been insufficient to enable them to determine the provenance or reliability of such statements.

C. The judicial review authorized under the DTA does not appear to allow the court, when it rules on the legality of the detention, to engage in the factfinding necessary to determine the extent to which the CSRT's detention decision relied on statements extracted by torture or other impermissible coercion. As such, the statute would force the federal judiciary to uphold Executive Branch detention of an individual even when that detention is based on evidence that has long been considered unreliable, inadmissible, and contrary to human dignity. Such review corrupts the judicial function, contravenes established common law and legal tradition, and is an inadequate substitute for the common law writ of habeas corpus.

ARGUMENT

THE DETAINEE TREATMENT ACT'S JUDICIAL REVIEW IS NOT AN ADEQUATE SUBSTITUTE FOR THE COMMON LAW WRIT OF HABEAS CORPUS BECAUSE IT APPEARS THAT THE COURT IS NOT AUTHORIZED TO DETERMINE THE EXTENT TO WHICH THE CSRT RELIED ON STATEMENTS EXTRACTED BY TORTURE, OR OTHER IMPERMISSIBLE COERCION, WHEN THE COURT RULES ON THE LEGALITY OF THE DETENTION

Although there are few absolutes in history, this much is clear: Reliance on statements extracted by torture or

other impermissible coercion is contrary to the clear condemnation of such conduct that existed at common law and that is woven into the fabric of our Nation's Constitution. A judicial review procedure that does not allow a court to determine whether, and to what extent, the detention before it is based on statements extracted by torture or other impermissible coercion when the court rules on the legality of that detention ignores the lessons of history, taints the federal judiciary, and provides an inadequate substitute for the common law writ of habeas corpus.

A. Common Law Courts And Our Founding Fathers Denounced Torture As Illegal And Refused To Rely Upon Statements Extracted By Torture Or Other Impermissible Coercion

1. Torture has been illegal under English common law for more than 350 years

a. More than a millennium ago, torture was allowed in England in trials by ordeal, which required the accused to submit to various painful tests, to decide questions of guilt and civil liability. *See* A. Lawrence Lowell, *The Judicial Use of Torture*, 11 HARV. L. REV. 220, 221-222 (1897). The use of such torture tactics—often involving fire or water—was not based on any theory that such methods would lead to reliable statements, but rather on the belief that God would intervene to disclose the truth. *See* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 4 (1978).

Torture was abandoned as part of the truth-seeking function in England in 1215, when trial by jury was introduced. Indeed, England prided itself at that time on its rejection of the legal system adopted by continental Europe, which incorporated torture of criminal defendants as a systemic element of its legal machinery. *See* John H. Langbein, *Torture and The Law of Proof* 73 (1976). In the late 1400s, for example, Chief Justice Fortescue of the King's Bench emphasized that the torture conducted in Europe, but rejected in England, yielded unreliable results

and thus did "its utmost to condemn the innocent and convict the judge of cruelty." John Fortescue, *De Laudibus Legum Angliae, A Treatise in Commendation of the Laws of England* 73 (Francis Gregor, trans., Cincinnati, Robert Clarke & Co. 1874) (c. 1460-1470).

b. The use of torture had one, relatively brief, resurgence in England between 1540 and 1640, a period during which the notorious Star Chamber operated. *See* Langbein, *supra*, 79, 81. The Star Chamber supplemented the proceedings of the common law and equity courts in both civil and criminal matters and placed a premium on speed and flexibility. *See* 5 William S. Holdsworth, *A History of English Law* 156, 165 (1924). In criminal matters, the Star Chamber considered itself "free to disregard not only the ordinary rules of procedure, but also the ordinary rules of law," and, consequently, "torture was freely used, to extort either a confession, or the disclosure of further information." 5 Holdsworth, *supra*, at 184-185; *see* Lowell, *supra*, at 290.

Even during the height of the Star Chamber, however, torture was used relatively rarely by that body (and not at all by the common law courts). Torture was authorized only by special warrants issued by the King or his Privy Council, *see* Lowell, *supra*, at 293, and such warrants were issued in only eighty-one cases. *See* Langbein, *supra*, at 81; *see also* David Jardine, *A Reading on the Use of Torture in the Criminal Law of England* 73-109 (London, Baldwin and Cradock 1837) (collecting many of the warrants).[3] The

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[3] Although the records of the warrants are incomplete, these eighty-one cases likely do "not drastically understate the total" number because torture "remained a very exceptional practice of the highest central authorities." Langbein, *supra*, at 82. The warrants typically authorized torture by rack or manacle, but could also include other coercion such as inhumane cells or extended deprivation of necessities. *See, e.g.*, Jardine, *supra*, at 79-80 (Sherwood Warrant) (accused committed to the "dungeon amongst the ratts"); *id.* at 82 (Humfrey Warrant) (authorizing "some slight kinde of torture, such as may not touch the losse of any lymbe, as by whipping"); *id.* at 31-32, 39 (Briant Warrant) (in addition to "the ordinary torture," authorizing "torture by

(Continued on following page)

most frequent victims of torture, by far, were those accused of political and religious wrongdoing, *see* Langbein, *supra*, at 88, 94-122, particularly those suspected of offenses against the State. *See* Lowell, *supra*, at 294-295.[4]

By the end of the Star Chamber period, common law courts declared that torture was unlawful and, in fact, regarded the preceding era as an improper exercise of royal prerogatives. Torture was clearly denounced as contrary to English law in the mid-to-late 1600s, some 350 years ago.

c. The precise explanation for the decline and ultimate cessation of torture in England is a matter of historical debate. Some attribute it to "the great constitutional struggle and civil war which made the government subject to the law" and prompted Parliament to abolish the Star Chamber. *A(FC) v. Secretary of State for the Home Department*, [2005] UKHL 71, at 53 ¶83, [2006] 2 A.C. 221 (appeal taken from Eng.) (Hoffman, L.); *see* An Act for the Regulating of the Privy Council, and for

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famine," during which the individual "was reduced to such extremities that he ate the clay out of the walls of his prison, and drank the droppings of the roof"); James Heath, *Torture and English Law* 190, 219 (1982) (Beesley and Humberson Warrant) (authorizing use of the "Little Ease," a small cell in which a man could not stand erect).

[4] In these instances, torture was most likely used to discover information about whom to investigate as possible accomplices, to quash threatened sedition, and to investigate felonies in which the victim had strong political connections. Torture was not viewed, even then, as a tactic that would directly yield reliable evidence for trial. *See* Langbein, *supra*, at 89-90, 136-137; Francis Bacon, *Certain Considerations, Touching the Better Pacification and Edification of the Church of England* (1604), *reprinted in* 2 Basil Montagu, *The Works of Francis Bacon, Lord Chancellor of England* 425 (Philadelphia, A. Hart 1850) ("torture is used for discovery, and not for evidence"). One popular commentator explained at the end of the 19th Century that he was not "aware of any single instance, even in the worst years of tyranny and prerogative, * * * when confessions obtained by the rack have been used for the conviction of accused persons." Frederick Andrew Inderwick, *The King's Peace: A Historical Sketch of the English Law Courts* 88-89 (London, Swan Sonnenschein & Co. Ltd. 1895) (footnote omitted).

taking away the Court commonly called the Star-Chamber (Habeaus Corpus Act), 1640, 16 Car. I, c. 10 § 3 (Eng.). At that same time, Parliament enacted legislation that is viewed as the predecessor of the Fifth Amendment's privilege against self-incrimination. *See* A Repeal of a Branch of a Statute *primo Elizabeth*, Concerning Commissioners for Causes Ecclesiastical, 1640, 16 Car. I, c. 11 § 4 (Eng.) (prohibiting ecclesiastical courts from requiring a person, under oath to "confess or to accuse himself or herself or any Crime * * * or any Neglect, Matter or Thing, whereby or by reason whereof he or she shall or may be liable or exposed to any Censure, Pain, Penalty or Punishment whatsoever"); John H. Wigmore, *The Privilege Against Self-Crimination: Its History*, 15 HARV. L. REV. 610, 633-635 (1902). These two Acts are appropriately viewed as a clear rejection of reliance on testimony extracted by torture or even lesser forms of compulsion.[5]

Other historians mark the turning point for the decline of torture to be a bit earlier, in the judicial consensus evidenced in *Felton's* case in 1628. *See R v. Felton*, (1628) 3 Howell's State Trials 369, 371. In that case, John Felton was accused of assassinating the Duke of Buckingham. One of the councilors employed to examine Felton threatened him with the rack unless he divulged the names of his accomplices. *Ibid.* The council then debated "whether by the law of the land they could justify the putting him to the rack," and King Charles I asked the common law judges whether it was legal to impose such torture. *Ibid.* The judges unanimously agreed that Felton "ought not by the law to be tortured by the rack, for no such punishment is known or allowed by our

[5] The Act that abolished the Star Chamber also provided for judicial review of the legality of the Star Chamber's detentions. The Act stated that "any Person" imprisoned by order of the Star Chamber, King, or Council should have habeas corpus and be brought before the court "without delay" with the cause of imprisonment shown and determined whether "just and legal." Habeaus Corpus Act, *supra*, § 8.

law." *Ibid.*; *accord* James Heath, *Torture and English Law*, 162-164 (1982) (quoting Bulstrode Whitelocke the Elder's similar contemporaneous account of the decision in Felton's case).

Although some modern academics question the scope and accuracy of the report in *Felton's* case, it was clearly understood in the late eighteenth century to express a definitive common law prohibition of torture. In reflecting on *Felton's* case, Blackstone stated in 1769 that a rack for torture "still remains in the tower of London: where it was occasionally used as an engine of state," but, he noted, the device was "not of law." William Blackstone, 4 *Commentaries* *326 (spelling modernized; footnotes omitted). *Accord* 2 Howell's State Trials 774 n.(a) (commentary added in 1775 by Francis Hargrave to fourth edition citing *Felton's* case for the proposition that torture was unlawful). Blackstone also praised the judges in *Felton's* case, noting that they had "declared unanimously, *to their own honour and the honour of the English law*, that no such proceeding was allowable by the laws of England." *Ibid.*; *see also* Leonard MacNally, *The Rules of Evidence of Pleas on the Crown* 278 (London, J. Butterworth 1802) (discussing *Felton's* case, "to the honour of the law, and of themselves, [the judges] unanimously resolved, that the *rack* cannot be legally used") (spelling modernized).

Moreover, writings by Sir Edward Coke contemporaneous to *Felton's* case reflected the same condemnation of torture as unlawful. In his *Second* and *Third Part of the Institutes of the Laws of England*, the manuscripts of which were prepared by Coke between 1629 and 1634, *see* 1 Steve Sheppard, *The Selected Writings and Speeches of Sir Edward Coke* lxv (2003), Coke asserted that to "put [a man] to torture" was contrary to the Magna Carta insofar as it would violate the prohibition on any freeman being in "any [way] otherwise destroyed" unless by lawful judgment or by law of the land. Edward Coke, *Second Part of the Institutes of the Laws of England* 48 (1642); Edward Coke, *Third Part of the Institutes of the Laws of England* 35 (1644). In his Third *Institutes*, Coke declared that "there is no law to warrant tortures in this land" and

"there is no one opinion in our books, or judicial record (that we have seen and remember) for the maintenance of tortures & torments." *Ibid.* (spelling modernized).[6]

These denunciations by preeminent jurists, together with the undisputed fact that the authorized use of torture ceased in England by the mid-1640s point to one conclusion: "that the Common Law, however ill-defined in some areas, did condemn interrogatory torture in any context, whether Executive, judicial (although outside its own process), or quasi-judicial." Heath, *supra*, at 178.

Now is not the time to abandon this 350-year-old doctrine.

2. Common law courts did not admit statements extracted by torture or other inhumane treatment to support determinations of guilt because of the inherent unreliability of such statements and because the cruelty of torture corrupts the judicial function

a. Even during the anomalous Star Chamber period, the weight of historical evidence indicates that statements extracted by torture or other inhumane treatment were not used against defendants in English common law courts. For example, a statute enacted in 1552 provided that a single confession was sufficient to prove the crime of treason, which normally required the testimony of two witnesses, but only if the confession was made "willingly without Violence." An Act for the Punishment of divers

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[6] Because Coke had, earlier in his career, signed warrants authorizing torture, Coke's denouncement of torture in his *Institutes* appears to reflect an evolution of his thinking on the issue. One scholar suggests that Coke's views changed "when the constitutional controversies of the seventeenth century had made it clear that the existence of any extraordinary power in the crown was incompatible with the liberty of the subject." 5 Holdsworth, *supra*, at 194. The *Institutes* thus reflected Coke's final conclusion that torture "always had been illegal by the common law, and the authority under which it had been supposed to be legalised he now denied." *Ibid.* (footnotes omitted).

kinds of Treasons, 1551, 5 & 6 Edw. VI, c. 11, §§ 9, 12. That restriction on the use of confessions only if voluntary and "*without violence*" was an express response to the fact that torture was used during the Star Chamber era even though the practice was "*against law*." Michael Foster, *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry; and of Other Crown Cases: To Which Are Added Discourses upon a Few Branches of the Crown Law* 244 (2d ed. corrected, London, W. Strahan & M. Woodfall 1776) (spelling modernized).

b. The common law courts also subsequently adopted rules of evidence that expressly prohibited use against defendants of testimony extracted by torture, inhumane treatment, or other, lesser forms of coercion. The courts did so because coerced testimony is inherently unreliable, because of the "cruelty of the practice as applied to those" determined to be innocent, and because of "the belief that it degraded all those who lent themselves to the practice." *A(FC)*, [2005] UKHL 71, at 6 ¶11 (Bingham, L.).

Sir Matthew Hale's *Pleas of the Crown* stated that, in order for a defendant's confession made prior to trial to be admissible at trial "it must be testified that he did [the confession] freely, without any menace or undue terror imposed upon him." 2 Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* 284 (1736), quoted in *Bram v. United States*, 168 U.S. 532, 546 (1897). Likewise, Lord Chief Baron Gilbert stated in 1760 that "this confession must be voluntary, and without compulsion; for our law in this differs from the civil law; that it will not force any man to accuse himself; and in this we do certainly follow the law of nature, which commands every man to endeavor his own preservation; and therefore pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on." Baron Gilbert, *The Law of Evidence* 139 (2d ed. 1760), quoted in *Bram*, 168 U.S. at 546.

Thus, well before the American Revolution, it was settled in the common law that, when persons make

"confessions under threats or promises," then "frequently * * * such examinations and confessions have not been made use of against them on their trial." *The King v. Rudd*, (1775) 168 Eng. Rep. 160, 161 (K.B.); *see The King v. Warickshall*, (1783) 168 Eng. Rep. 234, 235 (K.B.) ("no credit ought to be given" to "a confession forced from the mind by the flattery of hope, or by the torture of fear" and it "cannot be received in evidence").[7]

This rule derived in part from the unreliability of statements induced by threats or promises whereby innocent defendants were punished. *See Warickshall*, 168 Eng. Rep. at 235 n.1 (discussing *Perry's Case*, (1660) 14 Howell's State Trials 1312, in which a man "under a promise of pardon, confessed himself guilty of" the murder of Mr. Harrison and was executed and yet "a few years afterwards it appeared that Mr. Harrison was alive"); Theodore Barlow, *The Justice of Peace: A Treatise Containing the Power and Duty of That Magistrate* 189 (London, Lintot 1745) (claiming torture is not only "cruel" but "at the same Time uncertain, as being rather Trials of the Strength and Hardiness of the Sufferer, than any Proof of the Truth").

The rule was also adopted because experience demonstrated that "confessions extorted from the fear of death [or], the infliction of torture * * * so far from accelerating and clearing, impedes and fouls the current of justice." MacNally, *supra*, 44; *accord A(FC)*, [2005] UKHL 71, at 52 ¶82 (Hoffman, L.) (torture "corrupts and degrades * * * the legal system which accepts it"); *id.* at 80 ¶150 (Carswell, L.) (allowing admission of such evidence

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[7] *See also* John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1198 n.147 (1996) (collecting cases from the 1770s in the Old Bailey and at York assizes that excluded confessions); Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* 328-329 (1968) (collecting additional examples from England prior to the American Revolution).

would "degrade the [judicial] proceedings and involve the state in moral defilement").

3. Our Founding Fathers shared the common law's rejection of torture and the Bill of Rights demonstrates their disavowal of even lesser forms of coercion

The Founding Fathers embraced the English common law's rejection of torture and other impermissible coercion, which they viewed as a tool of royal despotism. *See* Seth F. Kreimer, *Too Close To The Rack And The Screw: Constitutional Constraints On Torture In The War On Terror*, 6 U. PA. J. CONST. L. 278, 312 (2003). The notion "that men are not to be imprisoned at the unfettered will of their prosecutors, nor subjected to physical brutality by officials charged with the investigation of crime" was "well known to those who established the American government." *Culombe v. Connecticut*, 367 U.S. 568, 581 (1961). In fact, such principles were "branded into the consciousness of our civilization by the memory of the secret inquisitions, sometimes practiced with torture, which were borrowed briefly from the continent during the era of the Star Chamber." *Ibid.*; *see also* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1681 (2005) (the prohibition against torture "is not just one rule among others, but a legal archetype—a provision which is emblematic of our larger commitment to nonbrutality in the legal system").

a. The debates surrounding the adoption of the Constitution demonstrate that the historical lessons drawn by the Founding Fathers about the Star Chamber, and its use of torture, underlay many of the provisions of the Bill of Rights. Most clearly, the Fifth Amendment was the Founders' response to the Star Chamber. "The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chambers proceedings occurring

several centuries ago." *Michigan v. Tucker*, 417 U.S. 433, 440 (1974).

In the ratification debates in Virginia, Patrick Henry observed that the distinguishing feature of America's common-law ancestors was that "they would not admit of tortures, or cruel and barbarous punishment." 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 447-448 (2d ed., Philadelphia, J.B. Lippincott Co. 1891). Henry noted that, absent a bill of rights, the new Congress might point to "the practice of civil law [in France, Spain, and Germany]" and assert that "there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture." *Id.* at 447-448. In arguing for the inclusion of a bill of rights during the constitutional conventions, other delegates expressly reflected on the horrors of the Star Chamber and railed against "the potentially oppressive use of the criminal justice system by the new federal government." Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment*, in *The Privilege Against Self Incrimination: Its Origins and Development* 109, 137 (Richard H. Helmholz ed., 1997).

George Nicholas argued in the Virginia ratification debates, in opposition to Patrick Henry, that no bill of rights was necessary because Virginia's Declaration of Rights, adopted in 1776, did not prohibit torture and yet no one had been tortured in Virginia. *See* 3 Elliot, *supra*, at 451. Nicholas was later forced to admit his error after George Mason, who was the principal author of the Declaration of Rights, responded that "the worthy gentleman was mistaken in his assertion that the [Virginia] bill of rights did not prohibit torture," because "one clause expressly provided that no man can give evidence against himself," in contrast to "those countries" where "torture is used" to "extort[ ]" evidence "from the criminal himself." *Id.* at 452.

James Madison drew from the language of the Virginia provision discussed by George Mason in proposing what is now the Fifth Amendment's Self-Incrimination

Clause. *See United States v. Hubbell*, 530 U.S. 27, 52-53 (2000) (Thomas, J., concurring). The provision was understood in part as "a ban on torture and a security for the criminally accused." Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* 430 (1968); *see* Akil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 927 (1995) ("The Founding-era history of the self-incrimination slogan in America was bound up with concerns about torture."). But those were not its only functions. *See* Levy, *supra*, at 430. The "rack in the Tower" was simply "the emblem of the need for a guarantee against coerced confession." Moglen, *supra*, at 137. The Fifth Amendment was also intended to prohibit "improper methods of interrogation," such as "incriminating interrogation under oath." Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, in Helmholz, *supra*, 181, 185, 192.

Other provisions of the Bill of Rights also reflect the Founding Fathers' antipathy toward torture and impermissible coercion within the justice system. For example, the Eighth Amendment's cruel and unusual punishments prohibition was enacted "as an admonition to all departments of the national government" to "warn * * * against such violent proceedings as had taken place in England." 3 Joseph Story, *Commentaries on the Constitution of the United States* 750-751 (Boston, Hilliar, Gray & Co. 1833); *see Gregg v. Georgia*, 428 U.S. 153, 169-170 (1976) ("The American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned * * * with proscribing 'tortures' and other 'barbarous' methods of punishment.") (citation omitted). Scholars also believe that the "root antitorture idea" is largely a Fourth Amendment concept. Amar & Lettow, *supra*, at 927.

Furthermore, it has long been recognized that "our country * * * wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed" as

an "assurance against ancient evils." *Chambers v. Florida*, 309 U.S. 227, 237 (1940); *cf. Chavez v. Martinez*, 538 U.S. 760, 796 (2003) (Kennedy, J., concurring in part and dissenting in part) ("[U]se of torture or its equivalent in an attempt to induce a statement violates an individual's fundamental right to liberty of the person.").

b. The Founders apparently were motivated by the same concern about unreliability that was at the root of the torture prohibition at English common law. Those who drafted our Constitution knew full well that English courts at that time refused to rely upon coerced confessions at trial because they were not reliable. *See* Alfredo Garcia, *The Fifth Amendment: A Comprehensive and Historical Approach*, 29 U. TOL. L. REV. 209, 224 (1998). American common law courts in the years immediately following the ratification of the Bill of Rights followed the same path. *See, e.g.*, *People v. Rankin*, 2 Wheeler Crim. Cas. 467, 469 (N.Y. Oyer & Term. 1807) (excluding a confession obtained through the threat "if you do not tell all you know about the [poisoning], you will be put in the dark room and hanged" with a note from the reporter, Jacob Wheeler, explaining that "it is impossible to say whether a confession, induced by these means, is not made rather from a motive of fear or interest, than from a sense of guilt"); *State v. Hobbs*, 2 Tyl. *382, *382-*383 (Vt. 1803) (dictum) (state constitutional prohibition of compulsory self-incrimination prohibited torture and made a torture-induced confession inadmissible because of its doubtful reliability).

The Founders' aversion to torture and other impermissible coercion was also rooted in the uniquely American desire to protect the delicate balance of power between the individual and the new government, which was, after all, the very purpose of the constitutional structures that they labored mightily to craft. Because state-sponsored torture "is the antithesis of the legitimate relation between the state and those subject to its power," Kreimer, *supra*, at 298, coercive criminal justice tactics would undermine the new Republic's fragile recognition of individual liberty like few other practices then known. *Cf.*

Story, *supra*, at 751 (crediting Blackstone with "wisely" recognizing that "sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution"); *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944) (recognizing that totalitarian regimes employ "unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical and mental torture," but "[s]o long as the Constitution remains the basic law of our Republic, America will not have that kind of government").

In sum, the Founders were well acquainted with the descendants of those who had suffered at the hands of the Kings and inquisitors and, without doubt, understood the connection between torture and tyranny. *See Ullmann v. United States*, 350 U.S. 422, 428 (1956) ("Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses."); *see also* Moglen, *supra*, at 133-134 (by "treat[ing] elements of common law criminal procedure as fundamental law," the Framers "sought to protect their practices against tyrannical innovations").

B. The CSRT Panels Routinely Upheld Government Detention Of Individuals As Enemy Combatants Without Determining Whether Statements On Which They Relied Were Extracted By Torture Or Other Impermissible Coercion

Despite the longstanding and well-established condemnation of statements extracted by torture or other improper coercion that is clearly reflected in Anglo-American legal history and tradition, recurring and substantial allegations about reliance by the CSRT panels on statements extracted by such methods now cast a disturbing shadow over judicial review of the CSRT detention determinations. Reports by the government itself, as well as by others, indicate that abusive

interrogations occurred at Guantanamo and elsewhere.[6] And the CSRT panels made their detention determinations without regard to how incriminatory statements were obtained.

Amici are not in a position to evaluate the veracity of the detainees' accounts, nor do we attempt here to distinguish between torture and other impermissible coercion. We maintain, however, that under the circumstances presented here and described below, the judicial review authorized by the Detainee Treatment Act is not an adequate substitute for the common law writ of habeas corpus because it does not appear to allow the reviewing court, when it rules on the legality of the detention, to engage in the factfinding necessary to reach an accurate determination of the extent to which the CSRT panel relied on statements extracted by unacceptable and impermissible means.

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[6] *See, e.g.*, Federal Bureau of Investigation, *Detainee Positive Responses*, at Responses 10, http://foia.fbi.gov/guantanamo/detainees.pdf (an anonymous FBI agent reports entering interview rooms where the detainee had been "chained hand and foot in a fetal position to the floor, with no chair, food, or water * * * for 18, 24 hours or more. * * * On another occasion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night."); *see also id.* at Responses 11-15, 62, 63; Department of Defense, *Army Regulation 15-6: Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* 63 (Aug. 2004), http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf; Human Rights Watch, *Guantanamo: Detainee Accounts*, at 12 (2004), http://hrw.org/backgrounder/usa/gitmo1004/gitmo1004.pdf (describing interrogation techniques that led detainees to falsely confess to being with Osama bin Laden in Afghanistan at a time when they were actually in England). *See also* Jane Mayer, *The Black Sites, A Rare Look Inside the CIA's Secret Interrogation Program*, THE NEW YORKER, Aug. 13, 2007, at 49 (describing report of International Committee of the Red Cross).

1. The CSRT panels did not investigate or exclude statements allegedly extracted through the torture or coercion of the detainee under review

a. The rules that govern the CSRT, which were promulgated by the Navy after the establishment of the CSRT by the Department of Defense established the CSRT in July 2004, stated that "a panel of three neutral commissioned officers" would determine in the context of "a non-adversarial proceeding," whether DOD had properly classified each detainee as an "enemy combatant." Memorandum from Secretary of the Navy, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba*, Enc. 1 (CSRT Rules) at 1 (¶¶ B, C(1)) (July 29, 2004).[9] The CSRT Rules make clear that a CSRT panel "is not bound by the rules of evidence such as would apply in a court of law." *Id.* at 6 (¶ G(7)). Rather, the panel is allowed to consider all "reasonably available" information that, in its own view, is "relevant and helpful" to its decision. *Id.* at 3, 4, 6 (¶¶ E(2), E(3), F(6), G(7)). Moreover, there is a "rebuttable presumption" that evidence against a detainee in the "possession of the U.S. government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant" is "genuine and accurate." *Id.* at 3, 6 (¶¶ E(3), G(11)). By contrast, exculpatory evidence, even if submitted to a CSRT panel by the government, is not entitled to the same presumption. *See id.* at 7 (¶ H(4)).[10]

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[9] http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

[10] These CSRT Rules governed the petitioners' CSRT proceedings. When Congress subsequently enacted the DTA, it directed the Department of Defense to establish new rules to ensure that future CSRT panels "to the extent practicable, assess—(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and (B) the probative value (if any) of any such statement." DTA at § 1005(b)(1). The rule promulgated pursuant to that directive, which has no effect on the instant case, merely restates

(Continued on following page)

Since the implementation of the CSRT Rules, the government has consistently maintained that the CSRT panels were authorized to make detention determinations in reliance upon statements extracted by torture or other impermissible coercion. The Principal Deputy Associate Attorney General explained unequivocally to a district court that if "reliable" information "came to the CSRT's attention that was obtained through a non-traditional means, *even torture by a foreign power*," nothing "would prevent the CSRT from crediting that information for purposes of sustaining the enemy combatant class."[11]

According to the government, this is so even if, *arguendo*, the individual detainee has fully enforceable constitutional rights: "|T|o answer your Honor's question very clearly, if the CSRT were to determine that evidence of a questionable providence *[sic]*, the result of torture perhaps, was reliable, I don't think there is anything in the due process clause as it would pertain to these Petitioners that would prevent the evidence from being relied upon."[12]

b. The actions of the CSRT panels confirm that they, too, did not view the question whether statements presented by the government were extracted by torture or other impermissible means to be relevant to the question of whether they could rely on that evidence. Indeed, CSRT panels have upheld the detention of hundreds of individuals without any apparent regard for whether the information presented was extracted by torture as alleged.

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the statutory text without further elaboration or guidance. *See* Memorandum from Gordon England, Deputy Secretary of Defense, to Secretaries of the Military Departments, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba*, Enc. 10 (July 14, 2006), http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf.

[11] Tr. of Mot. Hr'g at 84:15-22, *Boumediene v. Bush*, No. 1:04-cv-1166 (D.D.C. Dec. 2, 2004) (emphasis added).

[12] *Id.* at 86:19-24.

For example, the unclassified evidence recounted by the Recorder at the CSRT proceeding of Mamdouh Habib consists entirely of alleged admissions by the detainee.[13] Mr. Habib's government-appointed personal representative—a non-lawyer appointed to each detainee—explained to the CSRT panel that Mr. Habib maintained that "all of the information" he previously provided "was given under duress and torture" in Pakistan and Egypt prior to his arrival at Guantanamo.[14] The CSRT panel simultaneously determined that the allegations of abuse were *credible enough to warrant investigation* and upheld Mr. Habib's detention as an enemy combatant.[15] Regrettably, Mr. Habib's case is not unique.[16]

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[13] Unclassified Summary of Basis for Tribunal Decision, Tribunal Panel #6, *available at Habib v. Bush*, No. 1:02-cv-01130-CKK, Dkt. No. 32, Exh. A at 9 (D.D.C. Oct. 6, 2004). According to Mr. Habib's habeas counsel, the evidence against Mr. Habib derived entirely from purported "confessions" he made after he was tortured for six months. http://www.law.northwestern.edu/macarthur/documents/guantanamo/Written_Testimony_of_J_Margulies.pdf, at 4.

[14] Unclassified Summary of Basis for Tribunal Decision, Tribunal Panel #6, *supra*, at 9. Mr. Habib's habeas counsel reported that Mr. Habib had informed him that was, *inter alia*, beaten, suspended from hooks on the wall, and kept in a room with an extremely low ceiling where he could only stoop and which the guards slowly filled with water. Decl. of Joseph Margulies dated Nov. 23, 2004, *available at Habib v. Bush*, Dkt. No. 1:02-cv-01130-CKK, Dkt. No. 83, Exh. 2 at ¶¶ 10-11 (D.D.C. Jan. 5, 2005); Aff. of Joseph Margulies dated April 27, 2005, *available at Habib v. Bush*, Dkt. No. 112 at ¶ 4 (D.D.C. Apr. 29, 2005). The State Department has long condemned the use of torture by state security agents in Egypt and Pakistan. *See, e.g.*, Department of State, *Country Reports on Human Rights Practices—2006* (Mar. 6, 2007) http://www.state.gov/g/drl/rls/hrrpt/2006/78851.htm (Egypt); http:www.state.gov/g/drl/rls/hrrpt/2006/78874.htm (Pakistan).

[15] *Id.* at 11. Mr. Habib has since been released and is living in Australia.

[16] *See, e.g.*, Unclassified Summary of Basis for Tribunal Decision, Tribunal Panel #20, *available at Tumani v. Bush*, No. 1:05-cv-00526-RMU, Dkt. No. 13, Exh. 2 at 9 (D.D.C. Aug. 18, 2005) (referring torture allegations for investigation while simultaneously upholding continued detention).

In another specific instance, the CSRT panel apparently relied upon a videotape made by the Taliban in which the detainee, Abdul Rahim Al Ginco, volunteered to be a "suicide martyr."[17] Mr. Ginco, who had been imprisoned by the Taliban from May 2000 to January 2002, explained that the confession on the video, in which he also claimed to have been a spy for the United States, was coerced and made in response to three months of torture by the Taliban.[18] He also explained that his alleged association with an alleged al Qaida weapons specialist took place in the Taliban prison: "They beat me and tortured me[.] I couldn't handle it, and [I] told them he's with me, that we are both American spies."[19] Nonetheless, although it appears that Mr. Ginco had been imprisoned by the Taliban from well before September 11, 2001, to the time the Taliban regime collapsed, the CSRT panel upheld the government's detention of Mr. Ginco as an enemy combatant.[20]

An analysis of recently released CSRT transcripts and documents found that 18% of the Guantanamo detainees alleged torture, but the available record does not indicate that the CSRT panels resolved allegations of torture before

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[17] Summarized Unsworn Detainee Statement (Unclassified/FOUO) ("Ginco Statement"), ISN #489, at 3629, http://www.dod.mil/pubs/foi/detainees/csrt/set_51_3490-3642_Revised.pdf at 3620-33. *See also* Tim Golden, *Expecting U.S. Help, Sent to Guantanamo*, N.Y. TIMES, Oct. 15, 2006, at 26; Carol D. Leonnig, *Coerced Confession Traps Detainee, Lawyers Say*, WASH. POST, Oct. 14, 2006, at A17.

[18] *Ibid.* Mr. Ginco reported that the Taliban subjected him to beatings, electric shock, being hung from the ceiling, water torture, striking the bottom of his feet with clubs, and sleep deprivation. Mot. for Partial Summ. J. at 8-9, *Ginco v. Bush*, No. 05-cv-1310-RJL (D.D.C. Oct. 10, 2006).

[19] Ginco Statement, *supra*, at 3630.

[20] Mr. Ginco apparently is housed in the psychiatric ward, in part because other detainees believe he is a spy for the Americans. *Id.* at 3622.

upholding the detention of such individuals.[21] Rather, "in each case, the panel proceeded to decide the case before any investigation was undertaken." Mark Denbeaux & Joshua W. Denbeaux, *No-Hearing Hearings*, Seton Hall Public Law Research Paper No. 951245, at 36 (Dec. 2006), http://ssrn.com/abstract=951245.

2. A detainee had no means of knowing when a CSRT panel relied on statements extracted from others by impermissible coercion

Even more difficult procedural problems are manifest in a case where, unbeknownst to the detainee, a third party was allegedly tortured or otherwise subjected to inhumane treatment and incriminated the detainee as a result. Because the CSRT panels often relied on classified information, it is impossible for *amici* to know how many times a CSRT panel upheld the detention of an individual as an enemy combatant in reliance on such evidence, and, of course, a detainee in custody at Guantanamo who must represent himself without counsel before a CSRT panel is at even a worse disadvantage in terms of access to information.

Consider, for example, the Department of Defense statement that the interrogation of detainee Mohammed al Qahtani produced "detailed information about 30 of Osama Bin Laden's bodyguards who are also held at Guantanamo."[22] According to an interrogation log obtained by a journalist, Mr. al Qahtani was subjected to questioning for approximately 20 hours per day for seven weeks after his arrival at Guantanamo, during which period he was kept in isolation, and subjected to sleep and sensory deprivation

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[21] *Amici* do not have access to the classified evidence presented in any individual case.

[22] Department of Defense, *Guantanamo Provides Valuable Intelligence Information* (June 12, 2005), http://www.defenselink.mil/releases/2005/nr20050612-3661.html.

and other abuses.[23] Under standard CSRT procedures, the 30 men whom Mr. al Qahtani accused would never be told who was the source of the statement that they were Osama Bin Laden's bodyguards or under what circumstances the accusation had been extracted, and Mr. al Qahtani's statements would be presumed genuine and accurate.

This concern is not hypothetical. The available CSRT record for Faruq Ali Ahmed, for example, does not contain any allegations of abusive interrogation, and indicates that the detainee was not informed of the source of the allegations against him.[24] The fortuitous publication of the interrogation log enabled Mr. Faruq's habeas counsel to determine that the source of the allegations against Mr. Faruq had been a detainee who was "abused and coerced into making statements inculpating other men."[25]

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[23] Department of Defense, *Interrogation Log, Detainee 063* (Nov. 23, 2002 to Jan. 11, 2003), at 27, www.time.com/time/2006/log/log.pdf. The FBI reported that Mr. al Qahtani's treatment left him "evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a corner of the cell covered with a sheet for hours on end)." Letter from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, FBI, to Major General Donald J. Ryder, Department of the Army, Criminal Investigation Command, at 2, ¶ 3 (July 14, 2004), *attached to* Letter from Marc D. Falkoff, Covington & Burling, to Administrative Review Board, Guantanamo Bay Naval Station regarding Faruq Ali Ahmed (Feb. 5, 2005) (on file with author).

[24] Decl. of James R. Crisfield, *available at Abdah v. Bush*, Dkt. No. 1:04-cv-1254-HKK, Dkt. No. 30, Exh. A at final page (D.D.C. Oct. 12, 2004) (attaching record). Mr. Faruq's personal representative at the CSRT took the unusual step of labeling part of the evidence implicating Mr. Faroq as "unreliable" on the grounds that it was derived from an informant who "has lied about other detainees to receive preferable treatment." There is no indication that he realized that other evidence had been derived from the coercive interrogation of another detainee. *Ibid.* The CSRT nonetheless upheld Mr. Faruq's detention as an enemy combatant.

[25] Letter from Falkoff, *supra*, at 3; *see also* Letter from Robert Knowles, Covington & Burling, to Administrative Review Board, Guantanamo Bay Naval Station regarding Sadeq Mohammed Said

(Continued on following page)

Even when detainees suspected that the accusations against them resulted from the torture of another detainee, it was impossible for them to prove it. For example, Ibrahim Zidan told the CSRT that he believed another person—Anwar Abu Faris—had made false statements about Zidan receiving training in Afghanistan because Faris had been rendered to Jordan and tortured.[25] The publicly available record of Mr. Zidan's CSRT proceeding does not indicate any effort by the CSRT to determine the truth of this allegation.

3. The CSRT record is woefully incomplete regarding the accuracy of allegations of torture or other coercion

As described above, even when the CSRT panels were aware of substantial allegations that statements used against detainees had been extracted by torture or other impermissible coercion, those allegations appear to have had no effect on the panels' decisions regarding whether those individuals were properly detained. The CSRT's failure to question the reliability of the evidence allegedly extracted by torture might be attributable to the government's view that it is not the CSRT's role to investigate allegations of abuse.[27]

That result might also be explained, at least in part, by the fact that CSRT panels might not have been provided with information that would enable them to evaluate whether statements had been extracted by

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Ismail, at 1-2 (June 3, 2005) (on file with author). As a detainee, Mr. Faruq himself is not permitted access to news publications.

[25] Summarized Sworn Detainee Statement (Unclassified/FOUO) ISN #761, at 1175-1176 http://www.dod.mil/pubs/foi/detainees/csrt/set_11_1145-1178.pdf. The State Department has reported on the use of torture to obtain confessions in Jordanian prisons. *See* Department of State, *Country Reports on Human Rights Practices—2006* (Mar. 6, 2007) at §1c, http://www.state.gov/g/drl/rls/hrrpt/2006/78855.htm (Jordan).

[27] Tr. of Mot. Hr'g, *supra*, at 85:20.

torture, even if they had been inclined to do so. Lieutenant Colonel Stephen Abraham of the U.S. Army Reserve, who was assigned to the Office for Administrative Review of the Detention of Enemy Combatants from September 11, 2004 to March 6, 2005 (the time period in which most of petitioners' CSRT proceedings were held) recently testified before Congress that a CSRT panel "would not be advised as to whether information [it received from the government] had been provided under duress." *Upholding the Principle of Habeas Corpus for Detainees: Hearing Before the House Armed Services Comm.*, 110th Cong. (July 26, 2007).[28]

Lieutenant Colonel Abraham further testified that a CSRT panel was given only "distilled summaries" of information about a detainee gathered from intelligence agencies and prepared for the panel by "case writers." *Id.* at 6. And he explained that "a summarized document might say that a detainee 'is a member of Al Qaeda' but would not include any information about * * * whether the source was paid for the information, [or] whether the source was detained or subjected to coercive interrogation techniques." *Ibid.*

The gap between the information provided to the CSRT panels and the facts relating to the coercive circumstances under which statements may have been obtained could not be filled by the detainee himself. Detainees were permitted only to hear an unclassified summary of the evidence—a summary that the CSRT itself described as "conclusory."[29] The detainee was unassisted by counsel, and could neither examine the classified evidence against him nor conduct independent factfinding. Consequently, the detainee could not develop a

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[28] Prepared statement of Lt. Col. Stephen E. Abraham, at 7, http://armedservices.house.gov/pdfs/FC072607/Abraham_Testimony072607.pdf.

[29] *See, e.g.*, Unclassified Summary of Basis for Tribunal Decision, Tribunal Panel #20, *supra*, at 8; *see also* Denbeaux, *supra*, at 1, 19.

record to challenge the provenance or reliability of any accusation.[30]

C. The DTA Does Not Appear To Authorize A Court To Engage In The Factfinding Necessary To Rule On The Legality Of The Executive Detention And, As Such, Is An Inadequate Substitute For The Common Law Writ Of Habeas Corpus

The Detainee Treatment Act (DTA) authorizes the United States Court of Appeals for the District of Columbia Circuit to "determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." Pub. L. No. 109-148, tit. X, § 1005(e)(2)(A), 119 Stat. 2680, 2739 (2005). Unlike other statutes that address the authority of federal courts to assess whether an individual is properly detained in government custody, however, the DTA does not purport to authorize a court to hear and determine the underlying facts. *Compare* 28 U.S.C. § 2243 (federal habeas statute providing that "[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require").

As such, the DTA does not appear to permit an adequate inquiry into whether inculpatory statements are unreliable because extracted by torture or other impermissible coercion, an inquiry that is essential to a meaningful judicial review of the validity of a CSRT detention determination, particularly under the circumstances presented here. CSRT panels chronically failed to identify and root out evidence extracted by torture or other impermissible coercion as detailed above, and the system provides no meaningful opportunity for the detainee himself to make such a record. Thus, there can be no assurance that the record presented to the court of appeals will provide the information necessary to enable it to assess whether, and to what extent, the detainee's

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[30] Denbeaux, *supra*, at 2, 24-33.

detention is based upon such evidence. This is so no matter how broadly the "record" is defined. *Cf. Bismullah v. Gates*, Nos. 06-1197, 06-1397, 2007 WL 2067938 (D.C. Cir. July 20, 2007).

Consequently, the court of appeals would be unable to make a meaningful decision about the legality of the detention. Instead, the court would be forced to rule without having before it the judicial factfinding necessary to make an accurate assessment of the circumstances under which the challenged evidence was obtained. (Upon further review of such a case, *this* Court would be placed in a similarly untenable position.)

As documented at the outset of this brief, common law courts would have refused to rely upon statements extracted by torture or other forms of inhumane treatment because such evidence is inherently unreliable, because torture is contrary to human dignity, and because the judiciary has never condoned such abhorrent practices nor allowed the judicial process to be corrupted by them. Ordinarily, federal courts would have the power to vindicate these values by conducting a probing inquiry into the factual and legal bases for a detention by the government. *See* 28 U.S.C. § 2243; *Boumediene v. Bush*, 476 F.3d 981, 1009 (D.C. Cir. 2007) (Rogers J., dissenting) ("Throughout history, courts reviewing the Executive detention of prisoners have engaged in searching factual review of the Executive's claims."). Forcing judges to proceed to adjudicate the validity of an Executive detention without such inquiry and based on statements extracted by torture or other impermissible coercion contravenes legal history and degrades the legal system. It is also a clearly inadequate substitute for the common law writ of habeas corpus.

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of the court of appeals and remand the cases for further proceedings.

Respectfully submitted,

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AUGUST 24, 2007

64 25pg (31) (10)

Nos. 06-1195; 06-1196

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In The

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF FORMER UNITED STATES DIPLOMATS DIEGO C. ASENCIO, J. BRIAN ATWOOD, HARRY G. BARNES, JR., A. PETER BURLEIGH, WILLIAM C. HARROP, SAMUEL F. HART, JOHN L. HIRSCH, ALLEN HOLMES, GENTA HAWKINS HOLMES, ROBERT V. KEELEY, L. BRUCE LAINGEN, ANTHONY LAKE, SAMUEL W. LEWIS, STEPHEN LOW, ARTHUR MUDGE, DAVID D. NEWSOM, THOMAS R. PICKERING, LAURENCE E. POPE, ANTHONY QUAINTON, WILLIAM D. ROGERS, J. STAPLETON ROY, PAUL K. STAHNKE, MICHAEL STERNER, RICHARD N. VIETS AND ALEXANDER F. WATSON AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Each of the *amici curiae* has been in the diplomatic service of the United States government, for the most part as a presidential appointee. Most of us also submitted a brief *amici curiae* before this Court in the *Rasul* and *Al Odah* cases in 2004. At that time we argued that denial of *habeas corpus* to prisoners at Guantanamo undermined one of our country's most important diplomatic assets – our perceived commitment to the rule of law. We now reiterate and stress that message in light of developments since 2004. Our names and diplomatic posts are as follows:

Diego C. Asencio served as Ambassador to Colombia from 1977 to 1980, Assistant Secretary of State for Consular Affairs from 1980 to 1983, Ambassador to Brazil from 1983 to 1986, and Chairman of the Commission for the Study of International Migration and Cooperative Economic Development from 1987 to 1989.

J. Brian Atwood served as Under Secretary of State for Management in 1993 and as Administrator of the United States Agency for International Development from 1993 to 1999.

Harry G. Barnes, Jr. served as Ambassador to Romania from 1974 to 1977, Director General of the Foreign Service and Director of Personnel in the Department of State from 1977

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[1] The parties in the petitions have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that no person or entity other than the *amici curiae*, their counsel of record, or the Center for Civil and Human Rights of Notre Dame Law School, has made a monetary contribution to the preparation or submission of this brief.

to 1981, Ambassador to India from 1981 to 1985 and Ambassador to Chile from 1985 to 1988.

A. Peter Burleigh served as Ambassador and Coordinator for Counter-terrorism from 1991 to 1992, Ambassador to Sri Lanka and the Maldives from 1995 to 1997, and Ambassador and Deputy Permanent Representative to the United Nations from 1997 to 1999.

William C. Harrop served as Ambassador to Guinea from 1975 to 1977, Deputy Assistant Secretary of State for Africa from 1977 to 1980, Ambassador to Kenya from 1980 to 1983, Inspector General of the Department of State and the Foreign Service from 1983 to 1987, Ambassador to Zaire from 1987 to 1991, and Ambassador to Israel from 1991 to 1993.

Samuel F. Hart served as Ambassador to Ecuador from 1982 to 1985.

John L. Hirsch served as Ambassador to Sierra Leone from 1995 to 1998.

Allen Holmes served as Ambassador to Portugal from 1982 to 1985, Assistant Secretary of State for Political-Military Affairs from 1985 to 1989, and Assistant Secretary of Defense for Special Operations and Low Intensity Conflict from 1993 to 1999.

Genta Hawkins Holmes served as Ambassador to Namibia from 1990 to 1992, Director General of the Foreign Service and Director of Personnel for the Department of State from 1992 to 1995, and Ambassador to Australia from 1997 to 2000.

Robert V. Keeley served as Ambassador to Mauritius from 1976 to 1978, Deputy Assistant

Secretary of State for African Affairs from 1978 to 1980, Ambassador to Zimbabwe from 1980 to 1984, and Ambassador to Greece from 1985 to 1989.

L. Bruce Laingen served as Ambassador to Malta from 1977 to 1979 and Charges D'Affaires in Tehran from 1979 to 1981.

Anthony Lake is a Professor at Georgetown University's School of Foreign Service, and served as Assistant to the President for National Security Affairs from 1993 to 1997.

Samuel W. Lewis served as Assistant Secretary of State for International Organization Affairs from 1975 to 1977, Ambassador to Israel from 1977 to 1985, and Director of the State Department Policy Planning Staff from 1993 to 1994.

Stephen Low served as Ambassador to Zambia from 1976 to 1979 and as Ambassador to Nigeria from 1979 to 1981.

Arthur Mudge served as USAID Assistant General Counsel from 1967 to 1969, USAID Mission Director in Guyana from 1974 to 1976, USAID Mission Director in Nicaragua from 1976 to 1978, and USAID Mission Director in Sudan from 1980 to 1983.

David D. Newsom served as Ambassador to Libya from 1965 to 1969, Assistant Secretary of State for African Affairs from 1969 to 1974, Ambassador to Indonesia from 1974 to 1977, Ambassador to the Philippines from 1977 to 1978, and Under Secretary of State for Political Affairs from 1978 to 1981.

Thomas R. Pickering served as Ambassador to Jordan from 1974 to 1978, Assistant Secretary of State for Oceans, Environment and Science from 1978 to 1981, Ambassador to Nigeria from 1981 to 1983, Ambassador to El Salvador from 1983 to 1985, Ambassador to Israel from 1985 to 1988, Ambassador and Representative to the United Nations from 1989 to 1992, Ambassador to India from 1992 to 1993, Ambassador to the Russian Federation from 1993 to 1996, and Under Secretary of State for Political Affairs from 1997 to 2001.

Laurence E. Pope served as Associate Coordinator for Counter-terrorism from 1991 to 1993, Ambassador to Chad from 1993 to 1996, and Political Advisor to the Commander in Chief, US Central Command, from 1997 to 2000.

Anthony Quainton served as Ambassador to Central African Republic from 1976 to 1978, Ambassador to Nicaragua from 1982 to 1984, Ambassador to Kuwait from 1984 to 1987, Ambassador to Peru from 1989 to 1992, and Assistant Secretary of State for Diplomatic Security from 1992 to 1995.

William D. Rogers served as Assistant Secretary of State for Inter-American Affairs, U.S. Coordinator, Alliance for Progress, from 1974 to 1976, and Under Secretary of State for Economic Affairs from 1976 to 1977.

J. Stapleton Roy served as Ambassador to Singapore from 1984 to 1986, Ambassador to the People's Republic of China from 1991 to 1995, Ambassador to Indonesia from 1996 to 1999, and Assistant Secretary of State for Intelligence and Research from 1999 to 2000.

Paul K. Stahnke is Minister Counselor, retired. Among other posts, he was Counselor of Mission at the United States Mission to the Organization for Economic Cooperation and Development in Paris from 1978 to 1982, and Permanent Representative to the United Nations ESCAP (Economic and Social Council for Asia and the Pacific) from 1982 to 1988, while also serving as Economic Counselor in the United States Embassy in Bangkok during the same period.

Michael Sterner served as Ambassador to the United Arab Emirates from 1974 to 1976, and Deputy Assistant Secretary of State for Near Eastern and South Asian Affairs from 1977 to 1981.

Richard N. Viets served as Ambassador to Jordan from 1981 to 1984.

Alexander F. Watson served as Ambassador to Peru from 1986 to 1989, Ambassador and Deputy Permanent Representative to the United Nations from 1989 to 1993, and Assistant Secretary of State for Western Hemisphere Affairs from 1993 to 1996.

Each of us is persuaded that these cases present issues of profound importance to the future role and influence of the United States in the world. Accordingly, *amici curiae* submit this brief in support of the petitioners, Lakhdar Boumediene et al. and Fawzi Khalid Abdullah Fahad Al Odah et al.

SUMMARY OF ARGUMENT

The court of appeals held that federal courts lack jurisdiction over petitions for *habeas corpus* by prisoners at Guantanamo. The effect of this ruling may be to deny prisoners at Guantanamo meaningful judicial review of the lawfulness of their incarceration.

In the *Rasul* and *Al Odah* cases in 2004, following lower court rulings which denied prisoners at Guantanamo access to meaningful judicial review, most of the present *amici* joined a brief *amici curiae* of former diplomats who advised this Court of the adverse diplomatic consequences for the United States of those rulings.

Not only were the lower court rulings widely criticized abroad, but they were seized upon by repressive governments as a license to incarcerate their own citizens and others with impunity. The result, we advised this Court, undermined "what has long been one of our proudest diplomatic advantages – the nation's Constitutional guaranty, enforced by an independent judiciary, against arbitrary government."[2]

In the three years since this Court's judgments in *Rasul* and *Al Odah* affirming the right of prisoners at Guantanamo to *habeas corpus*, large numbers of *habeas* petitions have been filed on behalf of prisoners at Guantanamo. However, Congress has subsequently eliminated *habeas corpus* for prisoners at Guantanamo, creating instead an alternative judicial review remedy, whose

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[2] *Brief of Diego C. Asencio et al. as Amici Curiae in Support of Petitioners*, at 5, in *Rasul v. Bush* and *Al Odah v. US*, Nos. 03-334, 03-343 (2004).

alleged inadequacy is among the issues presently before this Court.

Meanwhile the worldwide criticism of our indefinite incarcerations at Guantanamo – which now exceed five years for some prisoners – not only continues, but grows stronger. Despairing of a judicial solution, respected international organizations and friendly governments now call simply for the closing of Guantanamo.

The President indicates that he, too, would in principle prefer to close the detention facility. However, practical obstacles reportedly impede closing the prison, and may continue to do so for years.

If the mounting cost to American diplomatic interests is finally to be curbed, it is imperative, at minimum, to restore meaningful judicial review for prisoners at Guantanamo. Our nation cannot credibly champion the rule of law in the world, while being seen to disregard it in our own affairs.

ARGUMENT

We, the *amici curiae* lending our names in support of this brief, have all been in the diplomatic service of the United States. Some have been ambassadors or foreign service officers, others have had appointments at senior levels in the Department of State or in the other agencies of the United States Government dealing with "that vast external realm." All are retired from public service.

It is not our purpose to add to what the parties will offer on the merits. We hope rather to enlarge on their presentation by setting before the Court our collective

professional experience as to the significance for American diplomacy and international relations of the holdings of the court below.

We understand that the D.C. Circuit Court of Appeals held that in light of recent statutory amendments, prisoners at Guantanamo no longer have the right to *habeas corpus* recognized by this Court in *Rasul v. Bush* in 2004,[3] and are limited to an alternative judicial remedy, whose adequacy is among the issues now presented before this Court.[4]

This is, from our foreign policy experience, a case of vast public import. In the *Rasul* and *Al Odah* cases in 2004, following lower court rulings which likewise denied prisoners at Guantanamo access to meaningful judicial review, most of us joined a brief *amici curiae* of former diplomats, alerting this Court to the adverse diplomatic consequences of those rulings.

Not only were the lower court rulings widely criticized abroad, but they were seized upon by repressive governments as pretexts to imprison their own citizens and others with impunity. The result, we advised this Court, undermined one of our most important diplomatic assets – our nation's traditional constitutional safeguards, enforced by independent courts, against arbitrary government.[5]

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[3] 542 U.S. 466 (2004).

[4] *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

[5] *Brief of Diego C. Asencio et al. as Amici Curiae in Support of Petitioners*, at 5, in *Rasul v. Bush* and *Al Odah v. US*, Nos. 03-334, 03-343 (2004).

In the three years since this Court's judgments in *Rasul* and *Al Odah* affirming the right of prisoners at Guantanamo to *habeas corpus*, large numbers of *habeas* petitions have been filed. However, in the Detainee Treatment Act of 2005, Congress eliminated *habeas corpus* prospectively for prisoners at Guantanamo, creating instead an alternative judicial remedy.[6] In the Military Commissions Act of 2006, Congress apparently extended that denial of *habeas corpus* retroactively to petitions already filed in the courts.[7]

We understand that the questions of whether, despite these statutes, prisoners at Guantanamo are constitutionally entitled to *habeas corpus* and, if so, whether the alternative statutory review is a "constitutionally adequate substitute for habeas corpus," are among the issues now before this Court.[8] We profess no special expertise on those constitutional questions.

However, our professional experience convinces us that American diplomatic credibility and effectiveness in many areas of international relations suffer greatly from the widely shared perception that, by denying prisoners at Guantanamo access to *habeas corpus*, our country has lost

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[6] Detainee Treatment Act of 2005, Title X, Public Law No. 109-148, 119 Stat. 2739. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), this Court held that the Act did not bar *habeas* jurisdiction over petitions pending at the time of its enactment.

[7] Military Commissions Act of 2006, section 7(b), Pub. Law No. 109-366, 120 Stat. 2600.

[8] *Boumediene v. Bush*, 127 S. Ct. 1478, 1480 (Breyer, J., dissenting from denial of *certiorari*), *vacated, cert. and rehearing granted*, 127 S. Ct. 3078 (2007).

sight of its historic commitment to independent and effective judicial review of the lawfulness of detention.

As we said in our brief *amici curiae* in *Rasul*, that perception was already widespread by 2004, as evidenced by diplomatic and other denunciations of our denying prisoners at Guantanamo access to effective judicial review.[9]

In the three years since *Rasul*, the length of imprisonment at Guantanamo without effective judicial review, which exceeded two years for some prisoners in 2004, now exceeds five years in some cases. Yet to our knowledge, not a single prisoner at Guantanamo has been able to litigate to conclusion a *habeas* petition challenging the lawfulness of his detention. The court of appeals has now ruled that none may do so.

The world has grown understandably impatient with these deepening departures from the basic tenet of Anglo-American law, that no one may be subjected to prolonged deprivation of liberty without meaningful judicial review. Ever since the coming into force in 1976 of the International Covenant on Civil and Political Rights, now joined by more than 150 nations including the United States, that basic principle of our legal tradition is also a fundamental right in international law.[10]

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[9] *Brief of Diego Asencio et al.*, note 2 above, at 8-9.

[10] International Covenant on Civil and Political Rights, UN G.A. Res. 2200A (XXI), 16 December 1966, *entered into force*, 23 March 1976, 999 UNTS 171, article 9.4 ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.")

Thus, in 2005, denouncing detentions at Guantanamo as inconsistent with "the rule of law," the Parliamentary Assembly of the Council of Europe became only the latest international body to call on the United States "to allow all detainees to challenge the lawfulness of their detention before a regularly constituted court . . . "[11]

During 2004 and 2005, respected judges of friendly nations continued to denounce our detentions at Guantanamo. Joining a House of Lords ruling against indefinite detentions of suspected foreign terrorists pending deportation, Baroness Hale was nonetheless at pains to note that the prison in question was "not the British Guantanamo Bay."[12] In another judicial opinion, the current President of the Inter-American Court of Human Rights lamented the "*Guantanamización*" of criminal procedure in the hemisphere.[13]

By 2006, however, as a critical mass of observers became persuaded that no judicial solution would emerge, worldwide condemnation of Guantanamo escalated to the point of calling for outright closure of the prison. That call was made public in early 2006 in a joint report by five independent experts of the United Nations Commission on

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[11] Council of Europe, Parliamentary Assembly, Resolution 1433, *Lawfulness of detentions by the United States in Guantánamo Bay*, 26 April 2005, pars. 7 and 8.iii, accessible at http://assembly.coe.int/Documents/AdoptedText/ta05/ERES1433.htm (last visited Aug. 15, 2007)

[12] *A v. Sec'y of State*, [2004] UKHL 56 [2005], Baroness Hale of Richmond, ¶223.

[13] Inter-Am. Ct. H. Rts, *Tibi v. Ecuador*, Judgment of 7 Sept. 2004, Concurring Op. Judge Sergio García Ramirez, ¶30, *www.oas.org* (last visited Aug. 12, 2007).

Human Rights.[14] It was soon echoed by the Secretary General of the Council of Europe,[15] the President of the Parliamentary Assembly of the Council of Europe,[16] the European Parliament of the European Union,[17] the United Nations Committee Against Torture,[18] the Inter-American Commission on Human Rights,[19] the Prime Ministers of Denmark and Germany,[20] and the Attorney General of Britain.[21]

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[14] United Nations Commission on Human Rights, *Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention et al., Situation of detainees at Guantánamo Bay*, U.N. Doc. E/CN.4/2006/120, 27 Feb. 2006, ¶96, accessible at http://daccessdds.un.org/doc/UNDOC/GEN/G06/112/76/PDF (last visited Aug. 15, 2007).

[15] Council of Europe Press release – 009 (2007), *US detention facility in Guantanamo was set up 5 years ago – Council of Europe Secretary General calls for its immediate closure*, 9 January 2007, accessible at https://wcd.coe.int (last visited Aug. 15, 2007).

[16] Council of Europe Press release – 089 (2006), *PACE President joins call for closure of Guantanamo*, 17 Feb. 2006, accessible at https://wcd.coe.int (last visited Aug. 15, 2007).

[17] *Bulletin of the European Union*, EU 6-2006, par. 1.33.2, *European Parliament resolution on the situation of prisoners at Guantanamo*, 13 June 2006, accessible at http://europa.eu/bulletin/en/200606/p133021.htm (last viewed Aug. 15, 2007).

[18] UN Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture*, U.N. Doc. CAT/C/USA/CO/2, 25 July 2006, ¶22, accessible at http://daccessdds.un.org/doc/UNDOC/GEN/G06/432/25/PDF (last visited Aug. 15, 2007).

[19] Inter-American Commission on Human Rights, Press Release No. 27/06, *Inter-American Commission Urges to Close Guantanamo Without Delay*, July 28, 2006, accessible at http://www.cidh.oas.org/Comunicados/English/2006/27.06eng.htm (last visited Aug. 15, 2007).

[20] Associated Press, *Rights Activists Say US Needs to Act; Want Prisoners Tried or Released*, BOSTON GLOBE, June 11, 2006, p. A11.

[21] K. Sullivan, *British Attorney General Says Guantanamo 'Should Close,'* THE WASHINGTON POST, May 11, 2006, p. A21.

The Lord Chancellor of Britain exemplified the chorus of respected international figures condemning Guantanamo as an "affront to the principles of democracy." Avowedly speaking with the authority of his government, the Lord Chancellor publicly accused the US of "deliberately seeking to put detainees beyond the rule of law in Guantanamo Bay."[22]

In response, President Bush let it be known that he would also prefer to close the prison at Guantanamo.[23] However, practical obstacles have impeded closing the facility to date and may continue to do so for years to come.[24]

Meanwhile it is essential to halt the hemorrhaging of American diplomatic credibility through the open wound of Guantanamo. As long as the prison continues to operate, at minimum, prisoners must have access to meaningful, independent judicial review.

The world understands that this country must decide how our criminal justice system should address the contemporary realities of terrorism. That is a domestic matter.

The Guantanamo prisoners case is different. It has become an issue of unusual concern abroad because it is a vivid reminder of how America's undoubted military power

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[22] *World in Brief*, THE WASHINGTON POST, Sept. 14, 2006, p. A15.

[23] White House news release, *President Bush and Prime Minister Rasmussen of Denmark Participate in Joint Press Availability*, June 9, 2006, accessible at http://www.whitehouse.gov/news/releases/2006/06/20060609-2.html (last visited Aug. 15, 2007).

[24] *E.g.*, W. Glaberson, *Hurdles Frustrate Effort to Shrink Guantánamo*, N.Y. TIMES, August 9, 2007, p. A1.

may be applied elsewhere. Citizens of foreign countries cannot assume that what happened to the Guantanamo prisoners cannot happen to them. Neither citizenship in a friendly country, nor location far from hostilities, renders them safe from capture and transfer to Guantanamo. On the contrary, as noted by Justice Breyer:

> [P]etitioners in *Boumediene* are natives of Algeria, and citizens of Bosnia, seized in Bosnia. . . . Other detainees, including several petitioners in *Al Odah*, also are citizens of friendly nations, including Australia, Canada, Kuwait, Turkey, and the United Kingdom; and many were seized outside any theater of hostility, in places like Pakistan, Thailand and Zambia.[25]

It is not evident why, if the Executive Branch can detain prisoners in Guantanamo free of effective judicial inquiry, it cannot expand the practice to establish a global criminal justice system with other prison camps like Guantanamo, similarly subject to no legal oversight and in which any foreigner deemed a danger by some official might be detained indefinitely. Indeed, our government acknowledged last year that it used secret prisons abroad. Even while transferring the then remaining 14 prisoners from those prisons to Guantanamo, the government made no commitment not to use secret prisons again in the future; subsequently, it has reportedly detained at least one new prisoner in a secret prison.[26]

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[25] *Boumediene v. Bush*, 127 S. Ct. 1478, 1480 (Breyer, J., dissenting from denial of *certiorari*), *vacated, cert. and rehearing granted*, 127 S. Ct. 3078 (2007).

[26] S. Stolberg, *President Moves 14 Held in Secret to Guantanamo*, NEW YORK TIMES, Sept. 7, 2006, p. A1; G. Miller, *Bush signs rules for CIA interrogators*, LOS ANGELES TIMES, July 21, 2007, p. A1.

The Detainee Treatment Act and Military Commissions Act deny *habeas corpus* only to prisoners who are not United States citizens. This limitation comforts domestic public opinion. Abroad, however, it only adds fuel to the fire. We are seen to tell the world, in effect, that we are unwilling to subject Americans to the same treatment we impose on foreign citizens. Aside from whether such discrimination on the basis of nationality is unlawful, it is offensive to others.[27]

The location of these discriminatory detentions at the American military base in Cuba has a further resonance abroad. As this Court well knows, Guantanamo is an artifact of America's imperial age in this hemisphere. There is, in the view of others, a heavy irony that these prisoners should be claimed to be beyond the reach of effective judicial review simply because they are being held in an enclave in Cuba – a nation whose authoritarian pretensions this country has opposed for over forty years.

It has been the experience of each of us that our most important diplomatic asset has been this nation's values. Power counts. But this nation's respect for the rule of law – and in particular our reverence for the fundamental constitutional guarantee of individual freedom from arbitrary government authority – have gone far to earn us the respect and trust which lie at the heart of all cordial relations between nations. Thus the perception of this case abroad – that the power of the United States can be

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[27] In *A v. Sec'y of State*, [2004] UKHL 56, the Law Lords ruled that Britain's indefinite detention of suspected foreign terrorists pending deportation was unlawfully discriminatory and disproportionate, when there was no similar detention of suspected British terrorists, despite their presenting similar risks.

exercised outside the law and even, it is presumed, in conflict with the law – has severely diminished our stature and repute in the wider world, and will continue to do so for as long as prisoners at Guantanamo are denied meaningful judicial review.

We have come to believe, in our representation of this country to other nations, that those nations are more willing to accept American leadership and counsel to the extent that they see us as true to the principle of freedom under the law. Indeed, the matter has rarely been better put than by President Bush in signing the Torture Victims Protection Act on March 12, 1992:

> In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that they are respected everywhere.[28]

The teaching of the court below, however, is that those "democratic institutions and the rule of law" need not be respected in Guantanamo or indeed anywhere other than in the United States. This puts United States citizens abroad – and the capacity of American diplomats to protect their interests – at risk because it can be invoked in support of other countries' practices of arbitrary detention.

This teaching not only offends our friends, it also provides ammunition to enemies of freedom. Repressive states use our example to justify their own abuses. Explaining the detention of militants without trial,

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[28] Statement on Signing the Torture Victim Protection Act of 1991, 28 WEEKLY COMP. PRES. DOC. 465 (March 12, 1992).

Malaysia's law minister said that the practice was "just like the process in Guantanamo Bay."[29]

In recent testimony before the US Helsinki Commission, a respected human rights organization reported similar invocations of Guantanamo by officials in Egypt, Jordan, Lebanon, Pakistan, Russia, Saudi Arabia and Venezuela. When Secretary of State Rice criticized human rights violations in Venezuela, for example, that nation's Foreign Minister retorted, "How many prisoners do they have in Guantanamo?"[30]

The present Administration summed up two centuries of foreign policy in the *National Security Strategy of the United States of America*, issued most recently in 2006. That document commits the United States to champion "the nonnegotiable demands of human dignity." It points out that the United States "has long championed freedom because doing so reflects our values and advances our interests." It adds that the United States "must defend liberty and justice because these principles are right and true for all people everywhere." And it defines the "nonnegotiable demands of human dignity" as including "the rule of law," "human rights," and limits on the "reach of government."[31]

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[29] Sean Yoong, *Malaysia slams criticism of security law allowing detention without trial*, Assoc. Press, Sept. 17, 2003.

[30] Human Rights Watch, *Guantanamo: Implications for U.S. Human Rights Leadership*, testimony before the US Helsinki Commission by Tom Malinowski, June 21, 2007, accessible at http://hrw.org/english/docs/2007/06/21/usint16489.htm (last visited Aug. 15, 2007).

[31] *National Security Strategy of the United States of America* (March 2006), chapter II, *available at* http://www.whitehouse.gov/nsc/nss/2006.html (last visited Aug. 15, 2007).

In our professional experience we have found these principles to be the strongest assets of American diplomacy. The admiration and respect for this nation abroad is a function of our own commitment to liberty under law. In this, we have led the world. The success of our interests in the wider arena turns importantly on the extent to which this nation is perceived as continuing to abide by these principles. Any hint that America is not all that it claims, or that it is prepared to ignore a "nonnegotiable demand of human dignity," that it can accept that the Executive Branch may imprison whom it will and do so beyond the reach of the due process of law, demeans and weakens this nation's voice abroad.

We have taken it as our duty to so state to this Court. There is no doubting America's power at this juncture. But values count too. And, for this nation, there is no benefit in the exercise of our undoubted power unless it is deployed in the service of fundamental values: democracy, the rule of law, human rights, and due process. To the extent that we are perceived as compromising those values, to that extent will our efforts to promote our interests in the wider world be prejudiced. Such at least is our collective experience.

George Kennan's Long Telegram from the American Embassy in Moscow to the State Department in 1946 defined the authoritarian bestiality of the Soviet system and its aim to break "the international authority of our state."[32] It was perhaps the most important American

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[32] George Kennan, *"The Long Telegram" from Moscow, Feb. 22, 1946, in* FOREIGN RELATIONS OF THE UNITED STATES 706 VOL. VI (Government Printing Office, 1969).

diplomatic communication of the last century. In closing, Kennan spoke for us all and for all time:

> [T]he greatest danger that can befall us in coping with this problem of Soviet communism, is that we shall allow ourselves to become like those with whom we are coping.[33]

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals for the District of Columbia should be reversed.

Respectfully submitted,

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[33] *Id.* at 709.

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(18) (30)

Nos. 06-1195, 06-1196

FILED

AUG 24 2007

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SUPREME COURT, U.S.

In the

Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL.,
PETITIONERS
v.
GEORGE W. BUSH, ET AL.,
RESPONDENTS.

KHALED AL ODAH, ET AL.,
PETITIONERS,
v.
UNITED STATES, ET AL.,
RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF SALIM HAMDAN AS *AMICUS CURIAE*

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Date: August 24, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICUS CURIAE*[1]

Salim Ahmed Hamdan, the Petitioner in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), has been detained along with the Petitioners in *Boumediene* and *Al Odah* (collectively, "*Boumediene*"), at the Guantanamo Bay Naval Base and deemed an "enemy combatant." However, Hamdan has additionally been charged with "Conspiracy" and "Providing Material Support for Terrorism" and slated for trial before a military commission. Hamdan submits this *amicus curiae* brief to explain why he and others charged before military commissions are on a different footing than those detained and why he and others similarly situated must have access to the writ of *habeas corpus* to challenge those proceedings on a pre-trial basis. Due to the interrelationship of this issue with the questions presented in *Boumediene*, Hamdan has asked this Court to grant his Petition for Certiorari Before Judgment. At a minimum, Hamdan asks this Court to render a decision in *Boumediene* that makes clear that he and others facing trial by a commission retain the right to pre-trial habeas found in Hamdan's previous case before this Court.

In *Hamdan v. Rumsfeld*, this Court ruled that Hamdan could not be tried by military commission because his trial violated both the Uniform Code of Military Justice and the Geneva Conventions. This Court held that both sources of law protected Hamdan and enforced these protections against the respondents, which included the Secretary of Defense and the President. On remand from this Court, the district court interpreted section 7 of the intervening Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (the "MCA"), to require dismissal of Hamdan's habeas petition. Hamdan's appeal from the district court's decision is pending in the D.C. Circuit. The Circuit Court has issued an order staying *en banc* consideration of Hamdan's case pending this Court's decision in *Boumediene*. *See Hamdan v.*

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[1] In accordance with the Court's Rule 37, Hamdan has received written consent of counsel for all parties to file this brief as *amicus curiae*. The Consents have been or will be filed with the clerk. No counsel for a party authored this brief in whole or in part or made monetary contribution to the preparation or submission of this brief.

Gates, No. 07-5042 (D.C. Cir. July 24, 2007) (per curiam order). Hamdan and the approximately 75 detainees that the Government currently intends to try in commissions therefore have the most profound interests in the outcome of this case.

SUMMARY OF ARGUMENT

The questions presented by *Boumediene* implicate some of the same issues Hamdan has raised in his habeas petition. Specifically, both cases question whether the MCA's jurisdiction-stripping provision applies retroactively to habeas petitions pending at the time of passage. Moreover, both challenge the Government's position that neither Petitioners nor Hamdan are entitled to the protection of the Suspension Clause and constitutional habeas because of their status as alleged alien enemies held outside of the United States.

There is, however, a fundamental distinction between the cases currently before this Court and Hamdan's pending case before the court of appeals. While the *Boumediene* Petitioners challenge their indefinite detention and the CSRT procedures used by the Government to justify that detention, Hamdan raises a pre-trial challenge to the legality of the military commission slated to try him for alleged war crimes.[2]

Although Hamdan agrees with Petitioners' argument that the territorial ambit of the Great Writ reaches those detained at Guantanamo, he submits this *amicus* brief to explain how his case differs from those currently before the Court and why this Court should resolve *Boumediene* in a manner that protects Hamdan's pre-trial access, and that of other commission defendants, to the writ. Because the questions in *Boumediene* are so closely related to those raised by Hamdan, he has asked this Court to grant his petition for a Writ of Certiorari Before Judgment and consider these cases together. Pet. Cert. Before J., *Hamdan v. Gates* (No. 07-15) (filed July 2, 2007).

As explained below, the habeas right to challenge an unlawful trial is included within the right to challenge executive detention.

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[2] *Al Odah* petitioner Omar Khadr has been charged under the MCA, but the *Al Odah* and *Boumediene* appeals concentrate on the legitimacy of the CSRTs as a basis for non-commission Petitioners' continuing detention.

Moreover, the MCA and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 ("DTA") appear to allow for a far more limited judicial review of commissions than CSRTs. Accordingly, if this Court does not grant Hamdan's Petition for Certiorari Before Judgment, then he respectfully asks that this Court use *Boumediene* to make clear that if Petitioners have access to the Great Writ then, *a fortiori*, so too does Hamdan and any other defendant facing trial and punishment by a novel and untested military commission. Indeed, the Government has conceded as much. *See* Br. for Respondents in Opposition to Cert., *Hamdan v. Gates*, No. 07-15, at 12 ("If this Court holds in *Boumediene* and *Al Odah* that enemy combatants at Guantanamo Bay may petition for *habeas corpus* . . . there is no reason to suppose that its holding would not apply to those enemy combatants who have been designated for trial by military commission.").

Should the Court conclude, however, that the *Boumediene* Petitioners do not now have access to the writ, Hamdan asks that the Court make clear that the ruling does not prejudice his separate appeal arguing for the right to bring a pre-trial challenge to the military commissions based on the fact that such challenges lie at the core of traditional habeas jurisprudence and that the MCA fails to provide an adequate alternative for habeas review of the commissions.

ARGUMENT

I. Military Commission Challenges Under the Great Writ Differ Significantly from Detention Challenges

The challenge brought by Hamdan differs in important respects from the challenges brought by Petitioners to their detention. First, while each challenges a portion of the statutory framework established by the MCA and the DTA, the cases implicate different statutory provisions and legal concepts. Thus, while the analytical framework surrounding the Suspension Clause claims in each case is similar, the legal analysis will necessarily diverge. Moreover, the well-recognized conceptual difference between detention on the one hand, and criminal prosecution and punishment on the other hand, distinguishes the two challenges

and suggests that, whatever the scope of habeas may be to challenge detention, challenges to commissions present a far simpler case for this Court to resolve.

A. The Instant Case and Hamdan's Case Implicate Different Statutes and Require Separate Analyses

Once aliens are detained at Guantanamo, they are subject to the Combatant Status Review Tribunal ("CSRT") process that was put into effect after this Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Because Petitioners here seek the writ of *habeas corpus* on the grounds that their indefinite detention without charge is unlawful, *Boumediene* Cert. Pet. at 6, the CSRT procedures are the focus of their argument. Putting aside their arguments on the retroactivity of the MCA and the geographical reach of habeas, Petitioners' Suspension Clause argument focuses on the legal aspects of *detention*. Accordingly, Petitioners argue that the CSRT process and the attendant review procedures set forth in section 1005(e)(2) of the DTA are an insufficient substitute for robust habeas review. *Boumediene* Pet. at 18-21.

By contrast, Hamdan challenges the legality and jurisdiction of the military commission set to try him for offenses under the laws of war. Thus, while Petitioners challenge the part of the DTA/MCA scheme dealing with indefinite detention, Hamdan challenges the second part of that legislative framework, the authorization of a military commission process to try and convict non-citizen detainees. In explaining why the CSRT procedures were an inadequate substitute for habeas review of detention in this very case, Judge Rogers recognized this operative distinction and noted that the answer to the question may depend on whether the petitioners were challenging only their detention or were facing "imminent trial." *Boumediene v. Bush*, 476 F.3d 981, 1005 (D.C. Cir. 2007) (Rogers, J., dissenting).

Under the MCA, alien detainees designated as "unlawful enemy combatants" by a CSRT may be subject to trial by commission. If the Government does choose to prosecute, the CSRT determination as to "unlawful enemy combatant" status is "dispositive for purposes of jurisdiction for trial by military commission." MCA § 3(a) (adding 10 U.S.C. § 948(c), (d)). The

MCA likewise only allows for narrow, *post hoc* review of commission final decisions by the D.C. Circuit, which can only consider "whether the final decision was consistent with the standards and procedures specified" by the MCA, not whether those standards and procedures are consistent with federal law and the Constitution. MCA § 3(a) (adding 10 U.S.C. § 950(g)). The MCA makes no provision for challenging whether the commission's procedures themselves are legal. Nor is there provision for review of factual conclusions; rather, "the Court of Appeals may act only with respect to matters of law." *Id.* Thus, *Boumediene*'s review of DTA section 1005(e)(2) will not answer the question of whether MCA section 3 provides a sufficient substitute for a habeas challenge to the legality of the military commissions.

B. Individuals Charged Before Commissions Have a Stronger Case for Habeas Than Those Being Detained

This Court and others have long distinguished between individuals objecting to detention and those challenging trials by untested military commissions. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006) ("Hamdan does not challenge, and we do not today address, the Government's power to detain him"); *id.* at 2817 (Scalia, J., dissenting) ("The vast majority of pending petitions, no doubt, do not relate to military commissions at all, but to more commonly challenged aspects of 'detention' such as the terms and conditions of confinement."); *see In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 447 n.7 (D.D.C. 2005) (distinguishing between the "legality of military commission proceedings" and "the rights of detainees with respect to their classifications as 'enemy combatants'"), *overruled by Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). The Government has also recognized the long line of cases from this Court holding that "special procedural protections often attach to individuals, including suspected offenders, only after they are accused" of a crime. Draft Memorandum from Assistant Attorney General Jack Goldsmith to Alberto Gonzales, (Mar. 19, 2004), in *The Torture Papers* 379 (Karen J. Greenberg & Joshua L. Dratel eds.) (citing U.S. Const. amend. VI; *United States v. Ash*, 413 U.S. 300, 321

(1973) (Stewart, J., concurring); *United States v. Gouveia*, 467 U.S. 180, 189 (1984); and *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). And the Government agrees that this "distinction between those who are and are not accused makes eminent sense." *Id.* Indeed, in this very case the Government has implicitly acknowledged that trial and punishment by a military commission give rise to greater rights of judicial review than detention alone. *See* Br. for the Respondents in Opposition to Cert., *Boumediene v. Bush*, No. 06-1195, at 13.[3]

Because trial by commission raises more serious concerns than even indefinite detention for at least four reasons, individuals subject to the former have an even stronger case for habeas review than those facing the latter.

First, whereas detention is a military function that serves national security goals, punishment is a judicial function that serves the goals of justice. The Government has repeatedly argued that this Court must defer to the President on matters of detention because detention serves military purposes. *See, e.g.*, Br. of Respondent at 4, *Rasul v. Bush*, 542 U.S. 466 (2004) ("[D]etention serves the vital military objectives of preventing captured combatants from rejoining the conflict and gathering intelligence to further the overall war effort and prevent additional attacks."); Br. of Respondent at 15, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) ("The detention of captured enemy combatants serves vital military objectives. First, detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies.") (citations omitted). The Government has, in fact, gone to great lengths to distinguish detention from punishment – which is not a military but a judicial function. *See id.* at 15-16 ("The detention of captured combatants during an ongoing armed

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[3] *See also Hamdi*, 542 U.S. at 593 (Thomas, J., dissenting) (drawing the "punishment-nonpunishment distinction"); *Amicus* Br. of the Military Attorneys Assigned to the Def. in the Office of Military Commissions, *Al Odah*, No. 03-343, at 5-7; *Yamashita*, 327 U.S. at 30 (Murphy, J. dissenting) ("[T]he obnoxious doctrine asserted by the Government in this case, to the effect that restraints of liberty resulting from military trials of war criminals are political matters completely outside the arena of judicial review, has been rejected fully and unquestionably.").

conflict is neither a punishment nor an act of vengeance, but rather a simple war measure.") (citations omitted); *id.* at 16 n.5 ("[T]he detention of enemy combatants has not historically been regarded as a punishment and is not designed to promote the traditional aims of punishment.") (citations omitted).

While the President may seek this Court's deference on "simple war measures" related to "vital military objectives," such deference is not warranted for punishment. This Court, not the military, has particular expertise when it comes to "promot[ing] the traditional aims of punishment," and this Court, not the military, is entitled to deference on such matters.

Second, individuals tried by a military commission face the most severe possible punishments of life imprisonment or death. In contrast, individuals who are merely detained and who have not been tried by a military commission *must be released* at the end of the "particular conflict in which they were captured." *Hamdi*, 542 U.S. at 518, 521 (plurality); *see also In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946). Moreover, many persons detained as enemy combatants at Guantanamo have been released and repatriated to their own countries, even while the particular conflicts in which they were allegedly captured are ongoing. *See* Press Release, Department of Defense, *Detainee Transfer Announced* (June 19, 2007) ("Since 2002, approximately 405 detainees have departed Guantanamo for other countries"), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=11030. Because individuals who are tried by commissions face no such prospect of freedom, they should have access to the Great Writ to test those trials.

Third, a successful habeas challenge to commissions cannot in any way endanger national security. After a successful challenge to a commission trial, the petitioner remains a detainee at Guantanamo. By contrast, the Government must release from military custody a petitioner who brings a successful habeas challenge to his detention. The Government cannot, and therefore does not, cite a single national security rationale for denying Hamdan the habeas right to challenge the jurisdiction of military commissions. Thus, when faced with habeas challenges to commissions, the Court need not balance interests as it must when

confronted with a challenge to detention. *Compare Hamdi*, 542 U.S. at 524 (plurality) (applying a due process balancing test for detention) *with Gosa v. Mayden*, 413 U.S. 665, 689 n.5 (1973) (Douglas, J., concurring) (noting that habeas has been historically used to test the jurisdiction of tribunals to try defendants); *and Fay v. Noia*, 372 U.S. 391, 423 (1963) ("It is of the historical essence of *habeas corpus* that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void."), *overruled in part on other grounds by Wainwright v. Sykes*, 433 U.S. 72 (1977).

Fourth, the *Boumediene* Petitioners have argued previously that those facing commissions have a weaker case for habeas review because the commissions at least offer some form of process. *See, e.g.*, Supp. Br. of Pet'rs Boumediene, et al., and Khalid, *Boumediene v. Bush*, No. 05-5062, at 18 (D.C. Cir.); Guantanamo Detainees' Supp. Br., *Al Odah v. United States*, No. 05-5064, at 13. In reality, however, those facing commission procedures are in a far worse position than those merely being detained. If convicted, they face the ultimate penalties of life imprisonment or death. And even if acquitted by a commission, the MCA does not require that they be released. Instead, an acquitted commission defendant would simply be returned to detention at Guantanamo and face the same fate as the *Boumediene* Petitioners.

II. The Writ of *Habeas Corpus* Must Be Available to Challenge Military Commissions on a Pre-trial Basis

Amicus believes that all persons subject to detention at Guantanamo have access to the Great Writ. This is especially so for those facing novel and untested military commissions, which have traditionally been at the core of habeas jurisprudence. In this area of *criminal* enforcement and punishment, the Court's institutional competence is at its zenith, and the harmful consequences of the writ being granted (if any) are at their nadir. Moreover, the military commissions purport to have the power to sentence individuals to death. In this situation, where those seeking habeas are threatened with the Government's ultimate sanction, habeas review is all the more necessary.

A. The Great Writ Has Historically Been Available to Challenge the Jurisdiction and Constitutionality of Military Tribunals

This Court has repeatedly held that the legality of military commissions may be tested in federal court through the writ of *habeas corpus*. For example, in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118 (1866), this Court exercised jurisdiction over *Milligan*'s habeas petition to answer the question of whether the military tribunal in that case had "the legal power and authority to try and punish" the defendant. That this Court found the military commission to be unlawful in *Milligan* is less important for present purposes than the fact that it clearly understood the writ of *habeas corpus* to be available to challenge military trials.

The same has been true in the case of American servicemen, where this Court has long held that the lawfulness of tribunals can be challenged on habeas. *See United States v. Grimley*, 137 U.S. 147, 150 (1890) ("It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and . . . may discharge [the defendant] from the sentence."). Habeas is permissible to examine whether the tribunal: (1) is legally constituted; (2) has personal jurisdiction over the accused; and (3) has subject-matter jurisdiction to hear the offense charged. *Hiatt v. Brown*, 339 U.S. 103, 111 (1950); *see also Gusik v. Schilder*, 340 U.S. 128 (1950) (recognizing the availability of habeas to challenge the jurisdiction of a court-martial).

In the case of alleged alien enemies, the Court has likewise allowed military commission defendants to test the legality of the process through *habeas corpus*. *Ex parte Quirin*, 317 U.S. 1, 25 (1942), held that "neither the Proclamation nor the fact that [the defendants] are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States . . . forbid their trial by military commission." The Court declined to hold that enemy aliens lack the ability to file habeas petitions, even though Attorney General Biddle opened his argument with that claim. *Id.* at 11 (reprinting argument). Indeed, *Quirin* offered the saboteurs the same habeas rights that were extended in *Grimley*. *See id.* at 48 (concluding that "the Commission was lawfully constituted" and that "Charge I . . .

alleged an offense which the President is authorized to order tried by military commission").

Similarly, in *In re Yamashita*, 327 U.S. 1 (1946), the Court permitted a convicted enemy belligerent, a Japanese Army General, to file a habeas petition. The Court recognized the role of the federal courts under *habeas corpus* to consider "the lawful power of the commission to try the petitioner for the offense charged." *Id.* at 8. Specifically, the Court found that, absent suspension of the writ, the federal courts possessed "the duty and power to make such inquiry into the authority of the commission as may be made by *habeas corpus*." *Id.* at 9.

Hamdan is in much the same position as General *Yamashita* and the *Quirin* defendants during the Second World War. He has been designated as an "enemy combatant" but contends that the Constitution, laws, and treaties "withhold authority to proceed with the trial." *Id.* at 9. And just as in *Milligan*, *Grimley*, *Quirin*, and *Yamashita*, the writ of *habeas corpus* is the appropriate vehicle by which to test that authority.

B. *Johnson v. Eisentrager* Does Not Preclude Habeas Review of the Legality of Military Commissions

In Hamdan's case, the district court incorrectly denied access to the writ because it misread *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In fact, as this Court has already held with respect to the Geneva Conventions, *Eisentrager* "does not control this case." *Hamdan*, 126 S. Ct. at 2794.

1. This Court should reach the merits of Hamdan's habeas challenge, just as it did in *Eisentrager*

Eisentrager does not stand for the proposition that courts are closed to those in Hamdan's position. On the contrary, the *Eisentrager* petitioners received a full hearing before this Court, with the Court carefully considering the substance of their claims before resolving them *on the merits*. This Court recognized as much in *Hamdan*, noting that in *Eisentrager* "[w]e rejected [petitioners' Geneva Convention] claim on the merits because the petitioners [unlike Hamdan here] had failed to identify any

prejudicial disparity 'between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank.'" 126 S. Ct. at 2793 (quoting *Eisentrager*, 339 U.S. at 790).

The *Eisentrager* Court reached the merits of the habeas challenge even though the Petitioners were nationals of an enemy nation who conceded their status as enemy combatants. In contrast, Hamdan and the Petitioners in the present case are nationals of friendly countries, who vigorously contest their designation as enemy combatants. *See Rasul v. Bush*, 542 U.S. 466, 476 (2004) (noting these two factors as effectively distinguishing Guantanamo detainees from the *Eisentrager* petitioners). Since the Court reached the merits on a challenge to military commissions by conceded enemy combatants in *Eisentrager*, that case cannot stand for the proposition that the federal courts cannot do the same in the easier case of alien nationals of friendly nations who challenge their designation and eligibility for trial by military commission.

While *Eisentrager* did discuss at length whether enemy aliens were afforded access to American courts, it stated that "the doors of our courts have not been summarily closed upon these prisoners" and that it heard and considered "all contentions they have seen fit to advance" before concluding that no basis for issuing the writ appeared. 339 U.S. at 780, 781. Indeed, *Eisentrager* engaged in precisely the same habeas inquiry into the jurisdiction of the military commission that the Court had previously provided in *Quirin*, *Yamashita*, and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). That inquiry focused on "the lawful power of the commission to try the petitioner for the offense charged." 339 U.S. at 787 (quoting *Yamashita*, 327 U.S. at 8).

In reaching the merits of the habeas challenge, the *Eisentrager* Court recognized that—as in *Quirin* and *Yamashita*—it had jurisdiction to consider whether the petitioners had been charged with an offense cognizable as a war crime. 339 U.S. at 787 (concluding that the charges had "a basis in conventional and long-established law"). That is not the case here; in fact, a plurality of this Court determined that the previous "conspiracy"

charge was *not* a violation of the laws of war. *Hamdan*, 126 S. Ct. at 2785-86. Reliance on *Eisentrager* to deny habeas review is misplaced where no court has had the opportunity to pass on that fundamental jurisdictional question.

Moreover, *Eisentrager* did not need to address the underlying question of the legality of the World War II military commissions because those questions had already been decided in *Quirin* and *Yamashita*. 339 U.S. at 786 ("[W]e have held in the *Quirin* and *Yamashita* cases . . . that the Military Commission is a lawful tribunal to adjudge enemy offenses against the laws of war."). The petitioners in *Eisentrager* thus had no claim that the commission itself was illegitimate. Here, the prior military commission established to try Hamdan (which is identical in many material respects to the commission he faces now) was deemed *unlawful* by this Court only a year ago. *Rasul* observed that the *Eisentrager* petitioners had "been afforded access to [a] tribunal," a factor that weighed against the extension of habeas in that case. *Rasul*, 542 U.S. at 476. It is inconceivable to think that subjection to an unprecedented and unlawful tribunal could satisfy this criterion.

2. The territorial limits of *Eisentrager* do not apply here

The district court erroneously believed that *Eisentrager* compelled dismissal of habeas petitions filed from prisoners held outside the "sovereign realm" of the United States. But Hamdan's case falls squarely within the geographic scope of constitutional habeas, which historically had an "'extraordinary territorial ambit.'" *Rasul*, 542 U.S. at 482 n.12 (quoting Robert J. Sharpe, *The Law of Habeas Corpus* 188-89 (2d ed. 1989)). In the eighteenth century, habeas was recognized to extend beyond the Kingdom of England; it was "a writ of such a sovereign and transcendent authority, that no privilege of person or place can stand against it. It runs, at the common law, to all dominions held of the Crown. It is accommodated to all persons and places." *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 36 (H.L. 1758). Indeed, Lord Mansfield stated there was "no doubt" the writ could issue in any territory "under the subjection of the Crown," even if that territory was "no part of the realm." *King v.*

Cowle, 97 Eng. Rep. 587, 598 (K.B. 1759). The writ even extended to India well before Britain's 1813 assertion of sovereignty.[4] In short, habeas jurisdiction has always turned on de facto control, not the formalistic notions of sovereignty adopted by the circuit and district courts here for the first time.[5]

As this Court recognized in *Rasul* and *Hamdan*, *Eisentrager* presented a unique factual situation, and its holding does not govern here. The *Eisentrager* petitioners were German nationals convicted by a military commission in China. The commission was established with the consent of the Chinese Government.[6] Following their convictions, the petitioners were detained at Landsberg Prison in occupied Germany, where the United States shared jurisdiction over detentions with the other Allies.[7] Based on this relatively dense legal landscape, the Government claimed in *Eisentrager* that "[t]he rights of these enemy aliens all flow from and must be vindicated within the framework of the system established for the occupation of their country . . . . They are foreigners in a foreign land, held in that foreign land by the sovereignty now governing it as a result of war, defeat, surrender, and occupation . . . . [Their] legal status does not differ from that

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[4] By 1775, judges began to issue common-law habeas writs to British subjects as well as "natives." *E.g.*, N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* 81 (2003); B.N. Pandey, *The Introduction of English Law into India* 151 (1967).

[5] For instances in which the writ issued from a court in England to locations outside the realm but under the control of the Crown, *see King v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669) (writ issued to Channel Island of Jersey on behalf of individual committed on "suspicion of treason"); *King v. Overton*, 82 Eng. Rep. 1173 (K.B. 1668) (writ issued to Jersey); Sir Matthew Hale, *The History of the Common Law of England* 120 (1739) (writ issued to Channel Islands); *see also Bourn's Case*, 79 Eng. Rep. 465, 466 (K.B. 1619) (writ issued to Calais); M. Bacon, *A New Abridgement of the Law*, Tit. *Habeas Corpus* (B) (7th ed. 1832) (same).

[6] *Eisentrager*, Index to Pleadings, Ex. 4—Message of 6 July, 1946 to Gen. Wedemeyer from Joint Chiefs of Staff. J.A. 167.

[7] *See Basic Principles for Merger of the Three Western German Zones of Occupation and Creation of an Allied High Commission, reprinted in Documents on Germany*, 1944-1970, Comm. on Foreign Relations, 92nd Cong. (Comm. Print 1971), at 150-51.

of Germans now detained in Germany by German authorities. Like such prisoners, or like Englishmen in England, or Frenchmen in France, they must look to the rights and remedies open to them under their country's present laws and government," not the American Constitution. U.S. Br., *Johnson v. Eisentrager*, 1950 WL 78514, at *65-67 (1950) (No. 306).

In contrast, Guantanamo is "territory over which the United States exercises plenary and exclusive jurisdiction." *Rasul*, 542 U.S. at 475. It is "in every practical respect a United States territory." *Id.* at 487 (Kennedy, J., concurring). There is neither shared control by multiple sovereigns, nor an underlying legal framework apart from the Constitution. Guantanamo in 2007 is not remotely analogous to occupied Germany in 1947, and the arguments counseling denial of the writ in *Eisentrager*—unwillingness to interfere with the multiple sovereigns and the textured, distinctive legal system present in occupied Germany—are absent in the unique case of Guantanamo.

Moreover, for years the Government has held individuals such as Hamdan not only within the territorial jurisdiction of the United States, but actually within what this Court deemed the statutory jurisdiction of the *federal courts*. *Compare Eisentrager*, 339 U.S. at 768 (emphasizing that the "alien enemy . . . in no stage of his captivity[] has been within its territorial jurisdiction"), *with Rasul*, 542 U.S. at 475-84 (holding that habeas jurisdiction extended to Guantanamo). The Government continued to hold Hamdan and others facing commission trial at Guantanamo for years after *Rasul*. Textually, there was nothing to "suspen[d]" in *Eisentrager*, as the Court found that the writ had never protected the petitioners. Here, by contrast, this Court has already found that the writ protects Hamdan and others similarly situated.

3. The *Eisentrager* petitioners did not even raise the claim at issue in this case

Eisentrager does not actually implicate the challenges brought by either Hamdan or the *Boumediene* Petitioners, namely, their claims under 28 U.S.C. § 2241(c)(3) and constitutional habeas that they are held and set to be tried in violation of the Constitution, treaties, and laws of the United States. *Eisentrager*'s

counsel oddly asserted only one type of habeas jurisdiction, that for "being a citizen of a foreign state . . . in custody for an act done or omitted under any alleged . . . order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations." 28 U.S.C. § 2241(c)(4); *see also* Br. for Respondent at 2, *Johnson v. Eisentrager*, 339 U.S. 763 (reprinting statute involved and only reprinting (a) and (c)(4)); *id.* at 24-26 (making argument based solely on (c)(4)). Eisentrager thus stood in a different position from General Yamashita, for Yamashita asserted a (c)(3) claim, namely that his trial violated the Constitution, treaties, and laws of the United States.

As such, *Eisentrager* could not benefit from, and this Court did not confront the possible tension with, *Yamashita*'s foundational claim. Nor could it confront the tension with the bedrock claim of *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325-26 (1867), where this Court observed that the *habeas corpus* statute "is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or law. It is impossible to widen this jurisdiction." *Eisentrager*'s tactical decision to assert only jurisdiction predicated on "the law of nations" may have led this Court to analogize his claim to private-law disputes from the war of 1812. *See Eisentrager*, 339 U.S. 776-77.

The strategic choice by *Eisentrager*'s counsel to place all his eggs in one jurisdictional basket cannot bind later individuals who seek to pursue other avenues for jurisdiction, particularly claims that a person "is in custody under or by color of the authority of the United States or is committed for trial before some court thereof," 28 U.S.C. § 2241(c)(1); *or* "is in custody in violation of the Constitution or laws or *treaties* of the United States," *id.* § 2241(c)(3) (emphasis added); *or* "[i]t is necessary to bring him into court to testify or for trial," *id.* § 2241(c)(5). While some of the dicta in *Eisentrager* appear to reach more than (c)(4), the Court in that case had absolutely no occasion to revisit, question, or even consider the other possibilities for jurisdiction that were at

issue in *Yamashita* and earlier cases.[8] The claims today go to the heart of constitutional law, and cannot be analogized to 190-year-old private-law disputes in New York state courts.

For each of the above reasons, "nothing in *Eisentrager* . . . categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts." *Rasul*, 542 U.S. at 484 (citation omitted).[9]

C. Those Facing Commissions Must Have the Ability To Challenge the Trials' Legality on a Pre-Trial Basis

Hamdan's petition invokes the fundamental right to challenge his military commission before he is subjected to an unlawful trial. This Court has recognized the necessity of a pre-trial habeas challenge to military trials in Hamdan's very case, over the

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[8] The Court has stated that doubts about military jurisdiction should be resolved in favor of civilian jurisdiction. *See United States ex rel Toth v. Quarles*, 350 U.S. 11, 15 (1955) ("There is a compelling reason for construing the clause this way: any expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals."); *see also Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1868) ("the general spirit and genius of our institutions has tended to the widening and enlarging of the *habeas corpus* jurisdiction"); *Price v. Johnston*, 334 U.S. 266, 283 (1948) ("[T]he writ of *habeas corpus* should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ."), *overruled on other grounds by McCleskey v. Zant*, 499 U.S. 467 (1991).

[9] The *Hamdan* district court relied on the fact that, in *Eisentrager*, it was immaterial whether the petitioners were in the service of a German civilian or military institution. But that was because the petitioners were *indisputably German nationals*, 339 U.S. at 765, and that status alone rendered them enemies as a matter of law, *id.* at 773-75 & n.6. In addition, *Eisentrager* emphasized that "these prisoners were actual enemies, active in the hostile service of an enemy power. There is no fiction about their enmity." *Id.* at 778. By contrast, Hamdan is a citizen of Yemen, a nation not at war with the United States, and he does not share the presumptive enemy affiliation of the *Eisentrager* petitioners. *Boumediene*, App. 95a ("These detainees are citizens of friendly nations . . . [including] Yemen[.]") (Rogers, J., dissenting).

Government's objection that the military commission Hamdan faced was solidly grounded in precedent from World War II. *Hamdan* held that "abstention is not appropriate in cases in which individuals raise 'substantial arguments denying the right of the military to try them at all.'" 126 S. Ct. at 2770 n.16; *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975) (same). Given the unprecedented nature of the commissions under the MCA, today's commission defendants continue to have a "compelling interest in knowing in advance whether [they] may be tried by a military commission that arguably is without any basis in law." *Hamdan*, 126 S. Ct. at 2772.

Hamdan is just the most recent of this Court's important precedents recognizing the right of those facing trial by military commissions to raise pre-trial habeas challenges to the legality of those commissions. In *Quirin*, this Court evaluated the legality of a military commission pre-trial because "the public interest required that we consider and decide those questions without any avoidable delay." 317 U.S. at 19. And over a century prior, the Court countenanced pre-trial challenges to the jurisdiction of both civilian and military trials in foundational cases. *E.g.*, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (undertaking a pre-trial habeas review of defendants' claims and stating they could not be tried for certain substantive offenses); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868) (entertaining pre-trial habeas challenge to the jurisdiction of military commission). Such pre-trial challenges are wholly consistent with the Great Writ's function as a means to test the jurisdiction of a court purporting to hold and try a defendant. *See, e.g.*, *In re Mayfield*, 141 U.S. 107, 116 (1891); *Ex parte Yarbrough*, 110 U.S. 651, 653 (1884).[10]

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[10] The necessity of pre-trial habeas review is not undermined by the fact that Congress has now authorized the military commissions in the MCA, *see* MCA § 3, and provided for exclusive appellate review in the D.C. Circuit, *see* 10 U.S.C. § 950g. As the Court recognized in *Councilman*, exhaustion of remedies in the military system is not required—even where Congress makes civilian appellate review ultimately available—before allowing habeas relief. *Councilman*, 420 U.S. at 759 (citing *United States ex rel. Toth*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960)). In *Toth*, *Reid*, and *McElroy*, the habeas

Hamdan has challenged the jurisdiction of the commission, its rules and procedures, and the legality of the particular substantive offenses for which he will be tried. *See Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9 (D.D.C. 2006). And without an opportunity to raise these challenges to the commissions on a pre-trial basis, he will be irreparably harmed. Without knowing in advance whether the commission has jurisdiction over him, what evidence it may consider, and for which offenses he may be tried, he or any other defendant will be unable to develop an effective defense strategy.[11]

Moreover, requiring a defendant to submit to a procedure that he contends is unlawful causes him "a significant and irreparable injury." *Rafeedie v. INS.*, 880 F.2d 506, 517-18 (D.C. Cir. 1989). Specifically, if a defendant participates in a proceeding that is found unlawful, the Government will "know his defense in advance of any subsequent . . . proceeding," *id.* at 517, whether it be a lawfully convened military commission or a civilian criminal trial. But if a defendant, in order not to prejudice himself in a later proceeding, "does not present his factual defense . . . he risks forsaking his only opportunity," *id.*

Finally, denying defendants a pre-trial challenge to the legality of their commissions would do away with another core habeas protection. At common law, "habeas incorporated a

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petitioners contended that Congress had no constitutional power to subject them to the jurisdiction of military tribunals. *Id.* The fact that Congress had provided for appellate review by an Article III court did not preclude the Court from holding in those cases that it was inappropriate to require exhaustion of the military trial process before entertaining habeas challenges.

[11] The Government clearly understands the strategic litigation importance of certainty in advance of trial. Indeed, the Government asked Congress to place within the MCA a pretrial right for interlocutory review when it loses—even if it loses a mere *evidentiary* question. During the MCA drafting, the Government requested, and Congress gave it, the right to take an interlocutory appeal any time there is an adverse ruling that "terminates proceedings of the military commission with respect to a charge or specification" or "excludes evidence that is substantial proof of a fact material in the proceeding." MCA § 3(a), 10 U.S.C. § 950d(a)). Yet it is unclear whether the MCA affords the defendant a comparable ability to challenge adverse rulings on these issues.

speedy-trial guarantee," *Boumediene*, 476 F.3d at 1006 n.9 (Rogers, J., dissenting) (citing cases), that the MCA explicitly eliminates in commission proceedings. *See* MCA § 3(a) (codified at 10 U.S.C. § 948b(d)(1)(A)) (providing that "any rule of courts-martial relating to speedy trial' 'shall not apply to trial by military commission"). Without the ability to file a pre-trial habeas petition, defendants facing military trial would have no way to obtain swift justice.

III. This Court Has Already Decided in *Hamdan* That the Detainees at Guantanamo May Vindicate Structural Constitutional Guarantees

The Government has characterized this Court's decision in *Hamdan v. Rumsfeld* as a statutory decision. *See, e.g.*, U.S. Br. Opp. Cert., *Boumediene v. Bush*, No. 06-1196, at 5. While there is some truth to that description, *Hamdan* makes clear that the Government and the panel below have overread the *Eisentrager* decision in finding that the detainees can assert *no* constitutional protections whatsoever.

Although *Hamdan* certainly held that the President's initial scheme for military commissions violated the Uniform Code of Military Justice, *see Hamdan*, 126 S. Ct. at 2759, *Hamdan*'s entire framework is built around the constitutional axiom of separation of powers. If the Government was correct in its claim that Guantanamo detainees could assert no constitutional protections, Mr. Hamdan could not have prevailed before this Court. Mr. Hamdan asserted a *constitutional* conflict between the President's Military Order and congressional statutes. This Court did not resolve that conflict by deeming it irrelevant or somehow accepting the Government's claim that *Eisentrager* barred detainees from asserting structural principles. Rather, it inquired into the constitutional separation of powers issue and explicitly found that in a conflict between the Congress and the President in this arena, Congress prevails. *Hamdan*, 126 S. Ct. at 2774 n.23.

That is to say, *Hamdan* is grounded in a constitutional principle, one available for detainees to vindicate. If a Guantanamo detainee lacked the ability to assert a structural violation of the Constitution, the President would have been able

to do whatever he wanted in his Military Order without this Court's interference in *Hamdan*. But the Court properly rejected such bold arguments, and instead found that Hamdan, a detainee at Guantanamo, was able to raise the constitutional structural conflict between the President's Order and Congress' statutes.

This point is particularly relevant in the present case, for just as constitutional principles of separation of powers served to limit the President's power in *Hamdan*, the Suspension Clause serves as a structural constitutional "limit on Congress's powers" to strip the courts of jurisdiction over these habeas cases. *See Boumediene*, 476 F.3d at 998 (Rogers, J., dissenting). Accordingly, Congress may not strip this Court of jurisdiction unless it acts "pursuant to the powers it derives from the Constitution," *id.* at 995, in the same way that in *Hamdan*, the President could not order military trials unless he acted pursuant to powers he derived from Congress and the Constitution.

IV. The Court of Appeals' Decision Disregards this Court's Fundamental Rights Jurisprudence

The court of appeals' decision in *Boumediene* further erred by summarily dismissing the "fundamental rights" jurisprudence of this Court and the Petitioners' efforts to invoke those rights. In the "most significant"[12] of *The Insular Cases*, *Downes v. Bidwell*, this Court identified certain rights that were "indispensable to a free government," distinguishing them from less essential protections that, while provided for in the Constitution, do not necessarily apply in all circumstances when the Government acts outside the United States. *Downes v. Bidwell*, 182 U.S. 244, 282-83 (1901). In elaborating on the distinction between constitutional prohibitions in effect only in the United States and those that operate "irrespective of time or place," the Court made clear that certain types of legislation are simply outside the powers of Congress, regardless of location. *Id.* at 276-77; *see also Dorr v. United States*, 195 U.S. 138, 146 (1904); *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922) (reaffirming "fundamental rights"

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[12] *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 601 (1976).

jurisprudence). Indeed, in *Flores*, this Court summarized the key holdings of *The Insular Cases*, noting that even in territories where admission to the Union was not anticipated, "'fundamental' constitutional rights were guaranteed to the inhabitants." 426 U.S. at 601 n.30.

Despite this long history of protecting fundamental rights in territory under U.S. control, the court of appeals in this case summarily and erroneously rejected the guidance of *The Insular Cases*. The panel distinguished those cases by saying that they related only to "Territory or other Property belonging to the United States." *Boumediene*, 476 F.3d at 992.

This reasoning is grossly flawed, and provides no basis for the sweeping assertion that no constitutional rights, fundamental or otherwise, protect Petitioners. This Court has already rejected the claim that the lack of formal sovereignty over Guantanamo places it beyond the jurisdiction of American courts and law. *See Rasul*, 542 U.S. at 480 ("[T]he United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses."). Guantanamo "belongs" to the United States in every meaningful sense. As Justice Kennedy has explained, "Guantanamo Bay is in every practical respect a United States territory . . . . From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." *Id.* at 487 (Kennedy, J., concurring). This "implied protection," if it means anything, must include protection for fundamental rights.

Rasul itself strongly suggests that the "fundamental rights" reasoning of the *Insular Cases* applies at Guantanamo. In *Rasul* the Court stated that Petitioners, held for over two years in territory subject to the exclusive jurisdiction and control of the United States, had adequately alleged a violation of the Constitution or laws or treaties of the United States necessary to support a valid habeas petition. *Id.* at 484 n.15. The Court cited to a section of Justice Kennedy's concurring opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990), a case testing whether the Fourth Amendment applied when U.S. agents

searched the Mexican residence of a Mexican citizen. That section of Justice Kennedy's opinion began with the proposition that "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." *Id.* at 277. It then analyzed the facts of *Verdugo* in light of the "fundamental rights" jurisprudence of *The Insular Cases*. *Id.* at 278 (Kennedy, J., concurring).[13] Justice Kennedy's focus on due process in *Verdugo* drew heavily on Justice Harlan's analysis of *The Insular Cases*, noting that "'the question of which specific safeguards . . . are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case.'" *Id.* (Kennedy, J., concurring) (quoting *Reid*, 354 U.S. at 75 (Harlan, J., concurring); *see also id.* at 277 ("'The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place.'") (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)).

Thus, at a minimum, some "safeguards" are due to criminal defendants in American courts as a matter of fundamental constitutional right, regardless of the location of the trial or the

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[13] *Verdugo-Urquidez* does not purport to hold that the Constitution *always* is inapplicable to non-nationals overseas. Although the Court held in that case that the Fourth Amendment did not apply in those circumstances, it regarded as established that certain "'fundamental' constitutional rights are guaranteed to inhabitants of . . . territories" under the control of the United States. *Id.* at 268. The Court emphasized the limited and highly contextual nature of its decision, which carefully examined the history of the Fourth Amendment. *Id.* The degree to which the Constitution applies extraterritorially is complex and dependent on many factors, including the particular provision, the status of the individual claiming its protection, and the territory in question. *See, e.g.*, *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Ocampo v. United States*, 234 U.S. 91 (1914); *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring) (explaining that the question is not whether the Constitution applies, as it must, but "what constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations"). *Verdugo-Urquidez*, moreover, reserved the question whether a person whose "lawful but involuntary" stay was prolonged "by a prison sentence" might be entitled to constitutional protections. 494 U.S. at 271-72.

status of the defendant. But if the court of appeals' decision in *Boumediene* is affirmed without modification, the minimal protections afforded by this Court's fundamental rights jurisprudence will be nullified, and criminal defendants in the military commissions set up under the MCA will be totally subject to the whims of Congress and the tribunals in those proceedings. While the full scope of such protection need not be articulated in this case (which, after all, involves *detention* rather than *criminal prosecution*), it is imperative that the Court not affirm the court of appeals' decision in a manner that strips criminal defendants of the ability to invoke fundamental constitutional rights in their defense.

Instead, the Court should use this case to reaffirm the fundamental rights jurisprudence regarding those minimal constitutional protections afforded to criminal defendants in all American courts. Among these protections are the following:

(1) the Constitution's most fundamental right—the right to *habeas corpus*. *See Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (habeas is "shaped to guarantee the most fundamental of all rights"); *see also Downes*, 182 U.S. at 282 (identifying "free access to courts" as one of the "natural rights enforced in the Constitution"). Without access to the courts via habeas, defendants lack the ability to protect their fundamental rights.

(2) a guarantee of due process of law, *see Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974) ("there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law") (internal quotation marks and citation omitted), including, among other things, the right to be tried before an impartial and independent court, *see Hamdi*, 542 U.S. at 535 (identifying the right to be heard by "an impartial adjudicator" as one aspect of the process due to an enemy combatant), and the right to confront one's accusers, *see Crawford v. Washington*, 541 U.S. 36, 49 (2004) ("It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty

to cross examine") (internal quotation marks and citation omitted); *see also Hamdan*, 126 S. Ct. at 2798 (plurality) (citing cases).[14]

(3) the right to not be tried on *ex post facto* charges, *see Downes*, 182 U.S. at 277 (suggesting that the Ex Post Facto Clause applies "irrespective of time or place," as it goes to "the competency of Congress to pass a bill of that description") (emphasis omitted); and

(4) protection against the use of evidence extracted by torture or coercion, *see Miller v. Fenton*, 474 U.S. 104, 109 (1985) (abusive interrogation techniques "are so offensive to a civilized system of justice that they must be condemned"); *Rochin v. California*, 342 U.S. 165, 173-74 (1952) (coerced confessions gravely "offend the community's sense of fair play and decency. . . . [T]o sanction [such] brutal conduct . . . would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.").[15] Such evidence is not only inherently unreliable, *see, e.g.*, *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964), but its admission necessarily corrupts the judicial process and violates fundamental constitutional and human rights.

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[14] The MCA offends fundamental confrontation principles by reversing the longstanding presumption against admitting hearsay evidence, and placing on the party opposing its admission (typically the defendant) the burden of proving its unreliability. As a practical matter, it then makes it virtually impossible for defendants to prove unreliability by protecting from disclosure any sensitive sources and methods used by the Government to obtain the hearsay evidence. MCA § 3 (adding 10 U.S.C. §§ 949a(b)(2), 949d(f)).

[15] Long before the drafting of the U.S. Constitution, the common law unequivocally condemned torture and banned judicial reliance on coerced testimony. *See, e.g.*, *A. v. Secretary of State*, [2005] UKHL 71, ¶ 11, ¶ 51 (appeal taken from Eng.) ("[T]he English common law has regarded torture and its fruits with abhorrence for over 500 years."). But in this case, the Executive Branch has maintained that it was not "the CSRT's role" to investigate allegations of torture, and it was permissible for CSRTs to rely on evidence "obtained through a non-traditional means, even torture" to make status determinations. Tr. 12/2/04 oral argument at 83-87, *Boumediene v. Bush*, Civ. No. 04-1166 (RJL) (D.D.C.). Likewise, the MCA would allow testimony obtained through "coercion" to be introduced into evidence at a commission trial. *See* MCA § 3 (adding 10 U.S.C. § 948r).

This is by no means an exhaustive list; rather, it merely illustrates some fundamental rights that the court of appeals swept aside in its overbroad and erroneous ruling in this case. This Court should not ratify that result, as to do so would leave criminal defendants before commissions without protection in a process that raises serious constitutional questions. Instead, the Court should resolve this case in a manner that ensures that the commissions do not transgress the Constitution's limitations on the exercise of power at the expense of fundamental rights.

Such a ruling would be solidly grounded in precedent, as this Court has noted the limitations imposed by the Constitution on such tribunals. *Quirin*, 317 U.S. at 29 ("We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial."). Neither of the prerequisites identified in *Quirin* has been satisfied with respect to the *Amicus* here, as the acts with which he has been charged ("Conspiracy" and "Providing Material Support for Terrorism")[16] are not offenses under the law of war and his trial on these charges is prohibited by the Ex Post Facto Clause. Hamdan's right to assert these defenses, and this Court's power to protect fundamental rights wherever the authority of the United States is being exercised, must be preserved.

V. The MCA Provides Neither an Adequate Nor an Effective Habeas Substitute

Absent suspension of the Great Writ, Congress may only eliminate federal jurisdiction over constitutional habeas claims if it provides a substitute "which is neither inadequate nor ineffective to test the legality" of the executive action. *Swain v. Pressley*, 430 U.S. 372, 381 (1977). In Petitioners' case, this will require an inquiry into whether DTA section 1005(e)(2)'s provision for review of CSRT decisions in the D.C. Circuit is such a substitute. Military commission challenges, however, will require a wholly distinct inquiry into whether MCA section 3's very different

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[16] *See* Hamdan's Pet. for Writ of Cert. Before J., filed in *Hamdan v. Gates*, S. Ct. Case No. 07-15, at 4.

provision for limited review of final commission determinations in the D.C. Circuit can act as an adequate substitute. Whatever the answer to the "adequate and effective" inquiry with respect to Petitioners, the MCA falls far short of this standard with respect to the claims of defendants challenging trial by military commission.[17] To the extent this Court concludes that the DTA

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[17] The MCA's convoluted provisions leave some doubt as to whether defendants in military commissions have any recourse at all to the federal courts. Under the 2005 DTA, section 1005(e)(3) provided for limited review of decisions of military commissions. But MCA section 3 explicitly states that "[e]xcept as otherwise provided *in this chapter* and *notwithstanding any other provision of law* (including section 2241 of title 28 or any other *habeas corpus* provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever . . . relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter." MCA § 3(a), 10 U.S.C. § 950j(b)) (emphasis added). Since DTA section 1005(e)(3) is codified in Chapter 47 of Title 10 as opposed to Chapter 47A (where the MCA is codified), the MCA explicitly shuts off any recourse to the commission review procedures in DTA section 1005(e)(3). *See* MCA § 3(a)(1) ("Subtitle A of title 10, United States Code, is amended by inserting after chapter 47 the following new chapter: Chapter 47A-Military Commissions").

Elsewhere in MCA section 3(a), Congress vested the D.C. Circuit with "exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission." 10 U.S.C. § 950g(a). Another section of the MCA, however, states that "[e]xcept as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider any other action . . . relating to any aspect of the . . . trial . . . of an alien" detained as an enemy combatant. MCA § 7(a). This latter provision seems to nullify the review provisions added in section 3(a), defining the DTA's already invalidated commission review procedures as the only available recourse.

Thus, one could fairly read the MCA as providing *no* valid provision at all for review of military commissions by an Article III court. On the one hand, the provisions of DTA section 1005(e)(3) are inapplicable because they appear in a different chapter of the U.S. Code than the MCA and the latter specifically denies any provision outside its own chapter from being available to challenge the trial of detainees. On the other hand, the MCA's own provisions for review of commission decisions appearing in section 3(a) would seem to be inapplicable by virtue of section 7(a)'s mandate that only DTA section 1005(e)(3) can be used to challenge any aspect of the trial of a detainee. This

provides an adequate substitute for habeas review of CSRT decisions, *Amicus* Hamdan asks that it issue a narrow decision that does not extend to the very different provisions governing review of military commissions.

The MCA purports to prohibit federal courts from considering the issue at the heart of the Great Writ and of Hamdan's legal challenge: whether the military commissions are lawfully constituted and have jurisdiction to try and punish Hamdan and other defendants. *See Ludecke v. Watkins*, 335 U.S. 160, 162 (1948). Instead, the MCA apparently restricts the reviewing court's inquiry to the issue of "whether the final decision [of the commission] was consistent with the standards and procedures" set forth by the Act. MCA § 3(a), 10 U.S.C. § 950g(c)(1). That is, the judicial review provided for by the MCA—the supposed habeas substitute—consists only of considering whether the commission followed the assertedly unlawful procedures in the statute. Defendants are seemingly denied the ability under the MCA to claim that the military commission's "standards and procedures" are themselves impermissible.[18] And this statutory scheme itself gives the

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result would defy the Constitution's requirement that to remove habeas jurisdiction Congress must provide petitioners an adequate and effective substitute. Despite this statutory abyss, for the remainder of this brief Hamdan assumes for the sake of argument that MCA section 3(a)'s review provisions are available following the final decision of a military commission.

[18] MCA section 3 also states that the D.C. Circuit's jurisdiction "shall be limited to the consideration of . . . (2) to the extent applicable, the Constitution and the laws of the United States." MCA § 3(a) (codified at 10 U.S.C. 950g(c)(2)). To the extent this cryptic provision allows federal courts any recourse at all to the Constitution and laws of the United States, it does not specify whether courts may evaluate the commission's procedures and standards against those laws or whether they may consider only the commission's final decision in a particular case.

Moreover, the MCA seemingly precludes the federal courts from considering a defendant's treaty claims. MCA § 3(a), 10 U.S.C. § 950g(c), § 948b(g). Under common law habeas, in contrast, courts must consider and vindicate treaty-based rights. *See, e.g., Mali v. Keeper of the Common Jail*, 120 U.S. 1, 17-18 (1887). Although Congress is free to abrogate treaties entirely, it must do so with a clear statement; otherwise, courts must interpret federal law as being consistent with

Government the keys to the federal courthouse; by not finalizing a decision (or by delaying prosecution) it can block judicial review forever.[19]

The MCA's failure to provide petitioners with any opportunity to test the legality of the commission's procedures stands in marked contrast to the scope of review the DTA prescribes for CSRTs. The DTA requires a federal court to make the inquiry into CSRTs that the MCA forbids for military commissions: "whether the use of [the CSRT] standards and procedures . . . is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(C)(ii).[20]

In addition, while the MCA prohibits review of factual matters in challenges to commissions, the DTA requires it for challenges to CSRTs. *Compare* MCA § 3(a) (codified at 10 U.S.C. § 950g(b) (providing that in a review of a military commission, "the Court of Appeals may act only with respect to matters of law") *with* DTA § 1005(e)(2)(C)(i) (requiring, with respect to CSRTs, that the D.C. Circuit ensure "that the conclusion of the Tribunal be supported by a preponderance of the evidence"). This DTA provision requiring at least some minimal factual review of CSRTs has led the D.C. Circuit to announce orders governing the evidentiary and procedural rules of the tribunals. *See Bismullah v. Gates*, No. 06-1387, slip op. at 13 (D.C. Cir. 2007) ("[T]he DTA

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international law obligations. *Cook v. United States*, 288 U.S. 102, 120 (1933); *see also Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The MCA does not constitute any such clear statement—on the contrary, it purports to uphold the Geneva Conventions, *see* MCA § 6; *id.* § 3 (codified at 10 U.S.C. § 948b(f))—and defendants therefore retain their treaty rights but lack a forum in which to vindicate them.

[19] As explained above, because the MCA does away with traditional guarantees of a speedy trial, the Government may delay a commission trial indefinitely at any point, preventing a "final" judgment or decision, and thereby immunizing the military commissions from any judicial scrutiny.

[20] DTA section 1005(e)(3) which, as explained above, section 3(a) of the MCA renders inapplicable to defendants, did permit the D.C. Circuit to make a similar inquiry for military commissions. *See* DTA § 1005(e)(3)(D)(ii). *But see* MCA § 3(a) (codified at 10 U.S.C. § 950j) (eliminating recourse to the DTA review procedures); *supra* note 17.

directs this court to 'determine the validity' of a Tribunal's 'status determination' . . . with particular reference to 'the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence.'"). Because the MCA forbids the D.C. Circuit to even consider factual issues regarding military commissions, it will be unable to issue orders for those commissions of the kind issued in *Bismullah* for review of CSRT determinations.

The MCA's prohibition on any judicial challenge to factual or evidentiary matters is particularly unacceptable as a habeas substitute because the MCA allows a defendant to be convicted and punished based on evidence obtained through use of "cruel, inhuman, or degrading treatment"—so long as the interrogation occurred before passage of the DTA on December 30, 2005. *See* MCA § 3 (codified at 10 U.S.C. § 948r) (prohibiting the use of such evidence obtained after passage of the DTA, and so implicitly inviting its use if obtained before that date). Because evidence "procured by coercion is notoriously unreliable and unspeakably inhumane," *Boumediene*, 476 F.3d at 1006 (Rogers, J., dissenting), "the English common law has regarded torture and its fruits with abhorrence for over 500 years," *A. v. Sec'y of State*, [2006] 2 A.C. 221 ¶ 51 (H.L.) (appeal taken from Eng.) (Bingham, L.). Accordingly, a proceeding that welcomes evidence obtained through "cruel, inhuman, or degrading" methods and immunizes such evidence from the scrutiny of Article III judges is no substitute for the writ of *habeas corpus*.

The Great Writ has long distinguished between persons convicted by civilian criminal courts of general jurisdiction, and those tried by the military or executive. As Chief Justice Marshall explained, on habeas review a judgment from a military tribunal – an "inferior court[] of limited jurisdiction" – is "not placed on the same high ground with the judgments of a court of record" such as a civilian court. *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 209 (1830).[21] Because habeas is at its zenith when challenging the

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[21] At common law, "[t]he judgments or orders of these tribunals of special and limited jurisdiction did not carry the same presumption of validity as the judgments of a superior court [i.e. a court of general jurisdiction]." Gerald L.

validity of these inferior courts, any adequate substitute must allow a full opportunity to challenge the legal and factual basis of the detention and trial. The MCA provides defendants before military commissions with neither, and so is inherently inadequate and ineffective as a habeas replacement.

Amicus believes the DTA's procedures are also an inadequate substitute for the Great Writ in detention cases. Regardless of how the Court decides that question, *Amicus* believes that the inquiry into whether Congress has provided an adequate substitute in *Boumediene* requires a different analysis than its military-commission counterpart. For the reasons stated above, Hamdan would prefer that this Court render a decision about whether the MCA provides an adequate substitute for habeas in commission cases following full briefing and oral argument on this specific question. However, after six years of awaiting a trial, Hamdan believes this Court should, if at all possible, resolve this question now. Indeed, in *Quirin*, this Court opted to hear the pretrial challenge to the military commission, even though the defendants had only been in captivity for a few weeks. Hamdan is about to start his seventh year of captivity. Both the nation and the international community have a deep interest in knowing what procedures the Government will employ to try those accused of being enemy combatants. It is high time to resolve this uncertainty.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below. Whether through the vehicle of Hamdan's companion Petition for Certiorari Before Judgment, or within this case itself, the Court should hold that the MCA's elimination of pre-trial *habeas corpus* to challenge a newfangled military tribunal with powers of life and death is impermissible.

Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 982 (1998). Because these special tribunals "might employ less protective procedures than the common law courts," *id.* at 982 n.115, habeas requires greater scrutiny of their jurisdiction and legality.

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Date: August 24, 2007

25P

(19) (31)

Nos. 06-1195, 06-1196

FILED

AUG 24 2007

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

KHALED A. F. AL ODAH, *et al.*,

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v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF INTERNATIONAL HUMANITARIAN LAW EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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3 Int'l Comm. of the Red Cross, Commentary: Geneva Convention Relative to the Treatment of Prisoners of War (J. Pictet ed., 1960) ..... *passim*

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are all experts in international humanitarian law, including law professors, lawyers, and a former principal of the International Committee of the Red Cross.[2] The subject matter of this brief – the detailed rules and regulations contained in the 1949 Geneva Conventions and their Protocols governing the circumstances and conditions under which States Party are permitted to confine and continue to detain combatants in an armed conflict – presents issues of international humanitarian law of which *amici* have firsthand knowledge as practitioners and scholars and about which they are deeply concerned. Fundamentally, *amici* wish to emphasize the richness and adaptability of international humanitarian law and its continued relevance to the armed conflicts of the twenty-first century.

Geoffrey S. Corn is Assistant Professor of Law at South Texas College of Law and the former Special Assistant for Law of War Matters to the U.S. Army Judge Advocate General.

Constance de la Vega is Professor of Law and Academic Director of International Programs at the University of San Francisco School of Law.

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[1] This *amicus* brief is filed with all parties' consent. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Counsel for *amici*, Simpson Thacher & Bartlett LLP, also represents two individuals, Ahmad Mohammad Al Darbi and Abdullah Alsaiari (a.k.a. Bassam Mohammad Al Dubaikey), in connection with petitions in federal court challenging their detention by the U.S. military at Guantanamo Bay. Messrs. Al Darbi and Alsaiari are not parties to the cases at bar.

Louise Doswald-Beck is Professor of Law at the Graduate Institute of International Studies and Director of the University Center for International Humanitarian Law in Geneva, Switzerland. Between 1987 and February 2001, she was a legal advisor at the International Committee of the Red Cross and became Head of the Legal Division in March 1998.

Laurel Fletcher is Director of the Boalt Hall International Human Rights Law Clinic. Professor Fletcher is active in the areas of transitional justice and humanitarian law.

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David J. Scheffer is the Mayer, Brown, Rowe & Maw / Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law. He is the former U.S. Ambassador-at-Large for War Crimes Issues (1997-2001) and exercised significant

responsibility within the U.S. Government for the investigation and prosecution of atrocity crimes (genocide, crimes against humanity, and war crimes) on a global basis.

Ron Slye is Associate Professor and Director of International and Comparative Law Programs at Seattle University School of Law. He teaches, writes, and consults in the areas of public international law, humanitarian law, and international human rights law.

Helen Stacy is a senior research scholar at the Center on Democracy, Development, and the Rule of Law at Stanford University's Freeman Spogli Institute for International Studies. She teaches at Stanford Law School.

SUMMARY OF ARGUMENT

The Geneva Conventions (the "Conventions") and their two Protocols provide detailed rules and protections governing the detention of combatants in armed conflicts. These rules govern the legality of an individual combatant's confinement, his right to challenge such confinement, the circumstances and conditions under which he may be interrogated, and his general treatment. A failure to comply with the Conventions' provisions has potentially serious consequences.

It is critical that Petitioners retain the ability to challenge the sufficiency of the current legal framework governing the terms and conditions of their confinement. *Amici*, therefore, respectfully urge this Court to allow Petitioners the opportunity to meaningfully contest the

legality of their detention under U.S. and international law, including the Geneva Conventions, their Protocols, and all domestic laws implementing them.

ARGUMENT

I. INTRODUCTION

International humanitarian law ("IHL"), also called "the law of war," describes the international rules governing armed conflict. As long as groups of people, and later states, have waged war, there have been rules in place defining acceptable behavior in armed conflict. Many of these customary rules now are contained in a web of bilateral and multilateral treaties, making IHL one of the most codified areas of international law. Customary international law continues to develop and supplement this extensive treaty regime. *See* Customary International Humanitarian Law (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

Modern IHL is founded upon the Geneva Conventions, which apply to "all cases of declared war or of any other armed conflict" as set forth in Article 2, common to all Conventions. The international community drafted these multilateral treaties in the aftermath of World War II to address the shortfalls of prior IHL treaties and to clearly prohibit atrocities such as those committed during that war. The United States played a leading role in this process. The Conventions now enjoy universal acceptance among the states of the world. Press Release, Int'l Comm. of the Red Cross, Geneva Conventions of 1949 Achieve Universal Acceptance (Aug. 21, 2006), *available at* http://

www.icrc.org/web/eng/siteeng0.nsf/html/geneva-conventions-news-210806 (last visited Aug. 21, 2007).

The collective goal of the Geneva Convention regime is to mitigate the effects of war by protecting persons who do not, or who can no longer, participate in hostilities. Accordingly, the Geneva Conventions provide specific protections to four classes of Protected Persons: the wounded and the sick in the field ("GC I"), the wounded and sick at sea ("GC II"), prisoners of war ("GC III"), and civilians ("GC IV").[3]

Two Additional Protocols supplement the Conventions with additional rules and protections. Additional Protocol I ("AP I") addresses international armed conflicts, whereas Additional Protocol II ("AP II") addresses non-international armed conflicts.[4] Although the United States has not ratified either Protocol, it has, nonetheless, recognized that certain key provisions dealing with the humane treatment of detainees constitute binding customary international law. In particular, Article 75 of AP I sets forth certain minimum guarantees that must be respected under all circumstances.

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[3] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[4] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

This Court has noted that the failure of the United States to ratify AP I is not due to objections to Article 75; rather, "the Government 'regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.'" *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2797 (2006) (quoting William H. Taft IV, *Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (2003) (alteration in original)).

Though the four Geneva Conventions primarily apply to international armed conflicts, one exception is Common Article 3, which is common to all four Conventions. Common Article 3 – a "convention in miniature" – sets forth a minimum set of rules governing non-international armed conflicts. *See, e.g.*, GC III, art. 3. While brief, the Article reflects "the rules of humanity which are recognized as essential by civilized nations. . . ."[5] 3 Int'l Comm. of the Red Cross, Commentary: Geneva Convention Relative to the Treatment of Prisoners of War 35 (J. Pictet ed., 1960) [hereinafter GC III Commentary] (art. 3).[6] AP II supplements the rules contained in Common Article 3. *See* AP II, art. 2(1) (treaty applies to "all persons affected by . . . armed conflict").

Combatants in non-international armed conflicts are also entitled to the protections of Article 75 of AP I. This

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[5] *See also* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27) (noting that Common Article 3 reflects elementary considerations of humanity).

[6] The International Committee of the Red Cross has promulgated the official Commentary to each of the Geneva Conventions. Members of this Court have recently looked to the official Commentaries to the Geneva Conventions for authoritative guidance in interpreting the meaning and intent of the treaties. *See Hamdan*, 126 S.Ct. at 2790 n.48.

Article sets forth a number of "Fundamental Guarantees" for those who are "in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol. . . . " AP I, art. 75(1). These Fundamental Guarantees mirror many of the provisions in the Geneva Conventions.

Elements of international human rights law and domestic law may apply alongside or in place of these IHL protections depending upon a number of factors, including factual circumstances, the classification of the conflict, and the existence of specific IHL rules governing the issue in question. To the extent that IHL does not apply, domestic law and international human rights law would govern a detainee's treatment. This brief addresses only those Petitioners whose detentions are governed by IHL, specifically the 1949 Geneva Conventions and their Protocols.

II. INDIVIDUALS WHO QUALIFY AS PRISONERS OF WAR MAY ONLY BE DETAINED TO PREVENT THEM FROM RETURNING TO THE THEATER OF WAR

GC III codifies the historic practice of interning combatants to prevent them from returning to the theater of war. GC III's protections apply to combatants who are prisoners of war ("POWs"). *See* GC III, art. 4 (defining POWs). Article 5 of GC III provides that

> [s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [defining POWs], such persons shall enjoy the protection of the present Convention until such

> time as their status has been determined by a competent tribunal.

Id., art. 5. *See also* AP I, art. 45(1).

A detainee therefore is entitled to a presumption that he or she is a POW until the state holding the detainee (the "Detaining Power") has proved otherwise. GC III, art. 5 (noting that individuals enjoy POW treatment "until such time as" the Article 5 tribunal rules otherwise); AP I, art. 45(1) ("A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the Detaining Power . . . . ").

The provisions and rules governing non-international armed conflict do not create a specific regime for the detention of individuals. Rather, the procedures applicable to their detention are governed by Common Article 3, AP II, and domestic law as buttressed by relevant provisions of international human rights law, such as the right of court review. *See, e.g.*, International Covenant on Civil and Political Rights, art. 9, ¶ 4, *concluded* Dec. 16, 1966, 999 U.N.T.S. 171.

III. WHEN COMBATANTS ARE DETAINED, THE GENEVA CONVENTIONS PROVIDE DETAILED RULES REGARDING THE CONDITIONS OF THEIR CONFINEMENT, WHICH MUST BE HUMANE AND COMPARABLE TO THE CONDITIONS ENJOYED BY FORCES OF THE DETAINING POWER

When combatants are detained, GC III regulates many of the quotidian aspects of such detention. *See, e.g.*, GC III, arts. 12-81. Some examples of these numerous regulations include:

- Detainees are to be, at a minimum, "quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area" including with respect to cubic space, general installations, and bedding. *Id.*, art. 25.[7]
- Conditions of confinement must make allowance for "habits and customs." *Id.*
- The Detaining Power must also afford "every guarantee of hygiene and healthfulness." *Id.*, art. 22. *Accord id.*, art. 29.
- The Detaining Power is under general obligations to provide sufficient and healthy rations that take account of the habitual diet of detainees. *Id.*, art. 26.

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[7] *But see* GC III Commentary at 501-02 (art. 108) (noting that such equal treatment is not appropriate where the conditions afforded the Detaining Power's forces fall short of the dictates of the Convention or of the principle of humane treatment); *id.* at 639 (art. 135).

- The Detaining Power must provide proper medical care to detainees as needed. *Id.*, arts. 30-31.
- Detainees must be accorded "complete latitude in the exercise of their religious duties." *Id.*, art. 34.
- Detainees must be accorded, among other privileges, the right to physical exercise (including in the open air), intellectual development, and recreation. *Id.*, arts 38, 108; GC III Commentary at 236-37 (art. 38) & 504 (art. 108).

In addition, and of particular significance, the Conventions dictate that combatants who are detained must be allowed to communicate with the outside world, subject to "necessary censorship." GC III, art. 71. *Accord id.*, art. 70. Denial of the right to communicate with the outside world, and particularly with family members, constitutes inhuman treatment prohibited by the Conventions. GC III Commentary at 627 (art. 130). The right to communicate includes the right to prepare, execute, and transmit legal documents. GC III, art. 77.

Moreover, the Power to which combatants owe allegiance must be informed of their detention and the measures taken for implementing the Conventions. *Id.*, art. 69. Combatants must also be given access to the International Committee of the Red Cross and other humanitarian organizations. *See, e.g., id.*, arts. 3, 9.

More generally, Common Article 3, which applies in both international and non-international armed conflicts, specifically proscribes "at any time and at any place whatsoever":

- violence to life and person;
- cruel treatment and torture; and
- outrages upon a person's dignity, in particular humiliating and degrading treatment.

GC III, art. 3. Article 75 of AP I adds to this list corporal punishment and the threat of any of the foregoing acts. *See also* AP II, art. 4 (setting forth similar fundamental guarantees in non-international armed conflicts).

IV. EVEN DETAINEES SUBJECT TO CRIMINAL AND DISCIPLINARY SANCTIONS ARE ENTITLED TO HUMANE TREATMENT AND CONDITIONS OF CONFINEMENT COMPARABLE TO THE FACILITIES GRANTED TO FORCES OF THE DETAINING POWER

Detainees may be subject to criminal and disciplinary sanctions for offenses committed either before or after capture. Under GC III, Articles 82-108 set forth the exclusive regime for effectuating such sanctions. GC III, art. 82 ("no proceedings or punishments contrary to the provisions of this Chapter shall be allowed."). Further, even where detainees are in disciplinary confinement, the Detaining Power must provide the principal safeguards of the Conventions. GC III Commentary at 503 (art. 108). Moreover, GC III applies with equal force even when detainees are prosecuted for events that occurred prior to capture. GC III, art. 85.

The Geneva Conventions contain a detailed set of rules setting out the due process rights of detainees. *See id.*, arts. 82-108. *See also* AP I, art. 75 (setting forth due process rights as fundamental guarantees applicable to all individuals detained in armed conflict). Similarly,

Common Article 3 also protects the core procedural rights of detainees. The Article prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are recognized as indispensable by civilized peoples." GC III, art. 3. *Accord* AP II, art. 6.

Confinement while awaiting trial for an indictable offense is permitted only where members of the armed forces of the Detaining Power would be subject to confinement if accused of a similar offense or if confinement is essential for national security purposes. GC III, art. 103. However, "[i]n no circumstances, shall the [pre-trial] confinement exceed three months." *Id.* If an individual is convicted, the type and execution of penalties post-conviction must be equivalent to those applicable to members of the armed forces of the Detaining Power. *Id.*, arts. 87-88.

V. THE CONVENTIONS PROHIBIT STATES PARTY FROM ABUSING DETAINEES DURING INTERROGATION OR FROM USING PHYSICAL OR MENTAL COERCION TO OBTAIN INFORMATION OR TESTIMONY

When a combatant is properly detained, the Detaining Power may attempt to obtain information from him or her. The Conventions, however, carefully regulate methods of interrogation in order to ensure humane treatment and a non-coercive environment. GC III Commentary at 163-64 (art. 17).

To the extent that combatants are questioned, interrogations must be carried out in a language they understand and under strictly non-coercive conditions.

GC III, art. 17. Under GC III, "[n]o physical or mental torture, nor any other form of coercion, may be inflicted" to secure any information whatsoever. *Id.* Detainees who refuse to answer "may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." *Id.* This prohibition includes practices "such as protracted questioning resulting in extreme exhaustion and nervous breakdown and carried out in such conditions that the accused is induced to admit anything at all in order to bring it to an end." GC III Commentary at 472 (art. 99). Similarly, no moral or physical coercion may be exerted on a detainee in order to induce him or her to admit guilt for an act of which he or she is accused. GC III, art. 99. Indeed, the Conventions specifically prohibit any use of chemical products to induce compliance or overcome willpower. GC III Commentary at 471-72 (art. 99).

In all situations, including interrogation, both Common Article 3 and Article 75 of AP I prohibit violence to life and person, cruel treatment, torture, and outrages against personal dignity, including humiliating and degrading treatment. GC III, art. 3; AP I, art. 75.

These provisions addressing interrogation respond directly to practices employed in World War II whereby certain categories of prisoners were placed *incommunicado* in "interrogation camps" before being sent to standard POW camps. GC III Commentary at 163 (art. 17). These camps were outside the control and oversight of Protecting Powers and the International Committee of the Red Cross. *Id.* The drafters of the 1949 Conventions made sure to prohibit not only various forms of "coercion" in interrogation, but also the use of "physical and mental torture." *Id.*

VI. THE CONVENTIONS ARE BASED ON SEVERAL FOUNDATIONAL PRINCIPLES

As demonstrated above, the Geneva Conventions and their Protocols set forth detailed regulations governing the detention, treatment, and prosecution of all combatants captured during armed conflict. These protections – which rest on the foundational principles of humane treatment, non-punitive detention until conviction, equality, and non-discrimination – safeguard the lives and dignity of combatants. In turn, the foundational principles provide guidance as to how the protections are to be applied in individual cases. Two of these principles, humane treatment and non-punitive detention, are particularly instructive here.

The principle of humane treatment requires that combatants who are in the "power of the enemy" and are outside of combat, whether they have laid down their arms, been captured, been injured, or fallen sick, must under all circumstances be protected and treated humanely. Humane treatment requires respect for the lives, dignity, and physical and moral integrity of all detained persons. *See, e.g.*, GC III Commentary at 627 (art. 130). The Detaining Power's duty to provide humane treatment has three major components: (1) the duty to provide basic life necessities (food, water, shelter, medical care); (2) the duty to respect human dignity; and (3) the prevention and prosecution of criminal conduct. *See* Maj. Thomas H. Barnard, *Preparing Interrogators to Conduct Operations Lawfully*, Army Law., Feb. 2007, at 9.

The principle of non-punitive detention prohibits detaining a combatant under penal conditions unless he or she has been charged with or convicted of a crime or

otherwise subjected to disciplinary measures. Thus, preventative internment must be distinguished from punitive detention. As described above, the Conventions do provide for the trial and punishment of combatants accused of committing crimes either before or after capture GC III, art. 103. Punitive detention, however, is permissible only following conviction of an indictable offense by a properly constituted tribunal within the terms established by the Conventions. *See id.*, art. 99.

VII. ANY BREACH OF ANY OBLIGATION ARISING UNDER THE CONVENTIONS IS SERIOUS AND MAY GIVE RISE TO STATE RESPONSIBILITY, INDIVIDUAL CRIMINAL LIABILITY, AND OTHER CONSEQUENCES

Compliance with the foregoing provisions and principles of the Conventions is a binding obligation that all States Party owe to one another. The Geneva Conventions establish two levels of responsibility for breaches: state responsibility and individual criminal responsibility. The responsibility for the treatment of detainees at all times rests with the State Party, regardless of which particular forces or military units may have captured or detained such persons. GC III, art. 12. GC III also makes plain that its obligations apply vis-à-vis the Detaining Power "from the time [detainees] fall into the power of the enemy until their final release and repatriation." *Id.*, art. 5.

The cornerstone of the Conventions' enforcement regime is the obligation that States Party impose individual criminal responsibility for certain violations of the Conventions considered to be war crimes. Such violations are "grave breaches" of the treaties. *Id.*, arts. 129-30. States Party must assert penal jurisdiction over individuals who

commit grave breaches regardless of the nationality of the perpetrator or victim. *Id.*, art. 129 ("Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.").

Examples of grave breaches under GC III include:

- Willful killing;
- Torture;
- Inhuman treatment;[8]
- Willfully causing great suffering;[9]
- Willfully causing serious injury to body or health; and
- Willfully depriving a prisoner of war of the rights of fair and regular trial.

Id., art. 130. It is notable that these provisions protect core due process rights alongside the physical and mental integrity of persons affected by armed conflict.

States Party are obliged to incorporate prohibitions against grave breaches into their domestic penal legislation and military disciplinary codes. Accordingly, the United States has incorporated liability for such grave breaches into its penal law under the War Crimes Act,

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[8] Inhuman treatment includes not only attacks on physical integrity or health, but also attacks on the dignity of a detainee. *See* GC III Commentary at 627 (art. 130).

[9] The offense of willfully causing great suffering is meant to cover moral suffering as well as physical suffering. *See* GC III Commentary at 628 (art. 130).

Pub. L. No. 104-192, 110 Stat. 2104 (1996) (codified as amended at 18 U.S.C. § 2441 (2007)), as amended by the Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b)(1), 120 Stat. 2600, 2633-35 (2006). In addition, the War Crimes Act allows for the prosecution of certain breaches of Common Article 3, including torture and cruel treatment. *See* 18 U.S.C. § 2441(d).

If the commission of a grave breach is established, the State Party must immediately remedy the violation and punish those responsible. GC III, art. 132. Indeed, the failure to criminally prosecute individuals who have committed grave breaches is itself a breach of the Conventions. *Id.*, art. 131.

Preventing and punishing the commission of grave breaches of the treaties is a State Party's most important obligation; however, any breach of the Conventions is considered serious under international law. GC III requires States Party to "take measures necessary for the suppression of *all* acts contrary to the provisions" of the Conventions. GC III, art. 129 (emphasis added). Consequently, States Party may criminalize other breaches not designated as "grave." GC III Commentary at 624-25 (art. 129).

In addition to state responsibility and individual criminal responsibility, a failure by a State Party or its officials tc comply with the rules and protections set forth in the Conventions has other serious consequences. The moral authority of the Conventions is tied, in part, to their universal acceptance and implementation. The failure of any signatory to abide by the rules set out in the Conventions erodes the effectiveness of the provisions and protective system as a whole. Disregard, real or perceived,

of Convention-based obligations, particularly by a party as influential as the United States, weakens the entire international legal regime and invites other signatories to disregard their own treaty obligations. The breakdown of the system of rules and protections embodied in the Conventions is to the detriment of all States Party and all persons, both military and civilian, affected by armed conflict. *See, e.g.,* Brief Amicus Curiae of Retired Military Officers in Support of Petitioners, *Boumediene v. Bush* (No. 06-1195) & *Al Odah v. United States* (No. 06-1196) (U.S. filed Aug. 2007).

CONCLUSION

International humanitarian law has the noble objective of regulating the most inhumane of human situations – armed conflict. Perhaps more than any other body of law, international humanitarian law assiduously polices the line between civilization and chaos, humanity and brutality, dignity and degradation. Indeed, as described above, the Geneva Conventions are at their most detailed and resolute with respect to situations in which combatants are detained. Treaty drafters knew all too well that it is under such circumstances that an individual is most vulnerable to abuse. The Conventions also recognize, implicitly, that just as such abuse indelibly harms the victim, it also degrades the perpetrator.

States Party to the Geneva Conventions face great challenges in ensuring compliance and implementation of these rules in the fog of war. Nonetheless, the obligations contained in the Geneva Conventions reflect not only a universal moral standard, but also binding law, solemnly

reflected in the civil, penal, and military codes of the global community of signatories. It is imperative that the United States continue to support and adhere to the Conventions. *Amici* respectfully urge this Court to retain jurisdiction and to allow Petitioners a meaningful opportunity to challenge the legality and conditions of their detention under U.S. and international law.

For all of the foregoing reasons, *amici* respectfully ask this Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

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AUGUST 24, 2007

MOTION FILED
AUG 23 2007

43P9 826B

(33)

No. 06-1196

IN THE
Supreme Court of the United States

KHALED A.F. AL ODAH, *et al.*
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v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF INTERNATIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT OMAR KHADR

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF INTERNATIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT OMAR KHADR

Pursuant to Rule 37.3(b) of the Rules of the Supreme Court of the United States, International Law Scholars (listed in Appendix A) hereby request leave to file the accompanying *amicus curiae* brief. This brief is submitted in support of the petition for writ of certiorari to the U.S. Court of Appeals for the District of Columbia Circuit. Petitioners and Respondents Khadr and Khalid have consented to the filing of this brief. Counsel for Respondent President Bush has not consented.

As set forth in the accompanying brief, the International Law Scholars listed in Appendix A are committed to the respect for international humanitarian,

human rights and criminal law, and have a deep interest in seeing that said legal norms are followed.

The International Law Scholars seeking to appear as *Amici* do so because of their great concern alternative process to habeas corpus provided for under the Military Commissions Act is inadequate for preserving well-established principles of international law. Specifically, *Amici* urge this Court to consider that the United States' position regarding the detention and prosecution of Omar Khadr before the Combatant Status Review Tribunals is in stark contrast to well-established precedent under customary international law which prohibits the prosecution of children alleged to have engaged in combat except in extraordinary cases. In those cases where such prosecutions are allowed, international law requires children be treated with special protections and with an eye towards rehabilitation and reintegration, and not retribution. Accordingly, the International Law Scholars listed in Appendix A respectfully request leave to file the accompanying *amicus curiae* brief.

August 23, 2007

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

Amici Curiae are international law scholars and experts in the area of international humanitarian law, international criminal law and international human rights law.[1] They submit this brief in support of Petitioners and Respondent Omar Khadr based on their firm belief that the alternative process to habeas corpus provided for under the Military Commissions Act is inadequate for preserving well-established principles of international law. Specifically, *Amici* urge this Court to consider that the United States' position regarding the detention and prosecution of Omar Khadr before the Combatant Status Review Tribunals is in stark contrast to well-established precedent under customary international law which prohibits the prosecution of children alleged to have engaged in combat except in extraordinary cases. In those cases where such prosecutions are allowed, international law requires children be treated with special protections and with an eye towards rehabilitation and reintegration, not retribution.

SUMMARY OF ARGUMENT

It is a principle of customary international law that children are to be accorded special protections in all criminal proceedings, and in any prosecutions for participation in warlike acts. This principle also holds true under international humanitarian law which affords special

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[1] Names and statements of interest of the individual *amici* are provided in the attached Appendix. This brief was authored by the *amici* and counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amici* or their counsel made any monetary contributions to the preparation or submission of this brief.

status to children in armed conflict and recognizes the need to distinguish them once captured. In appreciation of the unique issues related to children in armed conflict, no international criminal tribunal established under the laws of war, from Nuremberg forward, has prosecuted a former child soldier for violating the laws of war. To the extent that international law recognizes the limited culpability of children as combatants, it does so with an eye towards rehabilitation and reintegration, and not punishment. The alternative procedures established under the Military Commissions Act in lieu of habeas corpus have failed to provide the minimum guarantees afforded to children under clearly established international law norms applicable to the United States.

ARGUMENT

I. THE RIGHTS OF THE CHILD TO PROTECTED STATUS IN SITUATIONS OF ARMED CONFLICT IS A CUSTOMARY NORM OF INTERNATIONAL LAW

Norms of international law require that children (all persons under the age of 18) be provided with special rights and protections. These include specific norms governing the protection and treatment of children in armed conflict and children accused of having engaged in warlike activities. The development of these norms began in 1924 with provisions included in the Geneva Declaration,[2] and reiterated in 1959 in the Declaration of the Rights of the

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[2] Geneva Declaration of the Rights of the Child, Sept. 26, 1924, League of Nations, O.J. Spec. Supp. 21 at 43 (1924) (providing that "The child must be the first to receive relief in times of distress" and "must be protected against every form of exploitation.").

Child enumerating ten principles of special attention to the child as a vulnerable person, who by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. Doc. A/4354 (Nov. 20, 1959). The prohibition of the recruitment or use of child soldiers, the requirement that illegally recruited child soldiers be treated as victims, and the prohibition of the retributive prosecution of child soldiers absent extraordinary circumstances are well enshrined in international treaty law and supported by sufficient state practice and *opinio juris* that they should be recognized as part of customary international law and, hence, as binding on the United States.[3]

International humanitarian law definitively recognizes the need to protect children, especially from the

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[3] *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."); *United States v. Arjona*, 120 U.S. 479, 487 (1887) ("A right secured by the law of nations to a nation or its people is one the United States, as the representatives of this nation, are bound to protect."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987).International law, also referred to as "the law of nations," has as its source international conventions, international custom or state practice as evidence of a general practice of law, general principles of law accepted by civilized nations, judicial decisions, and the opinions of eminent scholars in the field. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980). "The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820), *Id.* See also, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2761 (2004) (international law includes "norm[s] of international character accepted by the civilized world").

horrors of war, and to provide redress for those horrors once the children have been removed from the conflict. Child-related provisions of the 1949 Geneva Conventions, recognized as binding in customary international law, provide repeatedly for age as a reason for privileges.[4]

The 1977 Additional Protocol to the Geneva Conventions further establishes "children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason." Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), June 8, 1977, 1125 U.N.T.S. 3, Art. 77(1).

The principle of special care for children is extended to non-international armed conflicts in Article 4(3) of Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, wherein child combatants,

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[4] Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, Art. 16 (creating a position exception from equality accorded by reason of age) and Art. 49 (requiring age differentiation); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, Art. 24 (outlining specific provisions for children under 15), Art. 50 (outlining specific obligations of occupying powers vis-à-vis children), Art. 51 (excluding persons under 18 from any circumstances that might necessitate them to be enlisted and compelled to labour by an occupying power) and Art. 68 (excluding children who were under 18 at the time of the offence committed from the death penalty).

particularly if illegally recruited, are entitled by virtue of their age to protections above and beyond those to which any similarly situated adult is entitled.

The 1989 U.N. Convention of the Rights of the Child (the "CRC"), defining a child as "every human being below the age of eighteen years," G.A. Res. 44/25, U.N. Doc. A/44/49 (Nov. 20, 1989), establishes the centrality of the survival and development of children, and articulates three major principles: (1) non-discrimination; (2) children's participation; and (3) the best interests of the child. *Id.*, Art. 1. Included in the CRC are specific provisions relating to armed conflict, *id.*, Arts. 38-39, which grant full recognition to the rules of international humanitarian law as they pertain to children, and call upon States Parties "to promote physical and psychological recovery and social reintegration" in "an environment which fosters the health, self-respect and dignity of the child." *Id.*, Art. 39.[5]

The 2005 World Summit Outcome Document, U.N. Doc. A/RES/60/1 (Oct. 24, 2005), called upon States to take effective measures to prevent the recruitment and use of children in armed conflict by armed forces and groups, to prohibit and criminalize such practices, and to "ensure that children in armed conflicts receive timely and effective humanitarian assistance, including education, for their rehabilitation and reintegration into society." *Id.* at ¶¶ 117-118.

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[5] Similar provisions are articulated in Article 40 of the CRC pertaining to treatment of juveniles under penal law.

II. INTERNATIONAL LAW PRESUMES A CHILD WHO HAS SERVED IN CIRCUMSTANCES SIMILAR TO THAT OF RESPONDENT WAS RECRUITED ILLEGALLY AND SERVED INVOLUNTARILY

A. International law restricts the recruitment and use of child soldiers in hostilities.

International law increasingly restricts the recruitment and use of child soldiers, with a prohibition on the recruitment and use of all children under fifteen for active participation in hostilities, and a prohibition on the forcible or compulsory recruitment of children aged between fifteen and eighteen years, who even if voluntarily recruited may not be used to participate directly in hostilities. Although children between 15 and 18 may volunteer for military service for the State, international law imposes strict criteria to ensure that such enlistments are the result of the child's (and his or her parents') informed consent. All recruitment into non-governmental armed groups is prohibited and deemed not to be truly voluntary.

The prohibition of the recruitment and use of children under 15 to participate actively in hostilities is both a treaty rule and a rule of customary international law. Article 77 of Protocol I prohibits the recruitment of children under fifteen into armed forces and their direct participation in hostilities in international armed conflicts.[6] Similarly, Article 4(3)(c) of Protocol II prohibits the recruitment of children under fifteen into armed forces or groups or their participation in hostilities in non-

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[6] 1125 U.N.T.S. 3

international armed conflicts.[7] Article 38(2) of the CRC requires all states "ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities," and Article 38(3) obliges states to "refrain from recruiting any person who has not attained the age of fifteen years into their armed forces."[8] These texts are derived directly from Article 77(2) of the 1977 Additional Protocol to the Geneva Conventions, which was used as the benchmark from which discussion on the CRC commenced, even by States which had not ratified or signed the Additional Protocol.[9]

For children between the ages of fifteen and eighteen, Article 3 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict imposes restrictions on the voluntary recruitment of children, obliging states to maintain safeguards to ensure, as a minimum: a) such recruitment is genuinely voluntary; b) is carried out with the informed consent of the person's parents or legal guardians; c) such persons are fully informed of the duties involved in such a military service; and d) they provide reliable proof of age

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[7] 1125 U.N.T.S. 609

[8] U.N. Doc. A/44/49

[9] Matthew Happold, CHILD SOLDIERS IN INTERNATIONAL LAW (2005), pp. 89-91. Indeed, in 1987 the then Deputy Legal Adviser to the State Department, explaining that whilst the U.S. Government was unwilling to ratify the 1977 Additional Protocol, it saw a number of its provisions as reflecting customary international law, including "the principle ... that all feasible measures be taken in order that children under fifteen do not take a direct part in hostilities." Michael J. Matheson, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 415 (1987) at 421.

prior to acceptance into national military service. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, GA Res. 54/263, U.N. Doc. A/RES/54/49, Annex I (May 25, 2000) ("Child Soldier Protocol").[10]

All recruitment of child soldiers by non-State armed groups is presumed to be involuntary and, as such, illegal. Article 4 of the Child Soldier Protocol prohibits non-State armed groups to, "under any circumstances, recruit or use in hostilities persons under the age of 18 years." This total prohibition, in contrast to the partial prohibition on the recruitment and use of child soldiers imposed by the Child Soldier Protocol for participation in government-sponsored military service, is justified because non-State groups cannot be parties to the Protocol. In consequence, the existence and effectiveness of any safeguards they claim to apply to ensure that the recruitment of child soldiers into their ranks is based on the child's (and his or her parents') informed consent cannot be monitored.

International law actively disfavours children's involvement in armed conflict, even where that participation occurs through arguably lawful recruitment and it severely restricts the recruitment of children and their use to participate in hostilities. Both Protocol I and the CRC require that in recruiting among children who have attained the age of 15, but who have not yet attained the age of 18, States shall endeavour to give priority to

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[10] The United States signed the Protocol on July 5, 2000, and ratified it on December 23, 2002. There are 117 parties to the Protocol, and 122 signatories. http://www.ohchr.org/english/countries/ratification/11_b.htm (last updated July 13, 2007).

those who are oldest. Indeed, international law may be moving towards prohibiting all recruitment and use of child soldiers.[11]

B. Children illegally recruited into armed conflict are deemed to have served involuntarily and therefore should be treated as victims, not perpetrators.

In most cases, children recruited into armed conflict are treated as victims of a war crime; in all cases, they are viewed as victims of human rights violations.[12] This status is firmly supported by international treaty law. The CRC and the Child Soldier Protocol are human rights treaties conferring individual entitlements on those persons (i.e. children) which they seek to protect. Article 3 of ILO Convention 182 goes so far as to define the forced or compulsory recruitment of children for use in armed

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[11] The 1990 African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), to which 39 African States are parties, requires that parties: "ensure that no child shall take a direct part in hostilities and refrain in particular from recruiting any child." Art. 22(2).

In 1995, the 26th International Conference of the Red Cross and Red Crescent adopted a plan of action, which (Commitment 1) committed it to promoting the non-recruitment and non-participation in armed conflict for all children under the age of 18.

[12] The 1993 Vienna World Conference on Human Rights initiated a study on the impact of armed conflict on children, which resulted in Graça Machel's 1996 Report, *Promotion and Protection of the Rights of Children: Impact of armed conflict on children,* a shocking revelation of horrific abduction and recruitment of child soldiers, sexual exploitation and other appalling crimes against children. U.N. Doc. A/51/306 (Aug. 26, 1996). The Report reiterated the need for reintegration of child soldiers put forth in the CRC, and articulated specific guidelines regarding the means by which to achieve that reintegration.

conflict as a form of slavery or a practice similar to slavery. Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO C182), June 17, 1999, 38 I.L.M. 1207 at Art. 3.[13] It is not only the act of illegal recruitment that violates a child's rights, but also his or her retention in an armed force or group into which he or she has been illegally recruited. In consequence, the war crime of child recruitment is a continuing crime.[14]

Article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute of the International Criminal Court respectively list "[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities" in international and non-international armed conflicts and "[c]onscripting or enlisting children under the age of fifteen into armed forces or groups or using them to participate actively in hostilities" in non-international armed conflicts as war crimes within the jurisdiction of the International Criminal Court. U.N. Doc. A/CONF.183/9 (July 17, 1998). Individual criminal liability for recruitment of children in an armed conflict has also been seen in international criminal tribunals created under the auspices of the United Nations, such as the Special Court for Sierra Leone.[15]

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[13] The United States ratified the Convention 182 on December 2, 1999. 165 countries have ratified the Convention. http://www.ilo.org/ilolex/

[14] See *Prosecutor v Thomas Lubanga Dyilo*, Decision on the confirmation of charges, Pre-Trial Chamber I, International Criminal Court, 29 January 2007, ICC-01/04-01/06-803, para. 248.

[15] Article 4(c) of the Statute of the Special Court for Sierra Leone (SCSL) incorporates Article 8(2)(e)(vii) of the Rome Statute word for word. U.N. Doc. S/RES/1315 (Aug. 14, 2000). All the defendants before the Special Court have been indicted for the war crime of child recruitment. In

The first prosecutions undertaken by the International Criminal Court confirm that international law treats children —even those who may commit crimes in the context of armed conflict—as victims of the conflict, rather than legally responsible actors. The ICC's first active prosecution, The Prosecutor v. Thomas Lubanga Dyilo, charges him with the war crime of "enlisting children under the age of fifteen" and "using children under the age of fifteen to participate actively in hostilities."[16] The ICC Prosecutor, Luis Moreno Ocampo confirmed that the case was intended to address "serious crimes against children. Child conscription destroys the lives and futures of thousands of children around the world. This case will contribute to exposing the problem and in stopping these criminal practices."[17] Notably, neither the International Criminal Court nor other international criminal tribunals have sought to hold the child soldiers who were recruited in

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Prosecutor v. Samuel Hinga Norman, the Special Court's Appeals Chamber ruled that enlisting child soldiers had been prohibited in customary international law and incurred individual criminal responsibility prior to the adoption of the Rome Statute, at least from the start of the SCSL's temporal jurisdiction in November 1996. *Prosecutor v. Norman*, SCSL-04-14-AR72(E) (May 31, 2004), Decision on preliminary motion based on lack of jurisdiction (child recruitment), May 31, 2004. See also, *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Trial Chamber II, Special Court for Sierra Leone (June 20, 2007) (finding all three accused guilty of child recruitment); and, *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Trial Chamber I (August 2, 2007) (finding Defendant Kondewa guilty of child recruitment).

[16] Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo, Warrant of Arrest of 10 February 2006. See also, *Prosecutor v. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen*, Indictment, ICC-02/04-01/05.

[17] International Criminal Court Press Release, Child Soldier Charges in the First International Criminal Court Case, 28 August 2006, ICC-OTP-20060828-157-En

these conflicts responsible for any crimes they may have committed on the battlefield.

III. INTERNATIONAL CUSTOMARY LAW AND POLICY CLEARLY DISFAVOURS THE PROSECUTION OF CHILD SOLDIERS FOR THEIR WARLIKE ACTS, RECOGNIZING CHILD SOLDIERS AS VICTIMS AND NOT PERPETRATORS

International law generally precludes the prosecution of child soldiers before war crimes tribunals, unless the exercise of criminal jurisdiction is intended to serve a rehabilitative function. This is particularly true for child soldiers who have been unlawfully recruited and whom international law categorizes as victims, requiring them to be treated in such a manner as to promote their rehabilitation and reintegration into society.[18] Accordingly, rehabilitation, not retribution, should be the purpose of any proceedings taken against or sanctions imposed on a child soldier.

To date, there is no precedent for the prosecution of a child solder before an international criminal tribunal. In those instances where international tribunals or semi-internationalized domestic courts operating in post-conflict settings do allow for the exercise of criminal jurisdiction over minors under the age of eighteen, they make clear that such prosecutions must recognize the special status of minors and should be intended for educational or rehabilitative purposes.

A. International law presumes that child soldiers are not triable absent extraordinary circumstances, and there is no precedent under

[18] See discussion, *infra*, Section II.

> international law for the prosecution of individuals who engaged in conflict when they were under the age of eighteen.

Although international law does not entirely preclude the exercise of jurisdiction over child soldiers by law of war tribunals, it is clear that, absent exceptional circumstances and rehabilitative intent, it disfavours such prosecutions. Even when the tribunal's statute permits such prosecutions, examination of the practices of international law of war tribunals provides no precedent for any person being tried before an international law of war tribunal for offences committed prior to his or her eighteenth birthday.

(1) The International Criminal Court

The tendency towards an international legal status of minors as exempt from criminal liability and prosecution for war crimes is underscored by the treatment of minors in the Rome Statute of the International Criminal Court. This treaty is the most recent and comprehensive international agreement with respect to liability for international crimes. It provides expressly at Article 26 that "The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime."[19] During the drafting of the Rome Statute, numerous proposals were made for varying ages of criminal responsibility which reflected different approaches taken in different countries. These discussions resulted ultimately in the exclusion of jurisdiction for those under eighteen. According to the discussion of the drafting history of Article 26 in the Commentary on the Rome Statute of the International

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[19] U.N. Doc. A/CONF.183/9 (July 17, 1998), 2187 U.N.T.S. 90, at Article 26.

Criminal Court, "under *international* law criminal responsibility begins at the age of eighteen, because according to all these laws no one under the age of 18 was charged with any crime by any of the Nuremberg Courts."[20]

(2) The Special Panels for Serious Crimes Established by the United Nations Transitional Authority in East Timor

The legislation establishing the Special Panels for Serious Crimes operated under the auspices of the United Nations Transitional Authority in East Timor provides special protections related to the prosecution of minors. While it allows that "A minor between 12 and 16 years of age may be prosecuted for criminal offences only in accordance with such rules as may be established in subsequent UNTAET regulations on juvenile justice,"[21] those regulations further provides that any prosecution of a minor under the age of 16 must be in "accord with the United Nations Convention on the Rights of the Child, and shall consider his or her juvenile condition in every decision made in the case."[22] The UN Convention on the Rights of the Child, in turn, provides that measures relating to children in armed conflict should be intended "to promote physical and psychological recovery and social reintegration".[23]

(3) The Extraordinary Chambers in the Courts of Cambodia

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[20] Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, Otto Triffterer, ed., (1999) at 494.
[21] United Nations Transitional Authority in East Timor, Regulation 2000/30, art 45.1
[22] Id., at Art. 45.4
[23] U.N. Doc. A/44/49, Art. 39.

The legislation establishing the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea essentially precludes the exercise of jurisdiction over minors, despite the fact that numerous international crimes were committed by minors during the conflict.[24] The Cambodian legislation limits jurisdiction to "those who were most responsible" for crimes during the Period of Democratic Kampuchea, thereby precluding the prosecution of minors who were mere perpetrators of such crimes.[25] Should a minor have been among those most responsible, the purpose of any prosecution would nonetheless have to be rehabilitative. Article 33 of the Cambodian legislation provides: "The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights"[26] Article 14 of the ICCPR, in turn, stipulates that criminal process over minors persons must "take account of their age and the desirability of promoting their rehabilitation."[27] Hence, any exercise of criminal jurisdiction over minors by the court should be intended to promote rehabilitation rather than retributive punishment.

(4) The Special Court for Sierra Leone

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[24] Meng Try Ea & Sorya Sim, Victims and Perpetrators The Testimony of Young Khmer Rouge Cadres at S-21 (2001) (documenting crimes in Khmre Rouge Cambodia by minors).

[25] Law on the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (NS/RKM/1004/006), art 1.

[26] *Id.*, art 33.

[27] International Covenant on Civil and Political Rights, Art. 14(4).

Although the Statute of the SCSL does provide the Court jurisdiction over children between the ages 15 and 18, it requires that juvenile offenders be treated differently than adults.[28]. The drafting history makes clear the provision related to juvenile offenders was retained only because the Statute left to the Court's Prosecutor, rather than its founders, the determination of who bore the greatest responsibility for the crimes committed during the conflict in Sierra Leone and who should consequently be prosecuted before the Special Court. The large number of child soldiers who actively participated in the conflict in Sierra Leone required, however unlikely, for provisions related to how those children were to be treated should the Court's Prosecutor ultimately decide to prosecute them.[29] The view of the United Nations Security Council, however, was that child soldiers were more appropriately dealt with by other accountability mechanisms, such as the Sierra Leone Truth and Reconciliation Commission.[30] Moreover, following the Special Court's establishment, its first Prosecutor, Mr David Crane, announced that he did not intend to charge anyone for crimes committed whilst they were under the age of 18 and no such charges have been brought.[31]

(5) The Tribunals for the former Yugoslavia and Rwanda

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[28] U.N. Doc. S/RES/1315 (Aug. 14, 2000) at Arts. 7(1)-7(2).

[29] Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/40, at 1.

[30] Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, at 1.

[31] *See* Special Court for Sierra Leone Public Affairs Office, "Special Court Prosecutor Says He Will Not Prosecute Children", 2 November 2002, available at http://www.sc-sl.org/Press/pressrelease-110202.pdf.

The Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda do not include any provisions governing the age of criminal responsibility.[32] This omission was deliberate and marked a belief that should the court seek to exercise jurisdiction over a minor, that minor could raise his or her age as an affirmative defense.[33] In confirmation of this belief, neither tribunal has brought any such prosecution.

(6) The State Court of Bosnia and Herzegovina

The recently established State Court of Bosnia and Herzegovina includes a Special Chamber for War Crimes to prosecute war crimes cases not addressed by the ICTY. The Court was created with assistance and aid from the international community, including the United States and the United Nations. The Criminal Code of Bosnia and Herzegovina provides an absolute bar on the prosecution of

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[32] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993). Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).

[33] *See* Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution No. 808 (1993), UN Doc. S/2570, para. 58. (stating that the "International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations").

minors below the age of 14.[34] The Code provides that with respect to minors "who at the time of perpetration of a criminal offence had attained fourteen years of age but had not reached sixteen years of age (a junior juvenile) only educational measures may be imposed."[35] The "educational recommendations" available to the War Crimes Chamber must be specifically designed for the purposes of rehabilitation and "to avoid initiation of criminal procedures against juvenile perpetrators."[36]

The statutes and authorizing legislation governing present international or semi-internationalized criminal tribunals make clear a progression toward the restriction of criminal prosecution of minors. Absent specific provision in the statute of a law of war tribunal permitting the rehabilitative exercise of criminal jurisdiction, international law precludes prosecution.

B. The presumption that prosecutions against child soldiers should not be brought absent extraordinary circumstances is a corollary to the belief the child soldiers are themselves victims in need of rehabilitation and reintegration into society.

While the exercise of criminal jurisdiction over minors is not formally barred by international law, should a war crimes tribunal seek to exercise jurisdiction over a minor it must do so with rehabilitative, not retributive intent. This principle of international law is evidenced by the inclusion of provisions in the recent Paris Principles and

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[34] Criminal Code of the Federation of Bosnia & Herzegovina, Art. 8.
[35] Id., at Art 80.
[36] Id., at Art. 77.

Guidelines on Children Associated with Armed Forces or Armed Groups (the "Paris Principles") stating: "Children should not be prosecuted by an international court or tribunal" and "[a]lternatives to judicial proceedings should be sought for children at the national level." Paris Principles, February 2007, §§ 8.6, 8.9.0.[37]

Article 39 of the CRC requires States to "take all appropriate measures to promote physical and psychological recovery and social reintegration" of child victims of "any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts." [38] Such recovery and reintegration must take place in an environment which fosters the health, self-respect and dignity of the child. Article 6 of the Child Soldier Protocol obliges States to take all feasible measures to ensure that children illegally recruited or used in hostilities are demobilized and accorded all appropriate assistance for their physical and psychological recovery and social reintegration.[39]

In February 2007, by approving the Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, some 58 States expressly committed themselves:

> To ensure that children under 18 years of age who are or have been unlawfully recruited or used by

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[37] Text available at http://www.unicef.org/infobycountry/files/ParisPrinciples310107English.pdf.

[38] U.N. Doc. A/44/49, Art. 39.

[39] U.N. Doc. A/RES/54/263, Art. 6.

> armed forces or groups and are accused of crimes against international law are considered primarily as victims of violations against international law and not only as alleged perpetrators. They should be treated in accordance with international standards for juvenile justice, such as in a framework of restorative justice and social rehabilitation.

Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, consolidated version, ("Paris Commitments"), Principle 11. [40] Another corollary, however, as the Paris Commitments also indicate, is that compliance with the international standards relating to juvenile justice is a condition with which any law of war tribunal must comply in order to exercise jurisdiction over child soldiers.

The United States itself has recognized the importance of programs aimed towards reintegration and rehabilitation, noting in its Initial Report under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict: "The United States has contributed substantial resources to international programs aimed at preventing the recruitment of children and reintegrating child ex-combatants into society and is committed to continue to develop rehabilitation approaches that are effective in addressing this serious and difficult problem."[41] The United States

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[40] Text available at http://www.unicef.org/protection/files/ParisCommitments120207english.pdf.

[41] Initial Report of the United States of America to the UN Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, U.N. Doc. CRC/C/OPA/USA/1 (22 June 2007), para. 34.

further noted that is has contributed, through the U.S. Agency for International Development, over $10 million towards the demobilization of child combatants and their reintegration into society, outlining programs in seven different countries, Afghanistan included among them.[42]

C. International law requires that trials of child soldiers be subject to specific minimum safeguards

The statutes of the international tribunals discussed above illustrate the universal recognition that children are subject to minimum safeguards in those limited instances where they are subject to prosecutorial jurisdiction. Article 7 of the SCSL Statute provides, *inter alia*, that:

> 1. ... Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international *human rights standards, in particular the rights of the child.*
>
> 2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate,

[42] Id., at para. 35.

> any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies. (emphasis added).

The Statute reflects the requirement that when dealing with child soldiers the primary objective must be to ensure their rehabilitation and reintegration into society (*see* § III.B above). Any prosecution must be consistent with the State's obligation to rehabilitate and reintegrate the child soldier into society both as regards process and outcome. The reference to "human rights standards, in particular the rights of the child" incorporates by reference the relevant provisions of the CRC on the rights of children criminal proceeding, requiring that every child accused of having breached the criminal law benefits from certain minimum safeguards.[43]

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[43] Article 40(2)(b) of the CRC provides the following minimum rights: (i) To be presumed innocent until proven guilty according to law; (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence; (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians; (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality; (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law; (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used; (vii) To have his or her privacy fully respected at all stages of the proceedings.

More recently, the Paris Principles reflect the same assumption, providing that: if national criminal proceedings are to be taken against children accused of crimes allegedly committed while associated with armed forces or groups, they are "entitled to the highest standards of safeguards available according to international law and standards." Paris Principles §§ 8.8, 8.9.1. Any such children-specific minimum safeguards are, of course, additional to safeguards that international law guarantees to all similarly situated defendants.

D. International law also disfavours prosecuting adults for crimes committed when child soldiers

International law views children as only relatively responsible for the crimes they commit because of their lack of psychological maturity and susceptibility to negative influences and external pressures at the time they committed the crimes.[44] Because their personalities are not yet fully formed, use of the criminal process against an individual who has attained the age of majority subsequent to the commission of the acts for which he is prosecuted must be directed towards their rehabilitation rather than retribution for their crimes. A person cannot be held fully responsible for a crime if he or she was not fully responsible at the time he or she committed it. The Rome Statute of the International Criminal Court specifically provides for this contingency,

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[44] As the Supreme Court explained in *Roper v. Simmons*, 543 U.S. 551, 570 (2005): "The susceptibility of juveniles to immature and irresponsible behaviour means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' (citation omitted)."

prohibiting the prosecution of individuals who are alleged to have committed crimes before their eighteenth birthday.[45]

Similarly, Article 7(1) of the Statute of the SCSL, which does allow for the Special Prosecutor to charge child soldiers, only covers an individual "who was at the time of the alleged commission of the crime between 15 and 18 years of age," and special protections are provided to persons who were under 18 at the time of the commission of the acts for which they are charged, regardless of their age when they are called to appear before the Special Court. The drafting of Article 7 to protect all persons who committed crimes when they were children, regardless of their age when they appeared before the Special Court, was deliberate.[46] Accordingly, a defendant who is now an adult but who was a child soldier at the time he or she allegedly committed war crimes continues to benefit from the protections international law accords accused child soldiers.

CONCLUSION

International human rights and humanitarian law has evolved to ensure that children are accorded protected status. In recognition of the limitations on a child's ability to consent to recruitment and use in armed conflict, international law imposes restrictions both on the recruitment and use of children in armed conflict, as well as on the prosecution of child soldiers for their warlike activities. To date, no international tribunal has prosecuted an individual for acts committed when that individual was still a minor; instead,

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[45] U.N. Doc. A/CONF.183/9, Art. 26.

[46] *See* Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, Annex, Art. 7.

international law aims to rehabilitate and reintegrate children. Respondent Omar Khadr's case demonstrates that the denial of habeas corpus to Petitioners will result in the United States' ongoing detention and prosecution of an individual alleged to have engaged in combat as a child in stark opposition to long-standing and well-established precedent under international law protecting the rights of children recruited into armed conflict. *Amici* therefore urge this Court to grant Petitioners' request for relief.

Dated: August 23, 2007

Respectfully submitted,

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John Cerone is a Professor of Law New England School of Law, where he teaches Public International Law, Human Rights Law, and International Criminal Law, and serves as director of the law school's Center for International Law and Policy. He has been a fellow at the Max Planck Institute for Comparative Public Law and International Law, and a visiting scholar at the International Criminal Court. Before joining the New England faculty in 2004, Professor Cerone was executive director of the War Crimes Research Office at American University Washington College of Law, where he served as a legal adviser to various international criminal courts and tribunals. He has extensive field experience in conflict and post-conflict environments, such as Afghanistan, Kosovo, Sierra Leone, and East Timor. He is accredited by the United Nations to represent the

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David M. Crane is a Distinguished Professor of Law at Syracuse University Law School and former Chief Prosecutor for the Special Court for Sierra Leone. He had formerly served over 30 years in the US federal government. Appointed to the Senior Executive Service of the United States in 1997, he held numerous key managerial positions, including serving as a Senior Inspector General, Department of Defense; Assistant General Counsel of the Defense Intelligence Agency; and

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Matthew Happold is Reader in Law at the University of Hull. He previously taught at the universities of Sussex and Nottingham. In 2004, he was a Visiting Fellow at the Human Rights Program, Harvard Law School and a Visiting Professional in the Office of the Prosecutor of the International Criminal Court. Matthew is the author of Child Soldiers in International Law (Juris Publishing: 2005) and of numerous journal articles and book chapters on children and armed conflict. He also practices as a Barrister from 3 Hare Court, London.

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Vesselin Popovski is Senior Academic Programme Officer, Director of Studies on International Order and Justice, UNU, Tokyo. His most recent book is International Criminal Accountability and the Rights of Children (Hague Academic Press, 2006), and he was co-author of the "Princeton Principles of Universal Jurisdiction" (2001). From 2002 until 2004 worked as a human rights expert in Russia for the European Union Project "Legal Protection of Individual Rights in Russia".

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Professor Sadat is the Henry H. Oberschelp Professor of Law at the Washington University School of Law and the Director of the Whitney R. Harris Institute of Global Legal

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Michael Scharf is Professor of Law and Director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law. During the first Bush and Clinton Administrations, Professor Scharf served in the Office of the Legal Adviser of the U.S. Department of State, where he held the positions of Counsel to the Counter-Terrorism Bureau, Attorney-Adviser for United Nations Affairs, and delegate to the United Nations General Assembly and to the United Nations Human Rights Commission. Professor Scharf is the author of over sixty scholarly articles and ten books, including Balkan Justice, which was nominated for the Pulitzer Prize in 1998, The International Criminal Tribunal for Rwanda, which was awarded the American Society of International Law's book of the Year Award in 1999, and Peace with Justice, which won the International Association of Penal Law Book of the Year Award for 2003. Professor Scharf has testified as an expert

before the U.S. Senate Foreign Relations Committee and House Armed Services Committee. In February 2005, Professor Scharf and the Public International Law and Policy Group, a Non-Governmental Organization he co-founded, were nominated for the Nobel Peace Prize by six governments and the Prosecutor of an International Criminal Tribunal for the work they have done to help in the prosecution of major war criminals, such as Slobodan Milosevic, Charles Taylor, and Saddam Hussein.

IN THE

Supreme Court of the United States

KHALED A.F. AL ODAH, *et al.*
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

I, Sarah H. Paoletti, hereby certify that I caused to be filed on August 23, 2007 via UPS with the Clerk's Office of the Supreme Court of the United States forty (40) copies of this Motion for Leave to File *Amicus Curiae* Brief and Brief of International Law Professors in Support of Respondent Khadr, and further sent, via U.S. Mail, First Class Postage prepaid, three (3) copies of said Brief to:

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I declare under penalty of perjury that the foregoing is true and correct.

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FILED
AUG
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1196

IN THE

Supreme Court of the United States

KHALED A.F. AL ODAH, *et al.*
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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[redacted] BRIEF OF JUVENILE LAW CENTER, *et. al.* AS *AMICI CURIAE*, AND BRIEF OF JUVENILE LAW CENTER *et. al.* IN SUPPORT OF RESPONDENT OMAR KHADR

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MOTION FOR LEAVE TO FILE BRIEF OF JUVENILE LAW CENTER, *et. al.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT OMAR KHADR

Pursuant to Rule 37.3(b) of the Rules of the Supreme Court of the United States Juvenile Law Center, *et. al.* hereby requests leave to file the accompanying *amicus curiae* brief. This brief is submitted in support of the petition for writ of certiorari to the U.S. Court of Appeals for the District of Columbia Circuit. Petitioners and Respondents Khadr and Khalid have consented to the filing of this brief. Counsel for Respondent President Bush has also consented to our request for consent.

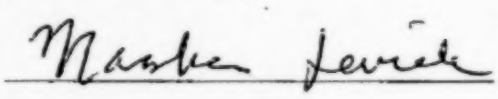
1. Juvenile Law Center (JLC), one of the oldest public interest law firms for children in the United States, was founded in 1975 to advance the rights and well-being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies: for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. More detailed information about JLC is available at www.jlc.org.
2. JLC works to integrate juvenile justice practice and policy with knowledge of adolescent development. JLC has edited several publications on this topic, including *Understanding Adolescents: A Juvenile Court Training Curriculum* (L. Rosado, American Bar Association Juvenile Justice Center, Juvenile Law Center, Youth Law Center 2000); *Youth on Trial: A Developmental Perspective on Juvenile Justice*, an examination of the impact of the legal

system on adolescent development and psychology published in 2000 (Thomas Grisso and Robert G. Schwartz, University of Chicago Press). JLC has also used knowledge of adolescent development to inform its contributions in two recent amicus briefs to this Court: *Roper v. Simmons*, 543 U.S. 551 (2005) (regarding the constitutionality of the death penalty for minors aged sixteen and seventeen at the time of their crimes) and *Yarborough v. Alvarado*, 124 S.Ct. 1706 (2004) (regarding whether a minor's age was properly considered when determining if the minor was in custody during a police interrogation).

3. JLC is particularly concerned with juvenile and criminal justice systems and their effect on children's emotional and psychological health. JLC is an active participant in the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, addressing the effects of juvenile and adult incarceration on juvenile offenders.
4. JLC helps to facilitate a national dialogue on juvenile justice issues both by participating as *amici* in cases across the country and conducting trainings at national conferences hosted by organizations such as the American Bar Association, National Council of Juvenile and Family Court Judges, Office of Juvenile Justice and Delinquency Prevention, and the National Association of Council for Children. JLC is also a co-founder, with the American Bar Association and the Youth Law Center, of the National Juvenile Defender Center (NJDC). NJDC offers a wide range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

5. JLC is deeply concerned by the possibility that the alternative process to *habeas corpus* provided for under the Military Commission Act (MCA) may be applied to a juvenile. Congress' silence regarding juveniles in the MCA indicates that Congress never intended for military commissions to have jurisdiction over child soldiers. JLC seeks to establish that federal law consistently differentiates between juveniles and adults. Therefore, it would be illogical to read jurisdiction into a silent statute when juveniles are routinely treated differently by federal law.

Respectfully submitted,



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INTEREST OF *AMICI*[1]

The organizations submitting this brief work with, and on behalf of, adolescents in a variety of settings, from day care to foster care, substance abuse to homelessness, and at every stage of the juvenile and criminal justice process. *Amici* are advocates and researchers who bring a unique perspective and a wealth of experience in providing for the care, treatment, and rehabilitation of youth in the child welfare and juvenile justice systems. *Amici* know from first hand experience that youth who enter these systems need extra protection and special care, clearly necessitated by their status as youth. *Amici* also know from their collective experience that adolescent immaturity often manifests itself in numerous ways that implicate culpability, including diminished ability to assess risks, make good decisions, and control impulses. It is precisely for these reasons that *Amici* believe that the status of childhood and adolescence separates youth from adults in categorical and distinct ways and that child soldiers cannot be held to the same standards of blameworthiness and culpability as their adult counterparts.

IDENTITY OF *AMICI*

See Appendix A for a list and brief description of all *Amici*.

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[1] *Amici* file this brief with the consent of Petitioners and Respondents Khadr and Khalid. Counsel for Respondent President Bush has also consented. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

STATEMENT OF FACTS

Amici adopt the statement of facts as articulated in the brief of Respondent O.K.

SUMMARY OF ARGUMENT

Amici support Respondent O.K.'s argument that military commissions convened pursuant to the Military Commissions Act (MCA) lack jurisdiction over O.K. The MCA is silent as to the issue of personal jurisdiction over minors and the military commissions do not provide for a distinct process for juveniles. It would be absurd to impute personal jurisdiction into a silent statute particularly given that federal law consistently accounts for the developmental differences between adults and youth.

It is widely understood that adolescents are categorically different than adults. Both United States Supreme Court jurisprudence and federal legislation reflect this understanding. Moreover, this federal law is complemented by an emerging body of social science research attesting to the developmental differences between adolescents and adults. This scholarship shows that adolescents are more likely than adults to engage in risky behavior; are more likely to consider only the immediate effects of their acts rather than the long-term consequences; and are far more susceptible to being overcome by external pressure from peers and authority figures than are adults, both in terms of how they evaluate their own behavior and in conforming their conduct. The scholarship also shows that because they live in the moment, adolescents feel that they have less of a stake in the future. All told, this recent research illustrates that juveniles as a class are less capable of controlling their impulses than adults, and thus are less culpable than adults.

ARGUMENT

Respondent's brief lays out the analysis establishing that Congress' silence in the MCA presupposes that an enemy combatant subject to military commission jurisdiction must at least be the minimum age to participate in hostilities and join the military force on whose behalf he allegedly fought. The brief establishes that this interpretation is supported by longstanding military law, international humanitarian law, and congressional intent. *Amici* build from Respondent's argument to demonstrate that Respondent's analysis of the MCA is further supported by a broad range of federal law distinguishing juveniles from adults.

United States Supreme Court jurisprudence and federal legislation have consistently accounted for the developmental and social differences of youth in delineating their constitutional and legal rights when they are accused of crimes. But "[i]n detaining O.K., the United States has flouted juvenile justice standards that provide for children to be treated in accordance with their unique vulnerability, lower degree of culpability, and capacity for rehabilitation." *See* Human Rights Watch, Press Release, *US: Move O.K. and Hamdan Cases to Federal Court*, June 1, 2007, http://hrw.org/english/docs/2007/06/01/usdom16050.htm (last visited Aug. 13, 2007). As demonstrated *infra*, the recognition that youth have a "their unique vulnerability, lower degree of culpability, and capacity for rehabilitation" is indeed imbedded in our legal tradition. And the powerful testimony of former Sierra Leonean child soldier Ishmael Beah at the hearings on the Child Soldier Prevention Act of 2007 reminds us of the wisdom of that tradition:

> I wouldn't be alive today if it weren't for the presence of non-governmental organizations that believed that children like myself, due to our emotional and psychological immaturity, had been brainwashed and forced to be killers, and above all, that we could be rehabilitated and reintegrated into society. Healing from the war was a long-term process that was difficult but very possible. It required perseverance, patience, sensitivity, and a selfless compassion and commitment from the staff members at my healing center. Effective rehabilitation of children is in itself a preventative measure and this should be the focus, not punitive measures against children that have no beneficial outcome.

Hearing on Casualties of War: Child Soldiers and the Law Before The Senate Judiciary Subcommittee on Human Rights and the Law, 110th Cong (April 24, 2007) (testimony of Ishmael Beah, Author, A Long Way Gone: Memoirs of a Boy Soldier), available at http://judiciary.senate,gov/print_testimony.cfm?id=2712&wit_id=6387. A holding by this Court that the military commissions convened pursuant to the Military Commissions Act (MCA) lack jurisdiction over O.K would fit squarely within this legal tradition.

I. FEDERAL LAW CONSISTENTLY RECOGNIZES THE DEVELOPMENTAL DIFFERENCES BETWEEN ADOLESCENTS AND ADULTS

A. United States Supreme Court Jurisprudence Consistently Differentiates Between Adolescents and Adults

That minors are different is a principle that permeates our law. As Justice Frankfurter so aptly articulated, "[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Accordingly, for the last sixty years, this Court has consistently considered the developmental and social differences of youth in measuring the scope and breadth of minors' constitutional rights.

For example, this Court has repeatedly noted that minors and adults are different for the purpose of determining the voluntariness of juvenile confessions during custodial interrogation. Thus, the Court has recognized that minors are generally less mature than adults and, therefore, are more vulnerable to coercive interrogation tactics. As the Court admonished in *Haley v. Ohio*, 332 U.S. 596 (1948), a teenager

> *cannot be judged by the more exacting standards of maturity.* That which would leave a man cold and unimpressed can overawe and overwhelm a lad... [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him.

332 U.S. at 599-600 (emphasis added).

The Court also has noted that minors generally lack critical knowledge and experience, and have a lesser capacity to understand, much less exercise, their rights when they are "made accessible only to the police." *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (finding statement taken from a 14-year-old boy outside of his parents' presence to be involuntary). And in *In re Gault*, 387 U. S. 1, 55 (1967), where the Court extended many key constitutional rights to minors subject to delinquency proceedings in juvenile court, the Court reiterated its earlier concerns about youths' special vulnerability: "The greatest care must be taken to assure that [a minor's] confession was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."

More recently, in this Court's *per curiam* decision in *Kaupp v. Texas*, 538 U.S. 626 (2003), where it held a 17-year-old's confession must be suppressed following an illegal arrest (absent undisclosed intervening evidence in the record) under the Fourth and Fourteenth Amendments, this Court applied earlier precedents in considering the defendant's status as a 17-year-old in its analysis:

> A *17-year-old boy* was awakened in his bedroom at three in the morning by at least three police officers, one of whom stated Awe need to go and talk..... [The boy's] `Okay' in response to Pinkins's statement is no showing of consent under the circumstances. *Pinkins offered [the boy] no choice, and a group of police officers rousing an adolescent out of bed in the middle of the night with the words `we need to go and talk' presents no option but `to go.'* There is no reason to think [the boy's] answer was anything more than `a mere

submission to a claim of lawful authority.'

538 U.S. at 631 (emphasis added) (citations omitted).[2]

This Court's protective stance toward youth in confession cases parallels its stance in other areas of criminal procedure. For example, the Court has emphasized the juvenile court's core principles of individualized rehabilitation and treatment, noting that youth, because they are still malleable and in development, are more amenable to such rehabilitative interventions than adults. *See McKeiver v Pennsylvania,* 403 U.S. 528, 540 (1971); *Gault*, 387 U.S. at 15-16.

Elsewhere in criminal procedure, the Court's recognition of the differences between youth and adults has led it to uphold practices directed at youth that it would not countenance if directed at adults. For instance, this Court has repeatedly held that the Fourth Amendment strictures may be relaxed when dealing with youth in public schools because youth as a class are in need of adult guidance and control. For example, the Court has sustained the constitutionality of warrantless searches by school officials of students' belongings upon reasonable suspicion that a student has violated school rules or the law, *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985). In the same vein, the Court has upheld random, suspicionless drug testing of student athletes,

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[2] *Yarborough v. Alvarado*, 124 S.Ct. 2140 (2004) is not to the contrary. There, the Court held only that youth was not a vital consideration when determining whether an individual is in custody for purposes of triggering *Miranda* warnings prior to interrogation. But *Alvarado* did not disturb this Court's prior precedents that youth is an important factor in assessing the voluntariness of a confession under the due process clause. Moreover, *Alvarado* reached the Court by way of a habeas petition; and pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the Court, therefore, only analyzed whether the state court's interpretation of the law in *Alvarado* was reasonable, not whether it was correct. 124 S.Ct. at 2149.

Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 664-65 (1995), and random, suspicionless drug testing of students engaged in extracurricular activities, *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 838 (2002).

To support these Fourth Amendment rulings, the Court has observed that "[t]raditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination -- including even the right of liberty in its narrow sense, i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians." *Vernonia,* 515 U.S. at 654 (citation omitted). This echoes the Court's earlier declaration in *Schall v. Martin*, 467 U.S. 253, 265 (1984), in explaining the rejection of a constitutional challenge to the preventive detention of juveniles charged with delinquent acts, that *"juveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to care for themselves.* They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae...*" (emphasis added) (citations omitted). *Cf. Vernonia,* 513 U.S. at 655 (when parents place their children in school they delegate custodial power to the latter, permitting the school a degree of supervision and control over their children that could not be exercised over free adults); *T.L.O.*, 469 U.S. at 339 (same).

The Court has endorsed constitutional distinctions between minors and adults outside the context of criminal procedure. In a series of cases involving state restrictions on minors' reproductive choices, the Court has said that "during the formative years of childhood and adolescence, *minors often lack the experience, perspective, and judgment to avoid choices that could be detrimental to them*," *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (emphasis added), as well as "*the ability to make fully informed choices that take account of*

both immediate and long-range consequences." *Id.* at 640 (emphasis added); *see also Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("The State has a strong and legitimate interest in the welfare of its young citizens, whose *immaturity, inexperience, and lack of judgment* may sometimes impair their ability to exercise their rights wisely.") (emphasis added). For this reason, the Court has held that states may choose to require that minors consult with their parents before obtaining an abortion. *See Hodgson*, 497 U.S. at 458 (O'Connor, J., concurring in part) (the liberty interest of a minor deciding to bear a child can be limited by parental notice requirement, given that immature minors often lack ability to make fully informed decisions); *Bellotti*, 443 U.S. at 640 (because minors often lack capacity to make fully informed choices, the state may reasonably determine that parental consent is desirable).

The Court also has curtailed the liberty interests of minors in other settings. Particularly illustrative is *Parham v. J.R.*, 442 U.S. 584 (1979), where the Court rejected a constitutional challenge to Georgia's civil commitment scheme that authorized parents and other third parties to involuntarily commit minors under the age of 18. In so doing, the Court stressed that "[m]ost children, *even in adolescence, simply are not able to make sound judgments concerning many decisions....*" *Id.* at 603 (emphasis added).

This Court has distinguished youth from adults under the First Amendment. In *Ashcroft v. American Civil Liberties Union*, 124 S.Ct. 2783 (2004), the Court was unanimous that protecting minors from harmful images on the Internet, due to their immaturity, is a compelling government interest. *Id.* at 2792; *id.* at 2801 (Breyer, J., dissenting).[3] And in *Ginsburg v. New York*, 390 U.S. 629, 637 (1968), the Court upheld a state

[3] The Court split only on whether the Child Online Protection Act used the least restrictive means, consistent with adults' First Amendment freedoms, for achieving that end. *Id.* at 2795; *id.* at 2797 (Stevens, J., concurring); *id.* at 2797 (Scalia, J., dissenting); *id.* at 2798 (Breyer, J., dissenting).

statute restricting the sale of obscene material to minors. Such a restriction was permissible for youth, as compared to adults, because "*a child -- like someone in a captive audience – is not possessed of that full capacity for individual choice* which is the presupposition of First Amendment guarantees." *Id.* at 649-50 (Stewart, J., concurring) (footnotes omitted) (emphasis added). *See also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that public school authorities may censor school-sponsored publications).[4] Most recently in *Morse v. Frederick*, 127 S.Ct. 2618 (2007) (holding that the principal did not violate student's right to free speech by confiscating a banner she reasonably viewed as promoting illegal drug use) this Court reaffirmed the principle that "[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings") (citing *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

These themes are echoed in the Court's public school prayer decisions. In holding that prayers delivered by clergy at public high school graduation ceremonies violate the

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[4] Similarly, the Court has upheld a state's right to restrict when a minor can work, on the premise that "[t]he state's authority over children's activities is broader than over like actions of adults." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). Although this Court has never ruled on the issue, lower courts also have upheld legislative restrictions on minors' liberty in the form of juvenile curfews. In upholding the constitutionality of juvenile curfews, courts have again relied on this Court's consistent refrain that minors' "immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely," *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (quoting *Hodgson*, 497 U.S. at 444), and that juveniles lack the fundamental right in free movement. *Hutchins v. District of Columbia*, 188 F.3d 531, 538-39 (D.C. Cir. 1999) (en banc) (citing, *inter alia*, *Vernonia*, 515 U.S. at 654 and *Schall*, 467 U.S. at 265) and *Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998) (citing, *inter alia*, *Vernonia*, 515 U.S. at 654).

Establishment Clause of the First Amendment, the Court in *Lee v. Weisman*, 505 U.S. 577 (1992), placed great emphasis on the "public pressure, as well as peer pressure," that such state-sanctioned religious practices impose on impressionable students. *Id.* at 593. The Court admonished that "[f]inding no violation under these circumstances would place objectors in the dilemma of participating [in the prayer], with all that implies, or protesting." *Id.* The Court stated it was not addressing whether the government could put citizens to such a choice when those "affected . . . are mature adults," rather than "primary and secondary school children," who are "often susceptible to pressure from their peers towards conformity . . . in matters of social convention." *Id.* Similarly, in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), the Court held that prayers authorized by a vote of the student body and delivered by a student prior to the start of public high school football games violated the Establishment Clause. The Court stressed "the immense social pressure" on students "to be involved in the extracurricular event that is American high school football." *Id.* at 311. As the Court described it, "the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one," *id.* at 312, and, in the high school setting, "the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." *Id.* By contrast, the Court has upheld against an Establishment Clause challenge the delivery of prayers at the start of legislative sessions, where the audience that is present invariably is made up almost exclusively of adults. *Marsh v. Chambers*, 463 U.S. 783 (1983). *See Lee*, 505 U.S. at 597 (distinguishing between "atmosphere" at legislative sessions and public high schools).

Most recently, in this Court's landmark decision in *Roper v. Simmons*, 543 U.S. 551, 569-72 (2005), the Court relied in part on social science research on the developmental

differences of adolescents to hold that imposition of the death penalty on those who committed their offenses when under the age of 18 constitutes cruel and unusual punishment. Specifically, the Court noted that studies confirm that "a lack of maturity and an underdeveloped sense of responsibility are found in youth more than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). Additionally, the Court noted that youth have less control over their own environment.[5] *Id.* at 569 (citing Laurence Steinberg and Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014

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[5] If Congress had intended for the MCA to apply to juveniles, it would have explicitly prohibited the imposition of the juvenile death penalty given that this Court struck down the juvenile death penalty as unconstitutional only one year prior to the enactment of the MCA. The MCA provides that an alien unlawful enemy combatant tried in a military commission may be sentenced to capital punishment. *See* 10 U.S.C. § 948d(d) ("A military commission under this chapter may...adjudge any punishment not forbidden by this chapter, including the penalty of death.."). Among other offenses, O.K. has been charged with "murder in violation of the law of war," which is punishable by death. 10 U.S.C. § 950v(b)(15). In *Simmons*, 543 U.S. at 561, this Court struck down the juvenile death penalty as violative of the 8th and 14th Amendments. The MCA was enacted in 2006 -- one year after the *Simmons* decision was issued. Yet, the MCA does not explicitly exempt juveniles from death penalty sentences. See 10 U.S.C. § 948d(d) (providing for the imposition of the death penalty without any exemption for juveniles); *but see* 10 U.S.C.A. § 979s (prohibiting the imposition of cruel or unusual punishments generally). The fact that the MCA does not mention juveniles at all, even in the provisions that provide for the imposition of the death penalty, which would be unconstitutional if applied to juveniles, supports O.K's contention that Congress did not intend for juveniles to be tried in the military commissions. *See* 10 U.S.C.A. § 948a-948c (describing military commissions generally, who is subject to them, and the scope of their jurisdiction without specifically mentioning juveniles).

(2003)).

In sum, in an unbroken line of decisions extending more than half a century, the United States Supreme Court has distinguished minors from adults under the law, noting that minors are, *inter alia*, (1) always in someone's custody and not at liberty to come and go at will; (2) less mature; (3) deficient in judgment and perspective; (4) more susceptible to the appearance or assertion of authority; (5) less able to think rationally in stressful situations; (6) less experienced and thus less knowledgeable; and (7) more malleable.

The Court's findings with respect to the developmental differences of teenagers in the critical realms of decision-making and judgment, in turn, are well-supported by a wide body of social science and medical research, as discussed in detail in Part II, *infra*.

B. Congress Has Differentiated Between Minors and Adults in the Criminal Context

Congress understands the need to treat children differently from adults in the criminal context. For example, the Juvenile Delinquency Act, 18 U.S.C. § 5031, *et seq.* ("JDA"), differentiates between adult criminal offenders and juvenile delinquents by setting forth specific procedures for the detention and prosecution of persons under the age of 18 , procedures that differ from those for the detention and prosecution of persons over the age of 18. The JDA specifically provides that juveniles shall not be prosecuted in a federal court unless (1) the state juvenile court (or other appropriate state court) lacks jurisdiction or refuses to exercise jurisdiction; (2) the state lacks "available programs and services adequate for the needs of juveniles"; or (3) the charged offense is a violent felony or a certain violation of the Federal Controlled Substances Act or Controlled Substances Import & Export Act, and there is a substantial federal interest

in exercising federal jurisdiction. 18 U.S.C. § 5032.

By setting forth in the JDA a special process and special procedures particular to the prosecution, detention and rehabilitation of juveniles, Congress clearly appreciated the need to treat juvenile offenders differently from adult offenders. For example, if a juvenile is adjudged delinquent, the JDA mandates that he not be "placed or retained in an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges," and "[w]henever possible, the Attorney General shall commit a juvenile to a foster home or community-based facility located in or near his home or community." 18 U.S.C. § 5039. *See also In re Sealed Case*, 893 F.2d 363, 367-68 (D.C. Cir. 1990) ("[T]he Act's underlying purpose is to rehabilitate, not to punish, so as 'to assist youth in becoming productive members of our society [by] channel[ing] juveniles, for whom the criminal justice system is inappropriate, away from and out of the system into human problem-solving agencies and professions.' The Act is premised on the notion that it is in the best interest of both the juvenile and society that juveniles be insulated from the stigma associated with criminal trials, the publicity, the retributive atmosphere and the threat of criminal incarceration attendant to criminal proceedings.") (quoting S.Rep. No. 1011, 93rd Cong., 2nd Sess., 22 (1974), reprinted in U.S.Code Cong. & Admin. News 1974, p. 5286); *United States v. Frasquillo-Zomosa, 626 F.2d 99, 101 (9th Cir. 1980)* ("The purpose of the Act, as amended in 1974, was to enhance the juvenile system by removing juveniles from the ordinary criminal justice system and by providing a separate system of treatment for them.") (citing S.Rep. No.93-1011, 93d Cong., 2d Sess., 22 (1974), reprinted in U.S.Code Cong. & Admin.News, p. 5283.); *Fagerstrom v. United States*, 311 F.2d 717, 720 (8th Cir. 1963) (stating that to be adjudged a juvenile delinquent and committed to custody is not to be convicted of

or sentenced for a crime, and "[t]he very purpose of the Act is to avoid the prosecution of juveniles as criminals").

II. RECENT SOCIAL SCIENCE RESEARCH SUPPORTS THE LONG-HELD VIEW THAT ADOLESCENTS ARE CATEGORICALLY DIFFERENT THAN ADULTS

This Court's holdings, as described in Part I *supra*, and federal legislation that take into account the developmental differences of adolescents are well-supported by the findings of social science research on the same. Empirical studies have established that youth are developmentally different from adults. This research confirms the wisdom in Congress's decision to not give military commissions convened pursuant to the Military Commissions Act (MCA) jurisdiction over youth such as O.K. In this Part, *amici* briefly describe the findings of social science research that undergird and legitimate all such legislative attempts to ensure that youth charged with criminal offenses are accorded special protections as compared to their adult counterparts.

First, the social research has demonstrated that youth, as compared to adults, are much less capable of controlling their criminal behavior and, consequently, they are less culpable than adults. Adolescents are often characterized as risk takers, more willing to take risks than adults and more likely to believe that they will avoid the negative consequences of risky behavior. Developmental psychology research supports this perception. Not only do adolescents prefer to engage in risky or sensation-seeking behavior, but, perhaps just as important, they may have different perceptions of risk itself. *See* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 260 (1996) ("The few extant comparisons of adults and

adolescents suggest that thrill seeking and disinhibition [as assessed via measures of sensation seeking] may be higher during adolescence than adulthood."). For example, adolescents appear to be unaware of some risks of which adults are aware, and to calculate the probability of positive and negative consequences differently than adults. The proven inability of juveniles as a class to appreciate the consequences of their actions, their propensity toward reckless behavior, their immature decision-making and, most importantly, their susceptibility to negative external influence, warrants different treatment of child soldiers than adult enemy combatants.

Moreover, adolescents are risk-takers who are more resistant to social control and less susceptible to deterrence. *See* Carl Keane et al., *Deterrence and Amplification of Juvenile Delinquency by Police Contact: The Importance of Gender and Risk-Orientation*, 29 BRIT. J. CRIMINOLOGY 336, 338 (1989) ("We suggest that those adolescents who are risk-takers will be more resistant to familial and formal control ...."). Issues of risk perception are closely related to those of temporal perspective, sometimes described as future orientation. Generally, adolescents tend to focus more on short-term consequences and less on the long-term impact of a decision or behavior. *See* Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 231 (1995) ("In general, adolescents seem to discount the future more than adults and to weigh more heavily the short-term consequences of decisions--both risks and benefits--a response that in some settings contributes to risky behavior.") (citation omitted). This focus on the immediate makes some intuitive sense: adolescents have had less experience with long-term consequences due to their age and they may be uncertain about what the future holds for them.

Also, adolescents are more likely than adults to be influenced by others, both in terms of how they evaluate their

own behavior and in the sense of conforming to what peers are doing. *See* Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOL. 608, 615 (1979) (showing peak peer conformity at grade 9 between grades 3 and 12); Scott, *Evaluating Adolescent Decision Making* at 230. Because a majority of delinquent adolescent behavior occurs in groups, *see* Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 867 (1981), peer pressure may exert a powerful counterweight to the societal commands of the criminal law. Furthermore, peer involvement affects perceptions of the certainty and severity of sanctions. *See* Mark C. Stafford & Mark Warr, *A Reconceptualization of General and Specific Deterrence*, 30 J. RES. CRIME & DELINQ. 123, 132 (1993) ("[A]n intelligent offender might be tempted to draw stronger conclusions about the certainty and severity of punishment from the cumulative experiences of friends than from his or her own relatively narrow life experiences."). O.K. is alleged to have acted with Al Qaeda, including attending an Al Qaeda training camp. In a group training camp environment, the peer pressure that affects juveniles far more severely than it affects adults, and is part of the juvenile's reduced culpability, is able to reign. But the MCA created no specific process by which the military commission could account for the effect of peer pressure on children or the unique characteristics of child soldiers discussed herein.

An adolescent's position in society is different from that of an adult, as reflected in legislation and case law cited in Part I of this brief. Adolescent autonomy is more restricted than that of adults, and minors are less integrated into the pro-social responsibilities, roles, and relationships of adulthood. Developmental psychologists have documented this reduced "stake in life." *See* Christopher Slobogin *et al.*, *A Prevention Model of Juvenile Justice: The Promise of Kansas v.*

Hendricks for Children, 1999 WIS. L. REV. 185, 199 (1999) Like adolescents' attitude toward risk and their foreshortened temporal perspective, this deficit may lead adolescents to underestimate the real costs of antisocial conduct. Stated another way, adolescents have had less exposure to the external constraints that create internal controls.

In addition, juveniles may be more prone to give false confessions when subjected to today's sophisticated psychological interrogation techniques. Studies have shown that juveniles do not understand the words of the *Miranda* warnings as well as adults, and do not appreciate the significance and function of *Miranda* rights. *See, e.g.*, Thomas Grisso, *Juveniles' Capacities to Waive Miranda Warnings: An Empirical Analysis,* 68 Calif. L. Rev. 1134-1166 (1980). Their low social status *vis-a-vis* their adult interrogators, societal expectations that they respect authority, and their naivete in believing that police officers would not deceive them, also may make them more likely to comply with the demands of their interrogators. *See* Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents,* 32 Hofstra L. Rev. 463 (Spring 2004); *see also* Gerald Robin, *Juvenile Interrogation and Confessions,* 10 J. Pol. Sci. & Admin. 224, 225 (1982). Moreover, juveniles' immature decision-making abilities, as well as their limited time perspective, emphasis on short-term benefits versus long-term benefits, and willingness to take risks, *see* Thomas Grisso and Laurence Steinberg et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants,* 27 LAW & HUMAN BEH. 333, 353- 356 (2003), make them particularly ill-suited to engage in the high stakes risk-benefits analysis that is called for in the modern psychological

interrogation.[6]

Perhaps even more dramatic are studies of wrongful convictions, which demonstrate that juveniles falsely confess with some regularity. A study of 328 exonerations since the advent of DNA testing in 1989 found that fifty-one of the exonerations involved false confessions, fourteen of which involved defendants who were under 18 at the time of the crime. Samuel Gross *et al.*, *Exonerations in the United States, 1989 Through 2003* (April 19, 2004) at http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf. A second study by Professors Richard A. Leo and Steven A. Drizin documented 125 proven false confessions, 101 or 81 percent of which were false confessions to murder. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L.Rev. 891, 947 (2004). Forty false confessors were juveniles, many of whom were juveniles aged 16 or older who confessed to murders. *Id.* at 945.

That juveniles may be more vulnerable to falsely confessing has also recently been accepted by John E. Reid and Associates, Inc., one of the nation's leading trainers of law enforcement in psychological interrogation techniques. In a recent memo sent to graduates of its training, Reid analyzed

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[6] There are no scientific studies proving definitively that juveniles are more likely to falsely confess than adults when subjected to psychological interrogation techniques. This is because it would be highly unethical to subject juvenile subjects to such stressful conditions for research purposes. Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 LAW & HUMAN BEHAVIOR 141, 142 (April 2003). One recent study, however, which subjected juveniles to far less coercive circumstances than are at play in interrogations, found that juveniles were significantly more likely to accept responsibility for an act they did not commit than are adults, and that confronting juvenile subjects with false evidence of their guilt only increased the likelihood that they would do so. *Id.* at 151-52.

documented false confession cases and noted that the fact that a suspect is a juvenile "appear[s] with some regularity in false confession cases." John Reid & Associates, *False Confession — The Issues,* Monthly Investigator's Tips (April 2004), available at http://www.reid.com/investigatortips.html?serial=1080839438473936. To safeguard against false confessions, Reid instructed interrogators to "exercise extreme caution and care when interviewing or interrogating a juvenile..." *Id.* Specifically, Reid advised interrogators

> when a juvenile ... confesses, the investigator should exercise extreme diligence in establishing the accuracy of such a statement through subsequent corroboration. In these situations it is imperative that interrogators do not reveal details of the crime so that they can use the disclosure of such information by the suspect as verification of the confession=s authenticity.

Id.

The scientific and sociological studies set forth above and that the *Simmons* Court found persuasive in demonstrating that juveniles were less mature and possessed less sense of responsibility (and therefore were less deserving of the death penalty) apply equally to child soldiers.[7] Juveniles'

[7] The Court cited the following articles and studies in its opinion: J. Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective,* 12 Developmental Review 339 (1992); Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty,* 58 Am. Psychologist 1009, 1014 (2003); E. Erikson, IDENTITY: YOUTH AND CRISIS (1968). In addition, there are numerous other studies that support the idea that the brain is not fully developed until at least age 25. *See* Elizabeth

heightened vulnerability to external pressure and their diminished control over their environment is particularly relevant to child soldiers who are recruited into battle. *Cf. Simmons* at 570 (recognizing that juveniles'"own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment"). Human rights and humanitarian organizations recognize that "c]hildren are uniquely vulnerable to military recruitment because of their emotional and physical immaturity"and "are easily manipulated and can be drawn into violence that they are too young to resist or understand." Human Rights Watch Fact Sheet, *Facts About Child Soldiers*, http://hrw.org/campaigns/crp/fact_sheet.html (last visited Aug. 13, 2007). Such organizations also recognize that the manipulation and recruitment to take up arms may come from family members, as was the case for O.K. *See* Coalition to Stop the Use of Child Soldiers, http://www.child-soldiers.org/childsoldiers/why-children-join (last visited Aug. 13, 2007) ("Family and peer pressure to join

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Cauffman and Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 *Behavioral Sciences and the Law* 741-760 (2000); Elizabeth S. Scott and Thomas Grisso, *Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88(1) Journal of Criminal Law and Criminology 137, 137-189 (1997); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Postadolescent Brain Maturation*, 21(22) The Journal of Neuroscience 8819, 8819-8829 (2001); National Institute of Mental Health, *Teenage Brain: A Work in Progress, A Brief Overview of Research Into Brain Development During Adolescence*, NIH Publication No. 01-4929 (2001); Kristen Gerencher, *Understand Your Teen's Brain to be a Better Parent*. Detroit Free Press, Feb. 2, 2005; Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 Hofstra L. Rev. 463, 515-522 (2003) (discussing scientific studies on adolescent neurological development).

up for ideological or political reasons or to honour family tradition may also be motivating factors.").

There is also strong social science evidence to support the notion that children generally have a greater capacity to rehabilitate than adults. *See* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in YOUTH ON TRIAL: A DEVELOPMENTAL PROSPECTIVE ON JUVENILE JUSTICE 23 (Thomas Grisso & Robert G. Schwartz, eds., 2000) ("the malleability of adolescence suggests that a youthful offender is capable of altering his life course and developing a moral character as an adult"); John H. Laub and Robert J. Sampson, SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70 (2003) (presenting lives of adjudicated delinquent and showing that their youthful characteristics were not immutable; change to a law-abiding life was possible and depended in many instances upon aspects of their adult lives). The *Simmons* Court found that the "reality that juveniles still struggle to define their identity means it is less supportable to conclude even a heinous crime committed by a juvenile is evidence of an irretrievably depraved character" and, therefore, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* at 570. As juveniles mature into adults, "the impetuousness and recklessness that may dominate in their younger years may subside." *Id.* For this reason, child soldiers are more amendable to rehabilitation and reintegration into society than their adult counterparts.

In sum, the growing body of social science scholarship set forth above attests to the developmental differences between adolescents and adults - differences that have been recognized by this Court and Congress. Given that it is widely understood in our legal tradition that adolescents are

categorically different than adults, it would be absurd to impute miliary commission personal jurisdiction over juveniles based on the MCA's silence with regard to juveniles.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Juvenile Law Center *et al.*, respectfully urge this Court to grant Petitioners' request for relief.

Respectfully submitted,

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APPENDIX A

IDENTITY OF *AMICI CURIAE*

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

The **Northwestern University School of Law's** Bluhm Legal Clinic has represented poor children in juvenile and criminal proceedings since the Clinic's founding in 1969. The **Children and Family Justice Center** (CFJC) was established in 1992 at the Clinic as a legal service provider for children, youth and families and a research and policy center. Six clinical staff attorneys currently work at the CFJC, providing legal representation and advocacy for children in a wide variety of matters, including in the areas of juvenile delinquency, criminal justice, special education, school suspension and expulsion, immigration and political asylum, and appeals. CFJC staff attorneys are also law school faculty

members who supervise second- and third-year law students in the legal and advocacy work; they are assisted in this work by the CFJC's social worker and social work students.

The **Children & Youth Law Clinic** (CYLC) is an in-house legal clinic, staffed by faculty and students at the **University of Miami School of Law**, which advocates for the rights of children in a variety of legal proceedings. Founded in 1995, the CYLC has appeared as amicus curiae in numerous federal and state court cases implicating significant due process, human rights and therapeutic interests of children in the custody of the state and federal governments. The CYLC provides legal representation to children of all nationalities in a range of legal proceedings, including state child protection and federal immigration and civil rights cases. The CYLC works to ensure that children receive protection from acts such as exploitation, arbitrary detention and unwarranted removal from parental care, consistent with international human rights standards governing the treatment of children by the State. We believe that courts should recognize the unique developmental characteristics of children, including their immature decision-making abilities, susceptibility to negative external influences, and capability for reform, should assure their fair treatment, and promote their best interests in all legal proceedings where their interests are adjudicated.

The **Barton Child Law and Policy Clinic** at **Emory University School of Law** was founded in March 2000. Barton was originally established to address the need in Georgia for an organization dedicated to effecting systemic policy and process changes for the benefit of the children in Georgia's child welfare system. In 2006, Barton was expanded to include a direct representation clinic known as

the **Juvenile Defender Clinic** (JDC) for those children charged with delinquent and unruly offenses.

The JDC provides a clinical experience for third year law students in the juvenile court arena. The focus of the clinical experience is to provide quality representation to children by ensuring fairness and due process in their court proceedings and by ensuring that courts make decisions informed by the child's educational, mental health and family systems objectives. The JDC believes that children should be treated appropriate to their developmental status and wherever possible in their home environment. JDC believes that courts should not be used as a broker for those services that should be systematically provided by schools, medical professionals and family support systems. The JDC at Barton is a clinic supported in its entirety by the Emory University School of Law. Legal services are provided at no cost to its clients.

Legal Services for Children (LSC) has been providing holistic legal services to children and youth in the San Francisco Bay Area since 1975. LSC employs a multidisciplinary model of representation, utilizing teams of attorneys and social workers to serve the complex needs of our minor clients. This model is based upon the premise that children are developmentally different from adults, and that legal representation and treatment should be individually tailored to account for the unique needs and competencies of each child. LSC fully supports the foundational principle supporting a separate juvenile court, recently reiterated by the Supreme Court in Roper v. Simmons: the constitution requires courts exercising jurisdiction over children to take into account their unique characteristics as juveniles. These principles should apply with equal force in military tribunals.

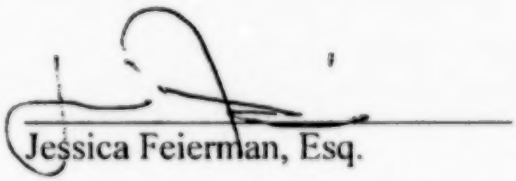
The **Mid-Atlantic Juvenile Defender Center** (MAJDC) is a multi-faceted juvenile defense resource center

that has served the District of Columbia, Maryland, Puerto Rico, Virginia and West Virginia since 2000. We are committed to working within communities to ensure excellence in juvenile defense and promote justice for all children. MAJDC promotes research and policy development throughout the region by conducting state-based assessments of juvenile indigent defense delivery systems. Following the assessment, MAJDC staff work to ensure the report is used to educate the public about issues related to the delivery of indigent defense services for juveniles and assists the public defender systems in responding to assessment recommendations. MAJDC also responds to the needs of juvenile defenders by coordinating training programs, providing technical assistance and maintaining a list-serve of juvenile defenders to respond to defender questions. MAJDC is a 501 (c)(3) non-profit organization.

The **National Association of Counsel for Children** (NACC) is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. Founded in 1977, the NACC is a multidisciplinary organization with approximately 2200 members representing all 50 states, DC, and several foreign countries. The NACC works to improve the delivery of legal services to children, families, and agencies; advance the rights and interests of children; and develop the practice of law for children and families as a sophisticated legal specialty. NACC programs include training and technical assistance, the national children's law resource center, the attorney specialty certification program, the model children's law office project, policy advocacy, and the amicus curiae program. Through the amicus curiae program, the NACC has filed numerous briefs involving the legal interests of children in state and federal appellate courts and the Supreme Court of the United States.

CERTIFICATE OF SERVICE

I, Jessica Feierman hereby certify that this 24th day of August, three copies of the Motion of Juvenile Law Center, *et. al.* for Leave to File an *Amicus Curiae* Brief in Support of Respondent Omar Khadr, and Brief of Juvenile Law Center, *et. al.* have been served, via first class mail on all counsel of record in this appeal as follows:



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AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(13) (20) Nos. 06-1195, 06-1196

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., *Petitioners*,
v.
GEORGE W. BUSH, ET AL., *Respondents*.

KHALED A.F. AL ODAH, ET AL., *Petitioners*,
v.
UNITED STATES OF AMERICA, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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STATEMENT OF AMICI[1]

This case raises the question of whether the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), in combination with the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739 ("DTA"), constitutes an unconstitutional suspension of the writ of habeas corpus by limiting access to federal courts by persons detained by the United States at the Unites States Naval Base in Guantánamo Bay, Cuba ("Guantánamo"). *Amici curiae* are professors of legal history at law schools and universities in the United States, England and Australia with expertise in English legal history prior to 1789 and/or early American legal history. *Amici curiae* have a professional interest in ensuring that the Court is fully and accurately informed regarding the historical scope of the common law writ of habeas corpus that, under this Court's precedents, is properly considered in evaluating the issues raised under the Suspension Clause of the United States Constitution.

SUMMARY OF ARGUMENT

Amici wish to clarify two points bearing on this Court's analysis of the constitutionality of the MCA[2]: the availability of habeas corpus and the nature of habeas review

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[1] A list of *amici curiae* is provided in the Appendix. *Amici* have no personal, financial, or other professional interest, and take no position respecting any other issues raised in the cases below, including the merits of the underlying claims for relief of each detainee. All parties have consented to the filing of this brief, proof of which has been lodged with the Court. This brief was not written in whole or in part by any party, and no person or entity other than *amici* or their counsel made any monetary contribution towards the preparation or submission of this brief.

[2] Section 7(a) of the MCA amends 28 U.S.C. § 2241 to provide that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

at common law. Historical evidence has long been considered by the Court as important in interpreting the Great Writ's availability and scope as guaranteed by the Suspension Clause and federal habeas statute. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789."); *see also Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) (Marshall, C.J.) ("for the meaning of the term habeas corpus, resort may unquestionably be had to the common law"). In this case, common law history from England and the United States shows that habeas corpus was available to petitioners regardless of their alienage, applied in places regardless of a territory's formal sovereign status, and ensured searching factual review to prevent illegal imprisonment and abuses of power.

Amici accordingly write to underscore the historical accuracy of this Court's recognition of the "writ's extraordinary territorial ambit." *Rasul v. Bush*, 542 U.S. 466, 481 n.12 (2004); *see also* Brief of Legal Historians (Jan. 14, 2004) filed in *Rasul v. Bush* and *al-Odah v. United States* (Nos. 03-334, 03-343), available at 2004 WL 96756. Disregarding *Rasul*'s analysis of the historical reach of the writ, the District of Columbia Circuit held in the present case that "the history of the writ in England prior to the founding" shows that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." *Boumediene v. Bush*, 476 F.3d 981, 990 (D.C. Cir. 2007); *see also* Gov't Br. Opp. Cert. at 9, 14. That contention misconstrues the nature of the common law writ of habeas corpus, which turned neither the petitioner's alienage nor on the petitioner's location within or without sovereign bounds. To the contrary, history demonstrates that the writ's primary function was to ensure the legal behavior of any agent acting pursuant to the Crown's authority in territory over which the Crown exercised *de facto* control. Thus, habeas applied whenever the jailer operated pursuant to the Crown's authority, regardless of the petitioner's

alienage and regardless of the sovereign status of the territory in which he was detained.

Amici also write to correct the government's assertion that common law courts sitting in habeas jurisdiction were barred from considering facts beyond those contained in the jailer's return. Gov't Br. Opp. Cert. at 12. The so-called "rule" against controverting the truth of the return, invoked here by the Government, existed primarily to protect the role of the jury—and thus lost its vigor outside of the post-conviction criminal context. In cases of executive and other non-criminal detention, courts employed a variety of procedural mechanisms to permit the admission and consideration of facts beyond the face of the return. Far from the "particularly deferential military context" claimed by the Government, *Id.* at 14, English and American courts were especially vigilant in protecting individuals detained by military authorities, and regularly engaged in independent factual inquiry to ensure that those individuals were not detained unlawfully.

ARGUMENT

I. AT COMMON LAW, HABEAS CORPUS JURISDICTION FOLLOWED THE JAILER, NOT THE DETAINEE, TO ANY TERRITORY UNDER THE *DE FACTO* CONTROL OF THE CROWN.

In *Rasul*, this Court found that since "[t]here was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown," the application of habeas corpus to "persons detained at the [Guantanamo Bay] base is consistent with the historical reach of the writ of habeas corpus." *Rasul*, 542 U.S. at 481-82 (quoting *R. v. Cowle*, 97 Eng. Rep. 587, 598-99 (K.B. 1759)). The lower court, nevertheless, concluded that "[t]he short of the matter is that given the history of the writ in England prior to the founding, habeas corpus would not have

been available in 1789 to aliens without presence or property within the United States." *Boumediene*, 476 F.3d at 990. *Amici* maintain that the lower court misconstrued the principles governing the reach of the common law writ.[3]

A. Courts exercised common law habeas jurisdiction regardless of a petitioner's alienage.

The Great Writ's authority was rooted in the King's prerogative to ensure that officials delegated to discharge the power of the Crown, especially jailers, were not abusing that power. *See* SIR MATTHEW HALE'S THE PREROGATIVE OF THE KING 228-29 (The Publications of the Selden Society, vol. 92) (Yale, D.E.C., ed., London: Bernard Quaritch, 1975)(hereinafter "HALE'S PREROGATIVES") ("The gaols are all in the king's disposal...for the law hath originally trusted none with the custody of the bodies of the king's subjects...but the king or

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[3] *Amici* refer throughout to the common law writ of *habeas corpus ad subjiciendum*, developed in the sixteenth century, "chiefly to protect subjects against unconstitutional imprisonment by privy councilors and officers of state." J.H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 126 (2d ed. 1979). Habeas corpus was written into statute with the Habeas Corpus Act of 1679, but judges had been issuing the writ on purely common law grounds at least a century prior. *See* H. Nutting, *The Most Wholesome Law: The Habeas Corpus Act of 1679*, 65 AM. HIST. REV. 527-43 (1959-60). For the next two centuries, the common law writ remained the primary means of challenging noncriminal forms of confinement by state and private actors because the famed statutory writ of the Habeas Corpus Act of 1679 applied only to criminal matters. *See* W. Holdsworth, 9 A HISTORY OF ENGLISH LAW 117-18 (2d ed. 1938); R.S. Walker, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY 82-83 (1960). The importance of the common law writ can be seen in *Aylesbury's Case* (1696), in which the court, despite finding that petitioner was not bailable under the Habeas Corpus Act, "thought it therefore very just and reasonable to bail him, not as an act of duty to which they were obliged by the statute, but as a discretionary act, which was in their power by the common law." P.D. Halliday & G.E. White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, at 32 n.90 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008252.

such to whom he deputed it.").[4] Because common law habeas attached to the wrongs of the jailer, not the rights of the petitioner, the availability of the common law writ was unrelated to the petitioner's nationality or alienage.

Thus, habeas corpus was traditionally available to all manner of aliens detained in the King's jails or otherwise subject to the King's authority. *See, e.g.*, *Somersett's Case*, 20 How. St. Tr. 1, 79-82 (K.B. 1772) (releasing on habeas African slave purchased in Virginia and briefly detained on English soil pending voyage to Jamaica); *Case of the Hottentot Venus*, 104 Eng. Rep. 344, 344 (K.B. 1810) (reviewing habeas petition of "native of South Africa"

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[4] The term "subject," as used by Hale and his contemporaries, arises in a specific historic context and cannot be equated with modern notions of a nation's "citizens." In his dissent in *Rasul*, Justice Scalia makes this common mistake. 542 U.S. at 501-02 (Scalia, J., dissenting) (arguing that "there would be habeas jurisdiction over a United States *citizen* in Guantanamo Bay," but that writ's historic reach would not encompass others, because "Guantanamo Bay is not a sovereign dominion, and even if it were, jurisdiction would be limited to *subjects*.") (emphasis added). Subjecthood was a more fluid and permeable category than present-day American citizenship: mere physical presence within territory under *de facto* English control could subject a person to the King's authority. HALE'S PREROGATIVES, at 56 ("Every person that comes within the king's dominions owes a local subjection and allegiance to the king, for he hath here the privilege of protection"); *see also* W. Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND 358 (1769) (citing Hale for proposition that "[l]ocal allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection. . ."). The closest eighteenth century analog to Justice Scalia's phrase "non-citizen" is not non-"subject," but rather "alien." *Id.*, 1 COMMENTARIES 354 ("The first and most obvious division of the people is into aliens and *natural-born* subjects. *Natural-born* subjects are such as are born within the dominions of the crown of England ... and aliens, such as are born out of it.") (emphasis added). "Alienage" was not a basis for barring access to habeas corpus. *See* discussion *infra* at 5-8. The proper historical use of the term "dominion" (which was a descriptive term rather than a term of art or formal territorial classification) is discussed *infra* at note 13.

allegedly held against her will in England). *Cf. Rasul*, 542 U.S at 481-82 & n.11.[5]

Similarly, prisoners of war and alleged enemy aliens[6] could challenge the legality of their detention by way of habeas corpus. Even where in these cases courts ultimately declined to discharge the petitioner, they reviewed the basis for the prisoner's detention on the merits. *R. v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759); *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779). Manuscripts[7] underlying *DuCastro's Case*, 92 Eng. Rep. 816 (K.B. 1697), show that the King's Bench issued a writ for Daniel Ducastro and Francis La Pierre, "alien enemies and spies." The court bailed petitioners over counsel's arguments that petitioners' status as foreigners disentitled them from access to habeas, and ultimately discharged the men. Halliday &

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[5] Habeas petitions from the late eighteenth century show that alienage might itself be a cause for discharge. The Royal Navy frequently press-ganged merchant sailors, including aliens, into serving on warships. *See generally*, N. A. M. Rodger, THE WOODEN WORLD: AN ANATOMY OF THE GEORGIAN NAVY 164-88 (1986). Many petitioners were able to secure discharge on the ground that aliens were ineligible for impressment. *See, e.g., Hans Anderson, et al.*, The National Archives, London (Kew) [PRO], ADM1/3680, folio 478 (K.B. 1778) (ordering two Danes impressed into the Royal Navy released on habeas corpus); *Jacob Lilliquest, et al.*, PRO, ADM1/3678, folios 123, 137 (K.B. 1759) (holding a English ship captain in contempt for ignoring previous court order to release a foreigner impressed upon his ship); *Booy Booysen [sic] and John Jurgenson Brandt*, PRO, ADM1/3677, folio 262 (K.B. 1758) (granting habeas release to two Danes impressed on the Princess Royal).

[6] In the English context, an enemy alien was defined was an individual native to a country in a declared war with England. *See, e.g.*, Blackstone, *supra*, 2 COMMENTARIES 401. All other aliens were "alien friends." *Id.* at 1 COMMENTARIES 360. Similarly, in the American context, the definition of an enemy alien has always been limited to nationals of a foreign government against which the United States had declared war. *See* Alien Enemies Act of 1798, ch. 66, § 1, 1 Stat. 577.

[7] Manuscripts provide an important supplement to seventeenth and eighteenth century printed reports. *See* J.H. Baker, *Why the History of English Law has not been Finished*, CAMBRIDGE L.J. 74, 82 (2000). *Amici* are prepared to provide the Court with copies of any of the manuscripts cited herein.

White, *supra*, at 27 n.72 (citing KB21/14, ff. 70v. and 72v., PRO, KB16/1/6 (teste 23 January 1697)).[8]

Early American courts likewise exercised jurisdiction over habeas claims filed by or on behalf of aliens. *See, e.g., Ex parte D'Olivera*, 7 F. Cas. 853 (C.C.D. Mass. 1813) (Story, J., on circuit) (discharging Portuguese sailors imprisoned for desertion upon holding that American desertion laws only applied to American ships); *Rasul*, 542 U.S at 481-82 & n.11. American courts also exercised habeas jurisdiction over claims filed by or on behalf of aliens alleged to be enemy aliens or prisoners of war. In *Lockington's Case*, for example, the Pennsylvania Supreme Court considered the habeas petition of an Englishman imprisoned as an enemy alien during the War of 1812.[9] Bright (N.P.) 269 (Pa. 1813). The court held that it had jurisdiction to hear the petition and considered at length whether the statute authorized the marshal to detain Lockington, concluding ultimately that it did. *Id.* at 301. Even the dissent agreed that an alleged enemy alien might receive habeas review, to determine whether the petitioner was in fact an enemy alien. *Id.* at 298-99 (Brackenridge, J.).

In sum, both English and American courts exercised jurisdiction over habeas corpus claims regardless of the alienage of the petitioner. This jurisdiction, moreover, was exercised even where the petitioner was alleged to be an enemy alien during time of war.

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[8] Even outside the habeas context, English courts that did not have the power to provide relief to enemy aliens nonetheless had jurisdiction to determine whether the petitioner before them was in fact an enemy alien. *See, e.g., Sylvester's Case*, 87 Eng. Rep. 1157 (K.B. 1703) (holding that a Frenchmen could challenge his designation as an enemy alien and thereby gain access to English courts). *Accord Sparenburgh v. Bannatyne*, 126 Eng. Rep. 837, 840-41 (C.P. 1797).

[9] Although Lockington's petition was brought under a state statute, the disposition of his case demonstrates the general understanding of habeas corpus jurisdiction at common law in America. *See* G. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 993 (1998).

B. Courts exercised common law habeas jurisdiction regardless of formal territorial sovereignty.

As this Court has recognized, at common law the writ of habeas corpus had an "extraordinary territorial ambit." *Rasul*, 542 U.S. at 482 n.12 (internal quotation marks omitted). Courts exercised jurisdiction over the habeas petition of any person detained within territory under the Crown's *de facto* control, regardless of whether the territory was under the Crown's formal sovereignty. *Id.* at 481 ("[T]he reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown."). This Court's conclusion in *Rasul* is fully supported by the historical record, and *amici* are unaware of any case before 1789 in which the common law writ of habeas corpus was held *not* to extend to any territory over which the Crown exercised sufficient power and control to enforce it.

1. Habeas writs issued directly by the King's Bench in Westminster to persons detained outside the realm of England.

Cases dating from the early seventeenth century through the late eighteenth century demonstrate the gradual expansion of the territorial ambit of habeas corpus. As discussed above, the writ was used throughout this period to ensure that no jailor acting in the name of the King was exempted from the scrutiny of the King's courts of law. *See* Blackstone, *supra*, 3 COMMENTARIES 131 ("[F]or the king is at all times [e]ntitled to have an account, why the liberty of any of his subjects is restrained, *wherever* that restraint may be inflicted.").[10]

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[10] *See* discussion of the term "subject," *supra* at n.4.

Throughout the seventeenth century, English courts issued common law habeas writs to so-called "exempt jurisdictions" – territories which, because of ancient privileges predating their acquisition by the English crown, maintained their own local courts of law.[11] Despite royal charters exempting these territories from general judicial oversight by the central English courts, the common law writ of habeas corpus still ran.[12] Sir Matthew Hale noted the importance of the writ's broad territorial reach "partly in respect of the interest the king hath in his subject, partly in respect there is no other means to examine whether his commitment be legal." HALE'S PREROGATIVES, at 207.

Throughout the eighteenth century, habeas corpus continued to reach exempt jurisdictions and distant sites subject to *de facto* English control. Lord Mansfield, writing his 1759 decision in *R. v. Cowle*, cited to a successful habeas action brought in 1601 by one Henry Brearly in Berwick-on-Tweed, an exempt jurisdiction on the Scottish-English border outside the formal realm of England, and declared that "[w]rits . . . such as writs of . . . habeas corpus . . . may issue to every dominion of the Crown of England. There is no doubt as to the power of this court, *where the place is*

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[11] These territories included Berwick-on-Tweed, the Isle of Man, the Channel Islands, the Cinque Ports and Palatinates such as Durham. *See* Blackstone, *supra*, 3 COMMENTARIES 79.

[12] *See, e.g.*, *Brearly's Case*, PRO, KB21/2, fols. 84v, 87 & 95 (K.B. 1600-1601) (writ issued to Berwick-upon-Tweed, exempt jurisdiction on the English-Scottish border) (cited in *R. v. Cowle*, 97 Eng. Rep. 587 (K.B. 1759)); *Bourn's Case*, 79 Eng. Rep. 465 (K.B. 1619) (writ issued to Dover, a Cinque Port town); *Jobson's Case*, 82 Eng. Rep. 325 (K.B. 1626) (writ issued to Durham, a County Palatine; writs previously issued to Calais and Bordeaux as early as fourteenth century). As the Court noted in *Rasul*, in the decades following the passage of the Habeas Corpus Act of 1641, English courts continued to exercise their common law jurisdiction over habeas claims from petitioners detained outside England. *R. v. Overton*, 82 Eng. Rep. 1173 (K.B. 1668) (writ issued to Isle of Jersey) and *R. v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669). *See also Anonymous*, 86 Eng. Rep. 230 (K.B. 1681).

under the subjection of the Crown of England."[13] 97 Eng. Rep. at 599. Thus, "even if a territory was 'no part of the realm,' there was 'no doubt' as to the court's power to issue writs of habeas corpus." *Rasul*, 542 U.S. at 482 (quoting *Cowle*).

Efforts to create enclaves beyond judicial reach were seen as affronts to the rule of law. In 1667 the Earl of Clarendon was impeached and charged with attempting to undermine the judicial exercise of habeas corpus by sending persons "to be imprisoned against law in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law." *See Proceedings in Parliament Against Edward Earl of Clarendon, Lord High Chancellor of England, for High Treason, and Other High Crimes and Misdemeanors: 15 and 19 Charles II. A.D. 1663-1667*, 6 STATE TRIALS 291, 330, 396 (1668). In the present case, the circuit court interpreted the "Clarendon Affair" as an example of the unavailability of habeas corpus to detainees held in certain locations. *Boumediene*, 476 F.3d at 989-90. However, Clarendon's prisoners were prevented from enjoying "the benefit of the law" *not* because their territorial location was beyond the jurisdiction of English courts, but rather because those courts were prevented from exercising their proper jurisdiction at common law by the very communication and transportation problems created by Clarendon's actions – actions that Parliament held to be

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[13] "[E]very dominion of the Crown of England" refers to every territory under the control of the English Crown. "Dominion" understood in its historical context is not a legal category of land-holding – colonies, protectorates and dependent territories have all been described as dominions – but rather an expressive term implying the breadth of the Crown's reach, applicable to any locale under the *de facto* control of the English Crown. *See generally* OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining "dominion" as "[t]he territory owned by or subject to a king or ruler, *or* under a particular government or control, *esp. a country outside England or Great Britain* under the sovereignty of *or owing allegiance to the English or British Crown*") (emphasis added).

treasonous.[14] The lower court's reading turns the historical record on its head: the Clarendon Affair does not prove the limits of the common law reach of habeas corpus; on the contrary, it demonstrates that creating enclaves of unreviewable executive detention is antithetical to the very purpose and history of the Great Writ.[15]

The Framers of the United States Constitution, steeped in English law, drew upon the common law framework in drafting the Suspension Clause. That framework was shaped by the learned opinions of Hale and Blackstone, by precedents such as *Brearly* and *Cowle*, and

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[14] Parliament also responded to the Clarendon Affair with the Habeas Corpus Act, 31 Car. 2, c. 2, passed in 1679, that reinforced the common law understanding that habeas had a broad territorial scope, removed any doubt that a court's jurisdiction to issue the writ extended to detentions overseas, and made it a separate offence to remove detained persons to "Scotland, Ireland, Jersey, Guernsey, Tangier, or into Parts, Garrisons, Islands or Places beyond the Seas, which are or at any time hereafter shall be within or without the Dominions of his Majesty." 31 Car. 2, c. 2, Sects. XI-XII (emphasis added).

A century later, Sir Robert Chambers, successor to Blackstone as Vinerian Professor of English Law at Oxford (and who later became a Justice of the Supreme Court of Judicature at Calcutta, *see infra* at note 19), argued that despite the practical complications of enforcement, habeas corpus was still the most effective legal recourse for those held, as Clarendon's prisoners had been, in extra-territorial detention. "Yet cases have formerly happened of persons illegally sent from hence and detained there in which a writ of habeas corpus would be the properest and most effective remedy." Sir R. Chambers, LECTURES ON ENGLISH LAW, COMPOSED IN ASSOCIATION WITH SAMUEL JOHNSON, 1767-1773 at 7, 8 (1986).

[15] Lord Mansfield expressed similar hostility to enclaves where executive detention could not be effectively reviewed by courts. In *Fabrigas v. Mostyn*, 20 Howell's State Trials 81 (K.B. 1775), a "native" of Minorca brought an action for false imprisonment and banishment against the English military governor, who claimed immunity. In rejecting the governor's sweeping assertion of absolute executive power, Lord Mansfield cautioned that "to lay down in an English court of justice such monstrous propositions as that a governor ... can do what he pleases ... and is accountable to nobody – is a doctrine not to be maintained; for if he is not accountable in this court, he is accountable nowhere." *Id.* at 231.

by reaction to the misadventures of Clarendon, all of which demonstrated that habeas prevented the establishment of prisons beyond judicial reach.

2. Habeas writs issued by English law courts located in overseas territories

English law courts established overseas, in a wide variety of territorial locations with differing gradations of allegiance to the Crown, possessed the power to issue the writ of habeas corpus. *See, e.g.*, Instruction Nos. 464 & 466, *in* 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 334-38 (L. Labaree, ed. 1967) (providing instructions extending writ to Barbados in 1702, Bahamas in 1729, St. John in 1769, and Nova Scotia in 1749); F. Madden & D. Fieldhouse, THE CLASSICAL PERIOD OF THE FIRST BRITISH EMPIRE, 1689-1783 at 450 n.2 (1985) (regarding extension of writ to Jamaica in late eighteenth century).

English courts in India, which provide a useful analogy to the case at bar, also had authority to issue writs of habeas corpus. Established by the Crown to ensure that the East India Company complied with the common law,[16] these courts had jurisdiction over an area that was not sovereign territory belonging to the Crown but nonetheless was under

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[16] After Parliament passed the Regulating Act of 1773 to oversee the administration of the East India Company, a royal charter established a Supreme Court of Judicature at Calcutta with jurisdiction that included Bengal, Bihar, and Orissa and which had the "full power and authority" to adjudicate "all complaints against any of his majesty's subjects for any crimes, misdemeanors or oppressions" in a manner similar to the King's Bench. 13 George III, §14. The Court took seriously its responsibilities to check abuses by the East India Company, as evidenced by Chief Justice Impey's warning to the Company's Governor General: "Though the natives without question are under your general protection, they are more immediately so under that of the laws. One great end of the institution of our court is their protection, particularly against British subjects vested with real or pretended authority." Chief Justice Sir Elijah Impey, Letter to the Governor General and Council of the East India Company, BL, MS Add. 16,265 (Impey Letterbook 1774-76) f29v (25 May 1775).

de facto English control. M.P. Jain, OUTLINES OF INDIAN LEGAL HISTORY 83-137 (1952).[17] Further, habeas reached into India not through a specific statutory grant, but through the common law.[18]

The Supreme Court at Calcutta's jurisdiction over habeas claims was not limited by the petitioner's alienage as long as the jailer in question was operating under the authority of the Crown or a Crown-chartered organization. As stated by Justice Robert Chambers of the Supreme Court at Calcutta, "I conceive every man in these provinces, whether subject to our jurisdiction or no, to be entitled to a *habeas corpus*, upon ... reason to believe that he is imprisoned without any just cause, *by a person employed by the East India Company.*" *Cumall a Deen Ally Khan v. Charles Goring*, BL Add. MSS 38,400 folio 84 (Sup. Ct.,

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[17] Britain intentionally delayed assertions of formal sovereignty over the range of territories controlled by the East India Company until 1813. 4 THE CAMBRIDGE HISTORY OF THE BRITISH EMPIRE 605 (Dodwell, H.H. ed. 1929) ("Down to [1813] the British assertion of sovereignty within the Company's possessions had been spasmodic and incomplete.").

[18] Habeas corpus is not mentioned the Regulating Act, and a subsequent royal charter for the Supreme Court of Judicature at Calcutta enumerated the Court's power to issue writs of "mandamus, certiorari, procedendo and error" but not habeas corpus. "Charter for Erecting a Supreme Court of Judicature at Fort William, in Bengal," of March 1774, in A COLLECTION OF STATUTES...AND AN ABRIDGEMENT OF THE COMPANY'S CHARTERS (1794), Appendix, p.1. The Court was able to implement the common law, however, and it was in the common law that habeas power resided. "The powers of Justice of the Court of King's Bench at common law are given severally and respectively to the Judges of this Court; and as (according to Blackstone) the Judges of the King's Bench used to issue writs of *habeas corpus* severally, we have agreed that we have severally authority to issue the writ." *R. v. Ramgovind Mitter*, Ind. Dec. (O.S.), I, 1009 (Sup. Ct., Calcutta, 1781) (Chambers, J.). Even the Governor General of the East India Company, whose employees were the recipients of habeas writs issued by the Court, acknowledged the Court's jurisdiction, explaining to company directors that "the Court cannot avoid issuing such writs, if the complainants swear that the defendants are employed in the service of English subjects." Governor General Hastings, Letter to East India Company Directors, IOL/L/PARL/2/9, no.16, ff. 265-268 (25 Feb. 1775).

Calcutta 1775) (opinion of Chambers, J.) (emphasis in original) (ordering the release of a revenue collector detained by the East India Company for alleged late payments).[19] This court issued scores of habeas writs, including many for petitioners of Indian or other non-English alienage.[20] To the extent the limits of the Supreme Court at Calcutta's habeas jurisdiction were discussed, the question turned not on the formal territorial sovereignty of the site of detention, but on the competence of local courts. Only when a local court was competent to review and redress unlawful detention might the English court consider declining to exercise its common law habeas jurisdiction as a matter of comity.[21]

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[19] Robert Chambers (1737–1803) had a long and distinguished career as a legal scholar and jurist. He succeeded Blackstone as Vinerian Professor of English Law at Oxford, served as Principal of New Inn Hall, Oxford, and enjoyed a twenty-five year long tenure as a Justice (later Chief Justice) of the Supreme Court of Judicature at Calcutta. *See generally* T. Curley, SIR ROBERT CHAMBERS: LAW, LITERATURE AND EMPIRE IN THE AGE OF JOHNSON (1998).

[20] *See, e.g.*, *Case of Seroop Chund* (Sup. Ct., Calcutta 1781) (Lemaistre, J.), reported in REPORT FROM THE COMMITTEE TO WHOM THE PETITION OF JOHN TOUCHET AND JOHN IRVING, AGENTS FOR THE ENGLISH SUBJECTS RESIDING IN THE PROVINCES OF BENGAL...WERE SEVERALLY REFERRED (London, 1781), unpaginated, Appendix 9 (issuing writ to bail Indian jailed for failure to repay debt); *In re Coza Zachariah Khan*, 1 Morley Dig. 277 (Sup. Ct., Calcutta 1779) (issuing writ to Indian held in "a distant place" and ordering its return upon receipt); *Case of Bancha Ram* (Sup. Ct., Calcutta 1775), *in* THE JUDICIAL NOTEBOOKS OF JOHN HYDE AND SIR ROBERT CHAMBERS 1774-1798, entry of 13 Feb. 1776, 72 vols., R4073 ff., Victoria Memorial Hall, Calcutta (hereinafter "NOTEBOOKS") (describing writ issued to Indian detainees jailed by English authorities); *Case of Joseph Pavesi* (Sup. Ct., Calcutta 1776) *in* NOTEBOOKS (same, as to French national detained in Bengal). *See generally* N. Hussain, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW 80-81 (2003).

[21] In *Case of Sanson* (Sup. Ct., Calcutta 1776), the four justices of the Supreme Court at Calcutta disagreed about the court's ability to discharge a French national ordered by a local Indian court to be held in an English-controlled jail on assault charges. *See* Curley, *supra* at 242-43, 593-94 n.61. Justice Chambers recommended deference to the local courts. *See* Sir. R. Chambers, Letter to Rt. Hon. Charles Jenkinson, *in*

Parliament recognized the application of the writ outside the realm of England to non-English aliens – that is, the use of habeas by Indian petitioners in India – even as it attempted to limit that application by statute. In 1781, at the behest of the East India Company, Parliament passed the Act of Settlement, which allowed jailers to defeat a petition for habeas corpus on behalf of a non-English alien by producing a statement from the Governor-General of the East India Company that the Company had authorized the detention. 21 Geo. III c.70; *see also* Jain, *supra*, at 122. However, the Act did not extinguish the Supreme Court's ability to exercise habeas corpus to "accommodate ... the religion and manners" practiced locally, which invited the Court to use habeas corpus to settle family disputes and to defend individuals held improperly on private or local authority rather than Company authority. 21 George 3, c. 70, s. 19, *see also* Halliday & White, *supra*, at 77-81. Throughout the end of the eighteenth century and into the nineteenth, English courts in India repeatedly used their habeas jurisdiction to do so.[22]

Liverpool Papers, Vol CCXII, East India Papers (Jan. 1778 – Jan. 1779) MS Add. 38,401 ff 28a-28b (1 Feb 1778). By contrast, Justices Hyde and LeMaistre thought the local courts were inferior to the English courts, and sought a fuller account of Sanson's detention before denying relief. Hyde, NOTEBOOKS, 16 and 22 Apr. 1776. Justice Lemaistre went so far as to suggest convening before the Supreme Court a trial, complete with witnesses, on the circumstances and legal merits of the detention. *Id.* Chief Justice Impey worried that the local courts would not heed the Supreme Court's ruling, and that Sanson's case was "not amenable to us." *See* Liverpool Papers, Vol CCXII, East India Papers (Jan. 1778 – Jan 1779) MS Add. 38,401 ff 28a-29b, Sanson ultimately escaped, mooting the case before the court could issue a decision. *Id.* at 30a (all reported in Curley, *supra*, at 242-43, 593-94 n.61. Nonetheless, Justice Hyde's position was borne out in subsequent cases, as the Supreme Court exercised habeas jurisdiction over local court systems. *See, e.g.*, B.N. Pandey, THE INTRODUCTION OF ENGLISH LAW INTO INDIA 151 (1967) (discussing writ issued in 1777 on behalf of Indian arrested and confined without trial by local criminal court in Bengal, outside Calcutta).

[22] *See, e.g., In re Muddoosooden Sandell*, 2 Morley's Dig. 29 (Sup. Ct., Calcutta 1815) (issuing writ on behalf of mother against son); *Rajah*

In sum, the proceedings of English courts – whether sitting in London or in overseas territories, whether operating in permissive or restrictive statutory environments – demonstrate the broad territorial reach of habeas corpus. They show that the common law writ's availability did not depend on formal constructs such as sovereignty or on the alienage of the prisoner but instead extended to any territory where the crown possessed sufficient power and control to ensure the jailor's obedience to the writ's command.

II. The Writ Provided for Meaningful and Independent Judicial Inquiry Regarding the Factual Basis for Detention, Including Consideration of Additional Evidence.

The Government has asserted that habeas courts at common law "engage[d] in highly deferential sufficiency review" that precluded prisoners from contesting the facts alleged in the custodian's return. Gov't Supp. App. Br. at 51. That assertion is incorrect, as it ignores the difference between post-conviction criminal cases and other forms of executive or other non-criminal detention. English and American judges in the time surrounding the Founding routinely looked beyond the face of the return to ensure that individuals received meaningful judicial inquiry regarding the factual basis for their detention.

Mohinder Deb Rai v. Ramcanai Cur, 1 Morley's Dig. 277 (Sup. Ct., Calcutta 1794) (issuing writ and discharging Indian prisoner detained by order of provincial court). A separate supreme court established at Madras in 1801, *see* Jain, *supra*, at 125, likewise continued to issue writs of habeas corpus. *See, e.g., R. v. Nagapen*, 1 Morley's Dig., 278 (Sup. Ct., Madras 1814) (writ issued on behalf of mother to obtain possession of her illegitimate infant unlawfully in putative father's custody); *R. v. Monisee*, 1 Morley's Dig. 278 (Sup. Ct., Madras 1810) (issuing writ to petitioners held outside Madras by local jailer).

B. A. At common law, judicial scrutiny was greatest outside the context of post-criminal convictions.

The Government's contention that common law courts were strictly bound by the four corners of the custodian's return (or response) to a habeas corpus petition is historically inaccurate. To the contrary, the general rule against traversing – or disputing – the facts asserted in the return applied primarily in post-conviction criminal cases.[23] While courts generally did not allow criminal detainees—who had already received a trial and a jury verdict—to contradict the facts stated in the return,[24] they commonly exercised independent review over the factual assertions of prisoners in cases of executive and other non-criminal detention that lacked the safeguards of a jury trial by considering additional evidence. J. Hafetz, *Note, The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2535-36 (1998). In cases arising out of "partially judicial, partially executive

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[23] This distinction is recognized by Dallin Oaks, despite his work having been cited prominently—and erroneously—by the Government. D.H. Oaks, *Legal History in the High Court--Habeas Corpus*, 64 MICH. L. REV. 451, 454 n.20 (1966) ("[W]ith respect to imprisonments other than for criminal matters, however, the exceptions to the rule against controverting the return were 'governed by a principle sufficiently comprehensive to include . . . most cases' so that it was impossible to specify those [non-criminal] cases in which it could not [be controverted].'") (quoting R.C. Hurd, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS 270-71 (1858) (bracketed language and ellipsis in original).

[24] By contrast, courts entertaining habeas petitions of pretrial criminal detainees seeking bail often considered extrinsic factual evidence going to the legality of the arrest. *See, e.g., Crisp's Case*, 94 Eng. Rep. 495 (K.B. 1744) (in considering return of commitment on allegation of highway robbery, examining affidavits "containing very strong circumstances to show that the prisoner did not commit the fact" and entering *nisi* order to bail); *Barney's Case*, 87 Eng. Rep. 683 (K.B. 1701) (granting bail for woman indicted for killing her husband after allowing her to introduce affidavits of fact showing malicious prosecution).

bodies, the writ moved yet closer to its role as a safeguard against the arbitrary power of the Crown itself." W.F. Duker, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 80 (1980). *Accord* Baker, INTRODUCTION, *supra*, at 419 (observing that the expanded powers of summary conviction "infringed the principle that a man should only be judged by his peers, and . . . were regarded with deep suspicion by the superior judges"). To that end, English and American judges in the seventeenth and eighteenth centuries ensured that individuals challenging executive detention received meaningful and independent review of both factual and legal questions.

Full exploration of the Government's chief historical source for the general rule against traversing the return shows that its reliance is misplaced for two reasons. First, among leading English jurists in the mid-eighteenth century, there existed a multiplicity of views surrounding the effect of the return, and the rule against traversing the return was neither iron-clad nor the prevailing view among judges. Second, and equally important, even defenders of the rule against traversing the return permitted the introduction of facts in habeas cases by a range of other means.

The Government principally relies on a statement by Justice John Eardley Wilmot, *Opinion on the Writ of Habeas Corpus*, 107 Eng. Rep. 29 (H.L. 1758), during the debate on the failed 1758 habeas corpus bill. Gov't Supp. App. Br. at 51. The bill would have extended certain procedural reforms available in criminal cases under the Habeas Corpus Act of 1679 to non-criminal cases and codified the common law practice of permitting the habeas petitioner to controvert facts stated in the return. 15 PARLIAMENTARY HIST. 871-74 (London, T.C. Hansard 1813). Wilmot opined that judges sitting in habeas were constrained by the return, except "by the clearest and most undoubted proof"—a jury verdict. 107 Eng. Rep. at 60.

Wilmot's view, however, was not commonly accepted. *See* J. Oldham & M. Wishnie, *The Historical Scope of Habeas Corpus and INS v. St. Cyr*, 16 GEO. IMM.

L.J. 488, 495 (2002) (criticizing account contained in W. S. Holdsworth, 9 A HISTORY OF ENGLISH LAW 120 (reprint 1966)). Six of the twelve common law judges disagreed with Wilmot's views, and after the failure of the 1758 bill, an alternative bill drafted by the judges expressly permitted judicial examination into the truth of the facts alleged in the return. Oldham & Wishnie, *supra*, at 490. In particular, Justice Michael Foster, widely respected by his colleagues for his expertise in criminal law, stated of non-jury executive detention cases, "as they come not within the general reason of the law, [they] are not within the general rule." Letter, Justice Foster to Chief Baron Parker, 20 How. St. Tr. 1378 (cited in Hurd, *supra*, at 267 (1858)). Foster recognized that if denied the opportunity to controvert the truth of the facts claimed in the return, a man pressed into military service could be sent away far from any court without an opportunity to contest the deprivation of his liberty. In such circumstances, "he is absolutely without remedy" because "[a]n ineffectual remedy is no remedy; it is a rope thrown to a drowning man, which cannot reach him, or will not bear his weight." Oldham & Wishnie, *supra*, at 489 (citing M. Dodson, THE LIFE OF SIR MICHAEL FOSTER 57-62 (1811) (reprinting letter dated May 24, 1758). Thus, Wilmot's statement by no means represented a consensus viewpoint. R.J. Sharpe, THE LAW OF HABEAS CORPUS 66 (2d ed., 1989) ("[T]here was nothing like unanimity in favour of Wilmot's formulation of the common law rule. In fact, there would seem to have been a preponderance of judicial opinion which favoured a more liberal construction."). Indeed, prisoners detained without charge contested the facts in the return in "*most* ... cases." Oaks, *supra*, 64 MICH. L. REV. at 454 n.20 (emphasis added).

The judges' debate was narrowly focused on what happened after the return was made, not on the broader issue of whether habeas petitions were barred from introducing, or whether judges might request or consider, additional facts. 15 PARLIAMENTARY HIST., *supra*, at 872. At common law, a

jailer made a return only *after* the court issued the writ. A prisoner moved, or "petitioned," for a writ of habeas corpus. The court could immediately enter the writ, thereby calling for the jailer to make a return. Instead of immediately issuing the writ, however, the court could issue an order to show cause, or rule *nisi*, why the writ should not issue. *See infra*, at 22-23. At that stage of the proceedings, because the return had not been entered, both sides were able to contest the factual and legal basis of the detention. Thus, common law judges – including Lord Mansfield, who concurred with Wilmot that "the Writ of Habeas Corpus issues upon the return supposing the facts alleged to be true"[25] – employed a variety of procedural mechanisms to conduct a full judicial inquiry into the factual basis of non-criminal detentions, including the consideration of extrinsic facts.

C. Habeas corpus provided a flexible and powerful tool for judges to inquire into the factual and legal basis for a prisoner's detention.

Common law courts routinely considered evidence beyond the face of the return in non-criminal contexts such as impressments and private detentions. As one historian recognized, "courts have never really been prevented by the common law rule from reviewing facts essential to the jurisdiction or authority underlying the order for detention." Sharpe, *supra*, at 70. *See also* G. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 980 (1998) (acknowledging that "[o]ne of the maxims of eighteenth-century habeas corpus practice had been that the petitioner could not controvert the facts stated in the return," but noting that the "general statement papered over exceptions"). Instead, by the eighteenth century, courts treated the so-called rule against controverting the truth of the return as essentially a procedural hurdle and reviewed

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[25] Oldham & Wishnie, *supra*, at 492 (citing Mansfield's own notes of the debates, Scone Palace MSS, Bundle 1352, unpublished manuscript).

additional evidence submitted by the prisoner if (1) the return was deemed insufficient; (2) prior to the entry of a return, the court issued a rule *nisi*, essentially converting the writ into an order to show cause; (3) the petitioner "confessed" to the facts contained in the return, which then permitted the introduction of additional factual allegations; or (4) the evidence pertained to jurisdictional facts, which often extended to the very core of the case and effectively vitiated the rule altogether. *See generally* Sharpe, *supra*, at 66-68, 72-73; Hurd, *supra*, at 267-71. In short, common law courts exercised an arsenal of mechanisms that formally preserved the respective roles of judge and jury in criminal cases while permitting judicial fact-finding in a wide range of cases of executive and other-non-criminal detention, where a prisoner had not received – and would not receive – the full panoply of protections provided in jury trials.

1. False or insufficient return

Courts did not hesitate to admit additional relevant information or even to conduct their own interview of witnesses and documents when a return appeared insufficient or false. Sufficiency of the return—a statement of the cause for detention and process given—was fundamental to preserving the integrity of the writ. *R. v. Winton*, 101 Eng. Rep. 51 (K.B. 1792) ("The courts always look with a watchful eye at the returns to writs of habeas corpus. The liberty of the subject so essentially depends on a ready compliance with the requisitions of this writ that we are jealous whenever an attempt is made to deviate from the usual form of the return."). Further, if the court had cause to believe a return was false—regardless of its adherence to legal form—the court permitted additional factfinding. *See Leonard Watson's Case*, 112 Eng. Rep. 1389, 1415 (K.B. 1839) (declining to establish blanket rule providing that custodian bear affirmative burden of demonstrating the veracity of the return, but permitting petitioner to demonstrate on traverse that the facts in the original return

were false and, upon such a showing, compelling jailer to explain the untruths in the original return or to provide further evidence of the return's veracity). Thus, in *Strudwick's Case*, 94 Eng. Rep. 271 (K.B. 1744), in response to a return that a prisoner was too sick to be produced in court, the court considered affidavits from both sides attesting to the prisoner's state of health. *See also Emerton's Case*, 84 Eng. Rep. 829 (K.B. 1675) (finding return insufficient on basis of affidavit attesting that petitioner's wife was still under respondent's custody).

2. Rule nisi: order to show cause

Perhaps the most common means of independent judicial fact-finding was to evade the return altogether. Upon receiving a motion for habeas corpus, the court issued a rule *nisi* in advance of a writ for habeas corpus. The jailer was ordered to show cause as to why the court should not issue the writ (which could be rebutted by the petitioner), instead of filing a return, which was presumptively binding. If the jailer was unable to show cause, the writ issued, and the petitioner had the advantage of the factual record already developed. In *R. v. Dawes*, 97 Eng. Rep. 486 (K.B. 1758), for example, Lord Mansfield "went minutely through the affidavits on both sides" on an order to show cause for the discharge of an impressed sailor, ultimately finding that the impressment was valid. In a parallel case, Lord Mansfield considered the case of a man who claimed he had been illegally conscripted into military service by force. On a rule *nisi*, the lawyers argued "upon the fact only," and the court, having taken "time . . . to look into the affidavits," ordered the petitioner's discharge. *R. v. Kessel*, 97 Eng. Rep. 486 (K.B. 1758).

Rules *nisi* commonly issued in private detentions as well. In *R. v. Turlington*, 97 Eng. Rep. 741, 741 (K.B. 1761), the court discharged a woman contesting her confinement in a "mad-house" after ordering a medical inspection, reviewing that doctor's affidavit from the medical inspection,

and examining the woman, who appeared to be sane. In *Case of the Hottentot Venus*, 104 Eng. Rep. 344, 344-45 (K.B. 1810), the court considered multiple affidavits from witnesses and ordered an examination of a "native of South Africa" to assess whether she was confined against her will.[26]. These and numerous other examples demonstrate that courts employed the rule *nisi* procedure on habeas to consider new facts in determining whether the prisoner was lawfully detained.[27]

3. Confession and avoidance

Courts overseeing habeas proceedings also engaged in factual review by permitting detainees to "confess and avoid" the return, allowing the petitioner to admit the allegations in the return and then file a special pleading to matters that did not explicitly contradict the return, including

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[26] Contemporaneous news reports indicate that the court undertook lengthy factual inquiry in considering the habeas petition brought on behalf of the "Venus Hottentot," a woman from South Africa who was alleged to be held and exhibited to the public against her will. 104 Eng. Rep. at 344-45. Over two days of proceedings, the court considered affidavits of a businessman who had turned down an offer to buy the detainee and another person who had gone to the exhibition and attested in detail to the prisoner's apparent misuse. On this extrinsic evidence, the court ordered that the prisoner be brought forth to determine whether she was being kept against her will. LONDON TIMES at 3B (Nov. 26, 1810). The court conducted a three hour independent examination of the detainee, and ultimately decided against issuing the writ, based upon the detainee's own testimony that she was employed in accordance with her own will. LONDON TIMES at 3D (Nov. 29, 1810).

[27] *See* LONDON TIMES at 4A (Nov. 30, 1801) (reporting case of John Rogers, who was detained by doctor as insane person; noting that court considered several affidavits from numerous doctors and relatives on both sides of the issue, and ordered that the writ should enter, but only to provide a court-appointed investigator to examine Mr. Rogers at the asylum); LONDON TIMES at 3B (Nov. 29, 1809) (reporting case of Tilley Mathews, whose relatives filed a petition when the governors of the hospital refused to release her; noting that the court considered multiple affidavits, and ordered hearing to consider "what additional evidence could be procured," including affidavits from the detainee's doctors).

additional facts not contained in the return. For example, in *Goldswain's Case*, 96 Eng. Rep. 711 (K.B. 1778), the court looked beyond the admiralty's return to a petition brought by a bargeman who had been impressed by the Admiralty despite being under the protection of the Navy-Board while carrying cargo for the King. The return made no mention of the claimed protections, but merely contained the statutory basis for impressment and the time and place Goldswain was taken. The court rejected the contention that it must defer to the admiralty's statement of the factual and legal basis for detention: "[W]e are not concluded by the return but the petitioner may plead to it any special matter necessary to regain his liberty." *Id.* The court then decided, on the basis of the additional factual evidence in the petitioner's special pleading submitted in response to the return, that he had been subject to protection by the Navy-Board and ordered his discharge. *See also Good's Case*, 96 Eng. Rep. 137 (K.B. 1760) (accepting the petitioner's affidavit stating that he was a ship-carpenter and thus entitled to an exemption from enlistment based on the petitioner's status as a freeholder); *Gardener's Case*, 79 Eng. Rep. 1048 (K.B. 1601) (ordering discharge based on petitioner's "confession" that he had possessed a handgun and additional submission that such possession was justified due to petitioner's status as deputy sheriff); Hurd, *supra*, at 353-61. "Confessing and avoiding" the return thus provided an important means of remedying unlawful detentions by enabling judges to consider existing evidence and to ensure there was adequate factual basis for executive and other non-criminal detentions.

4. Jurisdictional facts

Common law courts also frequently considered extrinsic evidence without resorting to any of the technical procedural mechanisms discussed above. These cases suggest that courts were willing to review jurisdictional facts—i.e., evidence showing that the detention in question was beyond the custodian's authority. Sharpe, *supra*, at 73

("[A]dmittedly, there can be little doubt that it is difficult to distinguish a jurisdictional fact from a non-jurisdictional one," but inferior courts and executive agencies would otherwise be permitted to establish the limits of their own powers, "and the courts have long considered that such unfettered powers would be intolerable with respect to the liberty of the subject."). In *Ex Parte Beeching*, 107 Eng. Rep. 1010 (K.B. 1825), for example, the court considered the legality of civil arrests under the Custom Act. The statute required that persons arrested under the statute be reviewed by justices of the peace residing near the place of arrest. The return alleged that petitioners were taken by their own consent to a jail more than 150 miles from their place of arrest. Justice Abbot stated that because the case arose under common law habeas, the effect of the return was an open issue. He observed that "[t]here is a very good reason for not permitting the truth of a return to be traversed where the person is charged with a crime, for that would be trying him upon affidavits," and thus usurping the role of the jury, but held that such reservations did not apply to the committing authority's jurisdiction, including the manner of arrest. *Id.*

In many instances, jurisdictional facts went to the heart of the case. Where the legality of detention turned on a factual requirement—such as enemy alien status or a factual basis for impressment— courts conducted an independent inquiry into the underlying facts, including evidence submitted by the prisoner, regardless of the return. Sharpe, *supra*, at 115-16 (habeas court will investigate whether detainee "is in fact and in law" an enemy alien or a prisoner of war). In *R. v. Schiever*, 97 Eng. Rep. at 551, a Swedish national challenged his detention as a prisoner of war. The court considered not only the affidavit of the petitioner, a Swedish sailor detained as a prisoner of war, but also that of Oluf Orundell, who was on board the privateer with the petitioner. *Id.* Though the court ultimately found that the petitioner was a prisoner of war, it considered extensive extrinsic evidence before doing so. *Accord Three Spanish*

Sailors, 96 Eng. Rep. at 775 (reviewing affidavits and bodies of petitioners before determining that petitioners "upon their own showing" were enemy aliens); *R. v. Marsh*, 81 Eng. Rep. 23 (K.B. 1688) (denying discharge of petitioner committed for piracy by admiralty following thorough review of all manner of evidence, including petitioner's own statements).

D. Early American courts continued the English common law tradition of conducting sufficient factual review to prevent illegal detention.

Early American courts similarly used the writ to remedy all manner of unjust commitment, even when doing so required factual inquiry beyond the face of the return. *R. v. Delaval*, 97 Eng. Rep. 913, 915-16 (K.B. 1763), in which Lord Mansfield conducted a full factual inquiry into the case of a girl held against her will, has been noted as "probably the best known and most influential habeas corpus authority imported into the country with the common law." D.H. Oaks, *Habeas Corpus in the States - 1776-1865*, 32 U. CHI. L. REV. 243, 271-72 (1965). Numerous examples from the Founding era confirm that judges routinely considered evidence beyond the face of the return, particularly in cases outside of the post-criminal conviction context. American courts, moreover, conducted fact-finding without resort to the formal procedural mechanisms used in England to consider additional evidence.

Chief Justice Marshall contemplated that courts sitting in habeas would review the decisions of committing magistrates for their adherence to core principles of due process by looking beyond the four corners of the return. In *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), Marshall considered a habeas petition by two defendants who had been arrested on charges of treason and committed pending trial. The Court "fully examined and attentively considered" the "testimony on which [the prisoners] were committed," in the prisoners' presence, during proceedings that stretched

over five days. *Id.* at 125. Marshall made clear that it was the Court's responsibility to undertake a plenary examination of the evidence, which, he noted, "the court below ought to have done." *Id.* at 114. The Court discharged the prisoners due to insufficient proof of the "actual assemblage of men for the purpose of executing a treasonable design" which the crime of levying war against the United States required. *Id.* at 125-36; *see also Ex parte Hamilton*, 3 U.S. (3 Dall.) 17, 17-18 (1795) (describing examination of affidavits submitted by prisoner and witnesses).[28]

Previous executive process did not foreclose a factual inquiry by a court during habeas proceedings. For example, Chief Justice Marshall, sitting on circuit, considered both factual and legal issues in reviewing the commitment of a civil debtor by a municipal authority. *In re Randolph*, 20 F. Cas. 242 (C.C.D. Va. 1833) (Marshall, C.J., on circuit). At the hearing, counsel for petitioner presented two new documents—authentic copies of the petitioners' original accounts to refute the accuracy of return, and the underlying warrant. 20 F. Cas. at 242. The court pointed to the municipal authority's erroneous accounting to demonstrate that the flawed quasi-judicial process was illegal. While the court acknowledged that it could not order a reaccounting, it could order release, which it did. *Id.* at 25.

The executive detention of military deserters drew especial judicial scrutiny. Numerous cases indicate that courts "exercising their original habeas jurisdiction were not bound by the returns to their writs, but commonly conducted evidentiary hearings to examine the substantive legality of

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[28] State courts also routinely considered extrinsic evidence in cases of non-criminal detention to determine that there was an adequate factual basis for the prisoner's confinement. *See also State v. Cheeseman*, 5 N.J. L. 522, 525 (1819) (considering upon return testimony and affidavits from mother, child and alleged guardians, and refusing to turn child over to guardians over child's own desires); *Matter of Oakes*, 8 Monthly Law Reporter 122, 122 (Sup. Jud. Ct. Mass. 1845) (not reported) (cited in Oaks, 32 U. CHI. L. REV. at 267) (remanding after two-day evidentiary hearing that commitment of mentally ill petitioner was proper).

detentions." *See* E.M. Freedman, *Milestones in Habeas Corpus: Part I*, 51 ALA. L. REV. 531, 572-73 & n.130 (2000) (collecting cases). For example, the district court conducted a detailed factual inquiry into the petitioner's state of mind and determined that he "enlisted ... when he was wholly incapable of transacting business or understanding it by reason of intoxication," thus invalidating the legal basis for commitment. E.M. Freedman, RETHINKING THE GREAT WRIT OF LIBERTY 166 & n.56 (2001) (citing and discussing *Matter of Peters*, M-1215 (D.W. Tenn. Dec. 31, 1827)).[29] Thus, as in the English impressment cases, American military enlistment cases often turned on extrinsic evidence submitted in response to the return. *See, e.g.*, *State v. Clark*, 2 Del. Cas. 578 (Del. Ch. 1820) (discharging soldier based upon newly submitted evidence contradicting the return and showing that soldier was underage and intoxicated at time of enlistment).

Courts exercised the same independent and *de novo* factual inquiry regardless of the petitioner's alienage. In *Ex parte Cabrera*, 4 F. Cas. 964, 964-66 (C.C.D. Pa. 1805), a foreign diplomat submitted a petition to federal district court on the grounds that he was entitled to immunity from imprisonment under state law for debt, and supplied numerous documents in response to the return. The court agreed, finding that the newly submitted pieces of evidence "fully establish" that there was no lawful basis for his confinement. *Id.* at 966; *see also Commonwealth v.*

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[29] *See also Commonwealth v. Murray*, 4 Binn. 487 (Pa. 1812) (following the submission of a return from naval officers attesting to the legality of the enlistment of an alleged minor, consider testimony of minor's mother regarding his age, family history and whether or not she in fact gave consent); *State v. Brearly*, 5 N.J. L. 555 (1819) (in response to return on habeas petition brought by proprietor on behalf of minor apprentice enlisted in navy, considering prisoner's and petitioner's own testimony and parties' stipulation of certain facts). *Cf. United States v. Bainbridge*, 24 F. Cas. 946, 949-52 (C.C.D. Mass. 1816) (Story, J., on circuit) (deciding as matter of law that Congress could require enlistment of minors without parental consent, but recognizing that court otherwise would have entertained detailed affidavits on issue of consent).

Harrison, 11 Mass. R. 63 (1813) (en banc) (ordering discharge upon affidavit of Russian captain to whom prisoner was given as apprentice and examination of Russian enlistee, despite plain face of return that apprentice swore to U.S. military officer that he was of age).

Courts similarly scrutinized the factual and legal basis for the executive detention of alleged enemy aliens. Again, courts considered additional facts submitted to show there was no lawful basis for the detention. *See, e.g.*, *Wilson v. Izard*, 30 F. Cas. 131, 131-32 (C.C.D. N.Y. 1815) (adjudicating habeas petition by English enlistees who claimed, inter alia, that as "alien enemies" they were ineligible to serve in military, "a fact not appearing on the return, but sworn to at the time of the allowance of the habeas corpus"); *Lockington's Case*, Bright (N.P.) 269 (Pa. 1813) (habeas corpus would issue if a petitioner contested the Government's factual assertions by submitting an "affidavit . . . [stating] that he is not an enemy alien").

In sum, English and American cases from the seventeenth through the nineteenth centuries demonstrate that the writ of habeas corpus functioned as a vigorous and critical limit on non-criminal detentions. Far from considering themselves bound by the four corners of the return, judges routinely considered extrinsic evidence such as in-court testimony, third party affidavits, documents, and expert opinions to scrutinize the factual and legal basis for detention. Only by providing meaningful review were courts able to protect the integrity of the Great Writ and to prevent the "practice of arbitrary imprisonments, . . . in all ages, the favorite and most formidable instrument[ ] of tyranny." A. Hamilton, Federalist Paper No. 84, in THE FEDERALIST PAPERS: A COLLECTION OF ESSAYS WRITTEN IN SUPPORT OF THE CONSTITUTION OF THE UNITED STATES 261 (Roy P. Fairfield, ed. 1981).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court exercise jurisdiction over the *habeas corpus* petitions and ensure independent judicial inquiry regarding the factual and legal basis for petitioners' detention.

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FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(33) (38)

Nos. 06-1195 & 06-1196

In the Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., *Petitioners,*
v.
GEORGE W. BUSH, ET AL., *Respondents.*

KHALED A.F. AL ODAH, ET AL., *Petitioners,*
v.
UNITED STATES, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTEREST OF THE AMICUS CURIAE[1]

The National Institute of Military Justice (NIMJ) is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and improve public understanding of military law. NIMJ's officers and advisory board include law professors, private practitioners, and other experts in the field, none of whom is on active duty in the military, but nearly all of whom have served as military lawyers, several as flag and general officers.

NIMJ appears regularly as an amicus curiae before the United States Court of Appeals for the Armed Forces, and has appeared in this Court as an amicus in support of the Government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of the Petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

NIMJ is actively involved in public education through its website, www.nimj.org, and through publications including the Annotated Guide to Procedures for Trials by Military Commissions of Certain Non-United States Citizen in the War Against Terrorism (2002) and two volumes of Military Commission Instructions Sourcebooks (2003-04). NIMJ has also sought to improve public understanding of military law by seeking release of comments on the rules governing military commissions. NIMJ is independent of the Government and relies for its programs exclusively upon voluntary private contributions.

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for the parties authored this brief in whole or in part, and no person or entity other than the amicus curiae, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

For more than five years, hundreds of individuals, from more than forty countries, have been held in military detention by the United States at its Naval Base in Guantanamo Bay and subjected to repeated interrogations under harsh conditions. According to the most comprehensive study of the population at Guantanamo Bay,[2] 93% of the prisoners were captured by parties others than the United States and its coalition partners, at a time when the United States was paying bounties for prisoners. Fewer than half of the prisoners are accused of committing a hostile act. Many were captured far from zones of active combat in Afghanistan and Iraq, in civilian settings in places as far-flung as Bosnia and Zambia. Many are held for nothing more than staying at hotels recommended by international travel guides, fleeing from troops fighting the Taliban, or owning a rifle or a Casio watch.[3]

Petitioners here contend that they are innocent of wrongdoing, engaged neither in combat nor in acts of terrorism, and are held without just cause. They further contend that they are entitled to a meaningful hearing at which the legality of their detention can be evaluated using fair procedures and an appropriate definition of the conduct for which they may lawfully be detained as combatants.

The majority below did not reach these claims because it concluded that it lacked jurisdiction over these habeas petitions and that the Constitution did not extend to Guantanamo. 476 F.3d 981, 994 (D.C. Cir. 2007). This brief does not focus on the jurisdictional issues or the question of the Constitution's territorial scope. Rather, it focuses on two of the claims that Petitioners would have the Court consider once it holds that it has jurisdiction and reaches the merits of their habeas petitions: first, that the

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[2] Mark Denbeaux et al., *Report on Guantanamo Detainees, A Profile of 517 Detainees through Analysis of Department of Defense Data* (2006).
[3] *Id.* at 17.

procedures used by the Combatant Status Review Tribunals (CSRTs) were inadequate; and second, that there is no lawful basis for Petitioners' detention because the CSRTs used a substantive definition of "combatant" that is not supported by the law of war and thus exceeds the scope of authority granted to the President by Congress. In one of the decisions on review, Judge Green held the CSRTs facially deficient on both these grounds. 355 F. Supp. 2d 443 (D.D.C. 2005). Similarly, Judge Rogers, dissenting in the Court of Appeals, thought the CSRT procedures inadequate, 476 F.3d at 1004-06, and skeptically described the Government's definition of "combatant" as "evolving and unlimited," *id.* at 1012 n.14. These judges were correct.

NIMJ files this brief to demonstrate how the Government's treatment of the prisoners at Guantanamo represents a dramatic and unlawful deviation from traditional military law and practice, both in terms of the procedures used to classify detainees and in terms of the substantive definition of "combatant." The Government's unlawful and unauthorized actions violate the rights of these Petitioners, and would endanger U.S. military personnel and civilians by undermining the law of war. After resolving the threshold jurisdictional issues, this Court should hold that Petitioners are entitled to habeas relief based on the procedural and substantive deficiencies of the CSRTs.

ARGUMENT

I. THE LAW OF WAR PROVIDES APPLICABLE STANDARDS FOR JUDGING THE LEGALITY OF PETITIONERS' DETENTION

A. Military law guarantees fair procedures to classify detainees in accordance with the law of war

The U.S. military has traditionally used fair procedures to classify prisoners in accordance with the law of war. The Government's failure to provide such procedures for the

Guantanamo detainees is a stark departure from this tradition of compliance with the law.

Contrary to the Government's argument that Guantanamo is a "law free" zone, U.S. armed forces everywhere in the world are governed by a comprehensive legal framework for the administration of justice. The Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-940, applies in peace and war, worldwide, and to American service members and people in their custody. UCMJ arts. 2(a)(1), (9) and 5, 10 U.S.C. §§ 802(a)(1), (9) and 805. These provisions reflect a legislative determination that rules of law can and do apply to persons located at, among other places, Guantanamo Bay.[4]

For over half a century, the UCMJ and implementing regulations have required compliance with the law of war, including the requirement that individuals seized in combat be afforded the protection of contemporaneous, competent and neutral tribunals to determine their status in doubtful cases in conformance with the law of war. This requirement stems from the Third Geneva Convention, which specifies that should there be any doubt "as to whether persons, having committed a belligerent act" are entitled to prisoner of war status, "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."[5]

This obligation is implemented in U.S. law through Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees ¶ 1-1(b) (1997) (AR 190-8). The Regulation is no mere aspiration,

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[4] UCMJ Article 2 makes the UCMJ applicable to "persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States." 10 U.S.C. § 802 (a)(12); *see Rasul*, 542 U.S. at 481-82 (Guantanamo Bay is such an area.).

[5] Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135.

but a detailed, enforceable rule of law promulgated under the authority of the UCMJ.[6] AR 190-8 specifically states that it "implements international law," including the Geneva Conventions. The Regulation provides that, "[i]n accordance with Article 5" of the Third Geneva Convention, in case of doubt "[a] competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces."[7] Such tribunals are legally required to determine whether individuals in custody meet the law of war definition of civilian rather than combatant, and whether or not they are entitled to prisoner of war status. Id. ¶ 1-6(e)(10) (listing possible determinations).

The requirement that wartime detainees' status must be determined by impartial tribunals in accordance with the law of war is recognized throughout authoritative sources on military law. This requirement is incorporated in the Department of the Army's *Field Manual on the Law of Land Warfare*, FM 27-10, at ¶ 71(a) (1956) (providing for a "competent tribunal" to determine the status of belligerents) (*The Law of Land Warfare*); the Department of the Navy's Commander's *Handbook on the Law of Naval Operations* § 11-7 (1995) (even "individuals captured as spies or illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated"); and the Army Judge Advocate General's

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[6] This Regulation was issued pursuant to 10 U.S.C. § 121, which authorizes the President to "prescribe regulations to carry out his functions, powers, and duties under this title." Duly enacted regulations like AR 190-8 constitute U.S. law. *Gratiot v. United States*, 45 U.S. (4 How.) 80, 117 (1846) ("As to the army regulations, this court has too repeatedly said, that they have the force of law . . . .").

[7] This identical regulation has been also adopted in the Navy (OPNAVINST 3461.6), Air Force (AF JI 31-304), and Marine Corps (MCO 3461.1.).

School's *Operational Law Handbook* 26 (2004) (directing judge advocates to "advise commanders that, regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of the [Third Geneva Convention], at least until their status may be determined") (*Army Operational Law Handbook*).

In the United States military's Area of Operations (AOR) that includes Afghanistan and Iraq, these provisions are further implemented by United States Central Command (CENTCOM) Regulation 27-13 (1995), which provides that U.S. personnel "who take or have custody of a detainee will: . . . (2) Apply the protections of the [Third Geneva Convention] to each [Enemy Prisoner of War] and to each detainee whose status has not yet been determined by a Tribunal covered under this regulation." This regulation applies to "all members of the United States Forces deployed to or operating in support of operations in the US CENTCOM AOR." Id. ¶ 2. Personnel who fail to treat any detainee in accordance with the Geneva Conventions "may be subject to punishment under the UCMJ." Id. ¶ 7(b).

The military's otherwise consistent record of compliance with these laws belies the Government's argument in these cases that legal process is incompatible with war. The U.S. Military Assistance Command in Vietnam, for example, enforced strict requirements for the classification of captured personnel, including providing impartial tribunals to determine eligibility for prisoner-of-war status. Directive No. 381-46, Annex A (Dec. 27, 1967), and Directive No. 20-5 (Sept. 21, 1966, as amended Mar. 15, 1968); *see also* Frederic L. Borch, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 29 (2001).

During Operation Desert Storm, the United States processed 69,822 Iraqi troops pursuant to AR 190-8. Borch, *supra*, at 22. The International Red Cross accordingly

reported that the United States complied with the Geneva Conventions more fully than any other nation in any previous conflict. *Id.* Similarly, in Panama in 1989-90, the United States provided tribunals to adjudicate the status of 4100 captured troops, promptly releasing 4000 and granting POW status to the remaining 100. *Id.* at 104-06. More recently, U.S. forces have also provided impartial tribunals compliant with Article 5 to adjudicate the status of captured belligerents in the current conflict in Iraq, a theater of active combat. Dep't of Defense, *Briefing on Enemy Prisoner of War Status Categories, Releases and Paroles* (May 9, 2003).

The Government's failure to provide the Guantanamo detainees with AR 190-8 hearings immediately after their capture is a dramatic break from decades of consistent military practice of compliance with the law. Since the United States has provided AR 190-8 tribunals in the war theaters of Vietnam, Panama, Iraq, and elsewhere, it is difficult to credit the argument that such tribunals at Guantanamo Bay, or litigation in the District of Columbia courts, would interfere with field commanders. Unlike the past tribunals that operated under fire, tribunals in Guantanamo Bay, or courts in the continental United States, would not be held in war zones. The Government offers no credible argument that tribunals required by military regulations and by the 194 nations subscribing to the Geneva Conventions would interfere with its war powers. The rules and practice of United States military forces establish that the involvement of competent tribunals in determining the status and rights of detained combatants is a regular component of military operations, and essential to ensuring compliance with the law of war.

There is simply no provision in any law, domestic or international, that permits the President to issue a blanket pronouncement that a military detention facility is outside

the law or that all individuals falling into the control of the United States in a particular theater of war are outlaws.

These protections may not be circumvented by a claim that detained personnel are not entitled to status as enemy prisoners of war. The Regulations implementing the Geneva Conventions provide a comprehensive framework for the treatment of persons caught up in armed conflict. By their explicit terms, *every* detainee whose status has not been determined by an impartial tribunal is entitled to their protection.

Having undertaken to adhere to these legal obligations, our military services and commander-in-chief are not free to disregard them. *Service v. Dulles*, 354 U.S. 363 (1957). The protections afforded by impartial tribunals are not voluntary or idiosyncratic efforts of field commanders, or applicable only to some detainees, but are the product of United States law, regulations, and orders protecting all classes of detainees.

B. This Court has traditionally used the law of war to inform its interpretation of statutes related to armed conflict and the scope of executive war powers

American compliance with the law of war has also been ensured by this Court's practice of looking to the law of war to inform the meaning of statutory provisions related to armed conflict, as well as the scope of inherent executive power. Based on these precedents, this Court should again be guided by the law of war in determining whether there is legal authority for the continued detention of Petitioners at Guantanamo.[8]

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[8] Reliance on the customary law of war (as reflected in the Geneva Conventions, among other sources) as a guide for interpretation of the scope of authorized government powers is analytically distinguishable from invoking the Geneva Conventions as a "source of rights" as described in section 5 of the Military Commissions Act of 2006 (MCA). When Congress does not intend its enactments to be read in light of international law, it says so explicitly, as it did in section

The Court relied on the law of war most recently in interpreting Article 21 of the UCMJ in *Hamdan*. Two years earlier, the plurality similarly relied on the law of war in interpreting the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) in *Hamdi*, 542 U.S. at 520-21; *id* at 550 (op. of Souter, J.). The plurality in *Hamdi* also indicated that the law of war could be relevant as one possible benchmark for evaluating whether particular procedures for classifying wartime detainees satisfy the constitutional requisites of due process. 542 U.S. at 538 (referring to AR 190-8 in discussing the "possibility that the [due process] standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal") (plurality op.); *id.* at 550 (op. of Souter, J.) (finding the detention of Petitioner unauthorized because of the Government's failure to comply with AR 190-8 and art. 5 of the Third Geneva Convention).

These decisions are only the latest in a long line of cases throughout American history that rely on the international law of war as a guide to the scope of government powers in armed conflict. *See Ex parte Quirin*, 317 U.S. 1, 27-28 (1942) (the Court has "recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals"); *The Prize Cases*, 67 U.S. (2 Black) 635, 667 (1863) (looking to international law of war to determine legality of wartime seizures by executive); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting) (noting that the President "cannot lawfully transcend the

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6(a)(2) of the MCA regarding the interpretation of the War Crimes Act, 18 U.S.C. § 2441(d). Thus, regardless of the meaning or proper application of these provisions of the MCA, reliance on the law of war as a guide for interpretation of authorized powers is as appropriate in this case as in other cases throughout American history.

rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorized proceedings which the civilized world repudiates and disclaims," in dissent from a majority opinion that restricted presidential war powers even further to measures explicitly authorized by Congress); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) ("congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed"); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) ("If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.").

Against this historic backdrop of compliance with the law of war, Congress would need to be exceptionally clear if it intended to empower the President to detain people in a manner not authorized by the law of war. Far from indicating an intent to authorize such deviation, however, Congress here authorized the President to use "necessary and appropriate force." AUMF § 2(a).

As the plurality of this Court concluded in *Hamdi*, the AUMF's reference to "necessary" and "appropriate" military force should be interpreted in light of "longstanding law-of-war principles," 542 U.S. at 521, to encompass only "fundamental and accepted" military detention practices that are by "'universal agreement and practice'" part of the lawful waging of war, *id.* at 518; *see id.* at 549 (op. of Souter, J.) (rejecting government's "claim here to be acting in accordance with customary law of war and hence to be within the terms of the Force Resolution.").

II. PETITIONERS' DETENTION IS NOT AUTHORIZED BY THE LAW OF WAR

As the above sections indicate, the requirements of the law of war are relevant both because of the binding military

rules and regulations that implement them and because this Court has traditionally relied on the law of war in interpreting the lawful scope of government powers in armed conflict. The continued detention of Petitioners at Guantanamo is unauthorized and illegal because the Government has deviated from both the procedural and substantive requirements of the law of war.

Petitioners are entitled to habeas relief on at least two grounds: first, the CSRTs employed procedures that are legally inadequate; and second, the CSRTs classified prisoners based on a substantive definition of "combatant" for which there is no authority. As the court below correctly concluded, because Petitioners' detention is not consistent with the law of war, it cannot be part of the "necessary and appropriate" force that Congress has authorized the President to use in fighting terrorism. 355 F. Supp. 2d at 475.

A. The procedures used by the CSRTs do not comport with the law of war

In accordance with the binding regulations described above, the U.S. military has traditionally used the procedures of AR 190-8 to classify prisoners in accordance with the law of war. None of the Petitioners received the hearings required by AR 190-8 immediately following their detention, and this fact alone renders their detention in violation of the law.

Moreover, the Government's attempt in the courts below to characterize the CSRT proceedings as comparable to those required by AR 190-8 misses the point that, at this late date, several years and half a world away from the place of capture, such minimal process is unacceptable. As this Court's decision in *Hamdi* made clear, "initial captures on the battlefield [where AR 190-8 hearings pursuant to Article 5 are held] need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have

been seized." 542 U.S. at 534 (emphasis added). Whereas battlefield needs may require a more summary proceeding, the defects in the CSRTs had no such justification. Petitioners here were far from a combat zone, and had been regularly interrogated for years, allowing the Government ample time to develop its evidence. The resulting proceedings ought to have been more robust if they were to remedy the lack of contemporaneous AR 190-8 hearings; instead they were less so.

The CSRTs did not provide even the minimum safeguards of an AR 190-8 proceeding. AR 190-8 hearings are based on evidence secured in compliance with the Geneva Conventions, which prohibit torture and coercion;[9] the CSRTs are not.[10] AR 190-8 hearings are conducted contemporaneously and near the place of capture, where witnesses are available; the CSRTs were conducted years later and thousands of miles from the battlefield. AR 190-8 hearings presume prisoners to be entitled to POW protections until proven otherwise (at ¶ 1-6(a)); the order creating the CSRTs begins with a recitation that the detainees subject to the CSRTs have already been determined to be enemy combatants,[11] requires the detainees to prove otherwise without access to witnesses

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[9] AR 190-8, ¶ 2-1a(1)(d) ("[t]he use of physical or mental torture or any coercion to compel prisoners to provide information is prohibited"); Third Geneva Convention arts. 3(1)(a), 17.

[10] Sec'y of the Navy, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba* § G(7) (July 29, 2004) (*CSRT Memorandum*) (allowing use of "any information it deems relevant and helpful"); *see also In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 472-73 (discussing allegations of CSRT use of statements obtained through torture or coercion).

[11] Deputy Sec'y of Defense, *Order Establishing Combatant Status Review Tribunal* § a (July 7, 2004) (*CSRT Order*)

and without being informed of the identity of accusers,[12] and in any event cannot grant detainees POW status.[13]

The failure of the CSRTs to meet even the basic requirements of AR 190-8 – let alone provide the additional protections necessary as a matter of due process to justify detention after so many years – is indicative of the degree to which they are inconsistent with the traditional law of war. The CSRTs are unauthorized because their deviation from the procedures required by the law of war takes them outside of Congress's authorization of "necessary and appropriate" force. Their departure from the law of war is also relevant to the issue of whether they satisfy the Due Process Clause. *Cf. Hamdi*, 542 U.S. at 538. While compliance with the law of war is not alone enough to satisfy constitutional standards of due process, *cf. id.* at 575 n.5 (Scalia, J., dissenting), failure to comply with even the most minimal law of war standards for battlefield tribunals certainly belies the argument that a given procedure constitutes due process.

Any neutral observer asked to describe the features of a civilized system of justice would be hard-pressed to identify anything more basic than the right to be informed of the basis for detention; the right to be confronted with evidence; and the rights to challenge that evidence and have assistance in doing so. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). As this Court made clear in *Hamdi*, "These essential constitutional promises may not be eroded." 542 U.S. at 533. Petitioners here have been denied these most basic rights.

In one of the decisions below, Judge Green – the only district judge to have reviewed the CSRTs in depth – found that they were woefully insufficient. She held that the

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[12] *CSRT Memorandum* §§ G(11), F(8), G(9).

[13] *CSRT Memorandum*, Encl. 9, Combatant Status Review Tribunal Decision Report Cover Sheet) ("The Tribunal has determined that he (is)(is not) an enemy combatant as defined in [*CSRT Order*]").

detainees had stated a valid claim that the CSRTs violated the Due Process Clause because in all cases detainees were (1) not provided with adequate notice of the bases for their detention; (2) forbidden access to material evidence upon which the CSRTs determined their status; (3) not given a fair opportunity to rebut the evidence upon which their status was determined; and (4) not provided with meaningful assistance to oppose the claims against them. 355 F. Supp. 2d at 468-72. In addition, the district court concluded that, in at least some of the cases, the CSRTs were alleged to have relied on evidence that was obtained by interrogations so severe as to amount to torture or impermissible coercion. Judge Rogers, who dissented from the jurisdictional ruling of the Court of Appeals, reached a similar conclusion. 476 F.3d at 1004-06.

B. The CSRTs used a definition of "combatant" that is inconsistent with the law of war

Judge Green also properly concluded below that the CSRTs were legally deficient because they employed a vague and overly broad definition of "enemy combatant." 355 F. Supp. 2d at 474-76.

In *Hamdi*, this Court recognized that the "necessary and appropriate force" authorized by Congress in the AUMF encompassed the detention of the "limited category" of persons who were "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan *and* who 'engaged in an armed conflict against the United States' there." 542 U.S. at 516, 518 (plurality op.) (emphasis added). As the Court explained, such detentions were supported by "longstanding law-of-war principles." *Id.* at 521.

As Judge Green found, "[t]he definition of 'enemy combatant' in the Order creating the CSRTs is significantly broader than the definition considered in *Hamdi*." 355 F. Supp. 2d at 475. The CSRT Order defines "enemy combatant" to be "an individual who was part of *or*

supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States and its coalition partners." CSRT Order § a (emphasis added). The Order specifies that this "includes" any person who has "committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *Id.* But it does not require that a person detained as a combatant have committed a belligerent act, directly supported hostilities, or otherwise "engaged in an armed conflict against the United States," as required by *Hamdi*. To the contrary, merely "supporting" the Taliban, al Qaeda, or associated forces is sufficient to subject one to indefinite military detention under the CSRT Order definition. *Id.*

At the hearing in the district court, the Government's attorney demonstrated the breadth of the CSRT definition in response to a series of hypotheticals. The Government argued that a variety of persons who did not participate directly in hostilities could be detained as combatants, including: "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities," "a person who teaches English to the son of an al Qaeda member," and a "journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source." 355 F. Supp. 2d at 475.

The law of war classifies all these individuals as civilians, not combatants. Congress's authorization of "necessary and appropriate" force cannot properly be read to encompass the classification and detention of individuals under the definition used by the CSRTs.

1. The law of war distinguishes between "combatants" and "civilians"

The Geneva Conventions, and especially Additional Protocol I, prescribe with considerable detail the rights and

duties of people caught up in armed conflict.[14] Additional Protocol I states that "combatants," who are "members of the armed forces of a Party to a conflict," art. 43(2), are lawful military targets, while non-combatants are not.[15] This deliberately limits the class of people who lawfully may be targeted by opposing military forces. People who are actually in the armed forces of a nation-state are deemed combatants and are generally lawful targets at all times; people who are not in the armed forces are generally not combatants and are generally not lawful targets.

Because the law of war provides a comprehensive scheme for people caught up in warfare, there is no intermediate status. Individuals must be classified either as combatants or civilians: "[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention . . . . There is no intermediate status; nobody in enemy hands can be outside the law." Int'l Comm. of the Red Cross, *Commentary to the IV Geneva Convention 51* (Jean S. Pictet ed. 1958); *see also Army Operational Law*

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[14] Although the United States has not ratified Additional Protocol I, it has acknowledged that much of the treaty reflects binding customary international law. *Army Operational Law Handbook* at 11; Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 420 (1987).

[15] Additional Protocol I further defines combatants to include: "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a Government or an authority not recognized by an adverse Party." Additional Protocol I art. 43(1). Members of disorganized militia groups who are not under a command responsible to a state Party to the conflict are not combatants under this definition. Conversely, civilians are defined as persons who do not fall into one of the categories of persons entitled to prisoner of war status pursuant to article 4 of the Third Geneva Convention and article 43 of Additional Protocol I. *See* Additional Protocol I art. 50.

Handbook 142 ("Anyone not qualifying as a combatant, in the sense that they are entitled to [prisoner of war] status upon capture, should be regarded as a civilian."); *The Law of Land Warfare* ¶ 73.

The law of war recognizes that civilians may cause harm in armed conflict. They may be treated as targets of force and, inferentially, as combatants, but only "for such time as they take a direct part in hostilities."[16] The law of war standard, therefore, for when people who are not ordinarily defined as combatants may be treated as combatants is when they take a "direct part" in "hostilities."

This standard contains three relevant criteria. First, it applies only to "hostilities." This word has a narrower connotation than the phrase "armed conflict," which appears frequently elsewhere in the Geneva Conventions.[17] Thus, an individual who would not ordinarily be considered a combatant must participate in actual "hostilities" – rather than the relevant armed conflict more generally – to lose protection as a civilian. The standard also has a clear temporal dimension. It lasts only "for such time" as the individual takes a direct part in hostilities. A civilian who takes part in hostilities regains his civilian status after his direct participation has ceased (although he may be criminally prosecuted for his illegal participation in hostilities).[18] Finally, the test sets up a demanding nexus. The individual must take a "direct" part. While this phrase is not further defined, it clearly provides that indirect aid—no matter how valuable—does not suffice.

A civilian does not become a combatant because he generally "supports" troops. Nor does he become a

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[16] Additional Protocol I, art. 51(3) ("Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."); Additional Protocol II, art. 13 (same).

[17] *See, e.g.*, Third Geneva Convention, art. 2.

[18] *See Public Comm. Against Torture v. Israel*, 46 I.L.M. 375, 393 (Isr. Supr. Ct. 2007).

combatant because an opposing commander suspects he might, at some point in the future, plot to engage in violent acts.[19] If the rule were otherwise, large parts of the civilian population of a country at war would become lawful targets for attack. Shooting a gun on a battlefield constitutes taking a "direct part in hostilities." So, too, would hijacking an airplane with the intent to use it as missile. Driving a truck full of explosives or carrying a gun towards the battlefield with the imminent intent to engage in combat could also amount to taking a direct part in hostilities. *See Public Comm. Against Torture v. Israel*, 46 I.L.M. at 391. By contrast, supporting the enemy cause off the battlefield, conspiring with the enemy, contemplating taking part in battle in the future, and sympathizing with the enemy do not constitute taking a direct part in hostilities under the law of war, although those acts may be punishable under domestic criminal law.[20]

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[19] *See* Int'l Comm. of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 619 (Claude Pilloud et al. eds. 1987) (*Commentary to Protocols*) (noting that there is "a clear distinction between direct participation in hostilities and participation in the war effort," to avoid endangering large parts of the civilian population).

[20] *Public Comm. Against Torture v. Israel*, 46 I.L.M. at 392 (direct participation does not include someone who "aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid."); Robert K. Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM U. J. INT'L. L. & POL'Y 49, 70 (1993) ("[A] civilian can be considered to participate directly in hostilities when he actually takes part in fighting, whether singly or as a member of a group. Such participation . . . would also include acting as a member of a weapons crew or providing target information for weapons systems 'intended for *immediate use against the enemy*, such as artillery spotters or members of ground observer teams.'"); *Commentary to Protocols* at 516 ("Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity

A civilian who participates directly in hostilities would in some circumstances be violating the law of war, and in the Government's nomenclature would presumably be labeled an "unlawful combatant."[21] "Illegal combatant" or "unlawful combatant" is not a term that appears in any treaty on the law of war. Commentators have occasionally used these phrases to describe someone who does not receive the privileges accorded to combatants, the most important of which are prisoner of war status and immunity from prosecution for merely engaging in combat. As used by these commentators, the phrase "unlawful combatants" actually encompasses two sets of people: members of the regular armed forces who do not wear uniforms and do not bear arms openly (and thereby lose their privileged combatant status) and civilians who unlawfully participate directly in battle (who never had privileged combatant status to begin with).

As persons in the latter category retain their civilian status, it is arguably improper to refer to them as combatants at all under the law of war: they are more accurately described as "unprivileged belligerents." George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 893 (2002).

Members of the Taliban armed forces would properly be considered combatants in the conflict in Afghanistan. Similarly, members of groups associated with the Taliban,

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takes place."); L.C. Green, THE CONTEMPORARY LAW OF ARMED CONFLICT 107 (2d ed. 2000).

[21] A civilian who directly participated in hostilities could be treated as a combatant only in the sense that he would become a lawful target of attack for the duration of his direct participation; in all other senses he would remain a civilian protected by the Fourth Geneva Convention. Fourth Geneva Convention art. 4; *The Law of Land Warfare* ¶ 73. The Fourth Geneva Convention would not prohibit the detention or criminal prosecution of such a person, provided that procedural safeguards were observed. Arts. 42, 43, 78; Additional Protocol I art. 75(4).

such as al Qaeda, who fought on the battlefield in Afghanistan and who served under a command responsible to Taliban officials, could also be classified as combatants in that conflict. In addition, other individuals who fought on the battlefield could be treated as combatants during their actual participation in the fighting.

At the same time, persons who are not alleged to be members of a regular armed force of a nation state, nor to have participated directly in hostilities, cannot be categorized as combatants—lawful or unlawful. For many of the prisoners at Guantanamo, including a number of the Petitioners in this case, the Government does not claim that they participated directly in hostilities in Afghanistan or Iraq.[22] Nor are many of these detainees alleged to be

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[22] As this Court recognized in *Hamdan*, the bulk of the 1949 Geneva Conventions and Additional Protocol I apply only in armed conflicts between state parties to the Conventions. A more limited body of law applies to armed conflicts "not of an international character," 126 S. Ct. at 2795-96, and thus is potentially applicable to those detainees not connected to international armed conflict in Iraq or Afghanistan. Like the law applicable to international armed conflict, the rules for non-international armed conflict distinguish between combatants and civilians. Civilians may not be targets of attack "unless and for such time as they take a direct part in hostilities." Additional Protocol II, art. 13. Thus, as in international armed conflict, those taking no direct part in hostilities cannot lawfully be classified as combatants. Furthermore, and in contrast to the law applicable in international armed conflict, the law of war applicable in non-international armed conflict arguably provides no independent authority for detaining either combatants or civilians. *al-Marri v. Wright*, 487 F.3d 160, 184-186 (4th Cir. 2007); John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extra-Territorial Context*, 40 ISR. L. REV. (forthcoming 2007) ("while the law of inter-state armed conflict authorizes the conflicting states to detain enemy combatants for the duration of hostilities, no analogous provision exists in the law of non-international armed conflict."); Marco Sassoli, *Use and Abuse of the Laws of War in the "War on Terrorism,"* 22 LAW & INEQ. 195, 210-11 (2004); Knut Dormann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 INT'L

members of "organized armed forces, groups and units which are under a command responsible to [the Taliban Government or the Government of Iraq] for the conduct or its subordinates."

Regardless of the facts of each Petitioner's case, the fundamental problem is that the CSRTs employed a definition of "combatant" that is overly broad, and so it is impossible to determine based on their findings which individuals have been properly detained. The CSRT definition encompasses many individuals who are not members of the armed forces of a nation-state, who did not participate directly in hostilities, and who never committed any belligerent act. Such individuals are civilians under the law of war. They may be arrested and punished under other laws, but they do not fall within Congress's authorization for "necessary and appropriate" military force.[23]

REV. RED CROSS 45, 47 (2003). While the law of war does not prohibit the detention of either combatants or civilians in non-international armed conflict, authority for such detentions cannot be derived directly from the law of war and must be explicitly authorized by and consistent with domestic legal and constitutional standards, and international human rights law.

[23] To the extent that some detainees at Guantanamo are unconnected with aspects of the "war on terror" that qualify as armed conflict, the law of war provides no authority whatsoever for their detention as "combatants." Not all terrorist actions rise to the level of armed conflict. Indeed, terrorist actions by private groups have not customarily been viewed as creating armed conflicts. Hilaire McCoubrey & Nigel D. White, INTERNATIONAL LAW AND ARMED CONFLICT 318 (1992). For example, as the United Kingdom stated when it ratified Additional Protocol I: "It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation." Reservations by the United Kingdom to Art. 1, para. 4 & art. 96, para. 3 of Additional Protocol I Key aspects of some parts of the "war on terrorism" diverge from traditional

2. This Court's decisions have rested upon a narrow definition of "combatant" that is consistent with the law of war

This Court's previous decisions have hewed closely to the traditional definition of "combatant" under the law of war as described above. Yaser Hamdi, for example, was alleged to have participated directly in hostilities at the time of his capture. Northern Alliance forces were "engaged in battle" with the Taliban when Hamdi's Taliban unit surrendered. Hamdi himself was allegedly carrying a Kalashnikov assault rifle at the time of his surrender. In its decision, the Court repeatedly emphasized Hamdi's direct participation in hostilities on a foreign battlefield. 542 U.S. at 522 n.1 ("the basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield"); *id.* at 523 (referring to the "context of this case: a United States citizen captured in a foreign combat zone") (emphasis omitted); 542 U.S. at 517 (decision addresses only the "narrow question" of whether the Government had authority to detain as "enemy combatants" individuals who were "part of or supporting forces hostile to the United States or coalition partners" in

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assumptions of the law of war. For example, the "war on terrorism" does not have clear geographic parameters. Furthermore, the law of armed conflict anticipates that armed conflict will, at some point, end, and regulates the return from a state of war to normal life. Third Geneva Convention art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."). As defined by the Government, however, the "war on terror" will not end until al Qaeda (an ill-defined and amorphous group) and its "associated forces" or supporters (also undefined), anywhere in the world are eradicated. *See, e.g.*, President Bush's Address to a Joint Session of Congress and the American People (Sept. 20, 2001) ("Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.").

Afghanistan and who "engaged in an armed conflict against the United States" there.).

In addition to participating directly in hostilities at the time of his capture, Hamdi was also specifically alleged to be affiliated with a Taliban government militia unit, 542 U.S. at 513, and therefore to be a part of the "organized armed forces, groups and units which are under a command responsible to [a] Party for the conduct of its subordinates." Additional Protocol I, art. 43(2). The defendants in *Ex parte Quirin*, also had the "status of an enemy belligerent" when they entered the United States, *id.* at 38, having worn uniforms of the German Marine Infantry when they came ashore from German military submarines, *id.* at 21.

By contrast, the Court held that the prisoner in *Ex Parte Milligan* was not a combatant. Milligan was accused of "joining and aiding" a "secret society" for the "purpose of overthrowing the Government," "holding communication with the enemy," "conspiring to seize munitions of war stored in the arsenals," and "to liberate prisoners of war" in Indiana at a time when it "was constantly threatened to be invaded by the enemy." 71 U.S. at 6-7. Nevertheless, Milligan was entitled to a civilian criminal trial. As the Court explained:

> If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the Government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

Id. at 131. As the Court emphasized in *Hamdi*, the key distinction was Milligan's lack of direct participation in hostilities: "Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against

Union troops on a Confederate battlefield, the holding of the Court might well have been different." 542 U.S. at 522.

In short, as the Court indicated in *Hamdi*, it has upheld the detention of enemy combatants only when "based on longstanding law-of-war principles." The Court has warned that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel." 542 U.S. at 521. The Government's attempted extension of the term combatant through the overbroad CSRT definition is exactly the unraveling the Court foresaw.

III. THE GOVERNMENT'S DEPARTURE FROM THE LAW OF WAR ENDANGERS AMERICAN SOLDIERS AND CIVILIANS

A. The CSRTs' broad redefinition of the term "combatant" erodes the most fundamental distinction in the law of war

The principle of distinction, which requires distinguishing between combatants and civilians, is the most fundamental principle of the law of war. As the official commentary to the additional protocols of the Geneva Convention observes, "the principle of protection and distinction forms the basis of the entire regulation of war." Int'l Comm. of the Red Cross, *Commentary to Protocols* 586; HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 65 (Dieter Fleck ed. 1995); *Quirin*, 317 U.S. at 30-31 (noting that "[b]y universal agreement and practice," the law of war draws a distinction between "the armed forces" and civilian populations); INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (Lieber Code) art. 22 (1863).

The concept of combatant determines who may be the lawful target of military attack. Combatants may be intentionally shot, bombed, or otherwise targeted with lethal force. *See* Additional Protocol I art. 48; Additional

Protocol II art. 52(2). Civilians are protected from being the intentional targets of armed attack, as long as they do not participate directly in hostilities. *See* Additional Protocol I art. 51(2); Additional Protocol II art. 13(2). "The principle of distinction is sometimes referred to as the "grandfather of all principles," as it forms the foundation for much of the Geneva tradition of the law of war. The essence of the principle is that military attacks should be directed at combatants and military targets, and not civilians or civilian property." *Army Operational Law Handbook* 166.

Within certain limits, combatants may be attacked with lethal force wherever they are found.[24] Thus, if all persons alleged to "support" al Qaeda or associate groups truly were "combatants," the law of war would not only allow them to be held until the end of active hostilities, but in many circumstances would allow them to be shot upon discovery, at any point, anywhere in the world.[25]

Military officers, statesmen, judges, and scholars have long recognized that any blurring between the categories of combatant and non-combatant could lead to a severe breakdown in limits on whom military forces may legitimately target. *See* Geoffrey Best, WAR AND LAW SINCE 1945, at 254-66 (1994). In many wars, virtually every member of society – from farmers and factory workers to government bureaucrats – may provide direct or

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[24] While it is forbidden "to kill or wound an enemy who, having laid down his arms, or having no longer the means of defense, has surrendered at discretion," Hague Convention [IV] Respecting the Laws and Customs of War on Land art. 23(c), the law of war authorizes attacks on "individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere." *The Law of Land Warfare* ¶ 31. Attacks on combatants must also be proportional and necessary to military objectives.

[25] Moreover, the Government might also be allowed to inflict collateral damage on bystanders. Fourth Geneva Convention art. 53; Additional Protocol I art. 52.

indirect support to the nation's military. Designating as combatants people who provide indirect support to a party engaged in armed conflict but who do not directly participate in hostilities would threaten to legitimize the wholesale targeting of civilian populations. *See* Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, Harvard Program on Humanitarian Policy and Conflict Research, 8-11 (Winter 2005). Moreover, maintaining a clear legal separation between combatants and non-combatants reinforces the separation of military and civilian functions and control. "Th[e] supremacy of the civil over the military is one of our great heritages. It has made possible the attainment of a high degree of liberty regulated by law rather than by caprice. Our duty is to give effect to that heritage at all times, that it may be handed down untarnished to future generations." *Duncan v. Kahanamoku*, 327 U.S. 304, 325 (1946) (Murphy, J., concurring). Expanding the definition of "combatant" of necessity increases the scope of military authority over civil society. Nations that adopt sweepingly overbroad definitions of "combatant," such as the one proffered by the Government in this case, run the risk of thrusting upon the military the roles of judge and jailer to a degree far exceeding military necessity.

Indeed, one of the most chilling aspects of the attacks of September 11, 2001 was the attackers' intentional targeting of civilians, a fundamental violation of the law of war. Some terrorist rhetoric refuses to acknowledge the distinction between civilians and combatants – labeling all U.S. and Israeli citizens, for example, the "enemy." This verbal sleight of hand renders the law of war useless, because it justifies the killing of any individual. It is precisely to protect against such abuses that the law of war defines "combatants" narrowly.

The CSRTs' definition of combatant renders the distinction between civilian and combatant illusory. This Court should, instead, employ the definition of "combatant" contained in the law of war in interpreting Congress's authorization of "necessary and appropriate" force.

B. The CSRTs' broad redefinition of the term "combatant" erodes fundamental liberties

Accepting the CSRTs' redefinition of the term "enemy combatant" would also erode fundamental liberties by extending the law of war far beyond its traditional domain. The law of war allows the Government extraordinary powers to deprive individuals of life, liberty and property with relatively minimal process. These extraordinary powers are justified both by battlefield exigency and by their limited temporal and geographic scope. If the Government's position in this case is accepted, it would extend those extraordinary powers without any of these limits.

The Government's own statements in litigation reveal how the breadth of its redefinition of the term "combatant" would encompass the "little old lady in Switzerland," the English teacher, and the journalist. 355 F. Supp. 2d at 475. The consequences of designation as an "enemy combatant" are severe, since such individuals will not be granted the due process of a criminal trial that those who are criminally accused of providing "material support" to terrorism are given. *See* 18 U.S.C. § 2339A-2339D. The breadth of the definition of enemy combatant is thus particularly troubling in light of the minimal process that individuals so classified are likely to receive before being indefinitely deprived of their liberty – or even their lives.

Moreover, such a broad expansion of the category of persons who can be treated as "combatants" could potentially affect U.S. citizens and persons in the United States as well as aliens overseas. *See Hamdi*, 542 U.S. at

520 ("a citizen, no less than an alien" can be subject to military detention and trial); *Ex parte Quirin*, 317 U.S. at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war."). While the differences between persons arrested in the United States and those seized abroad are of potential constitutional significance, this Court should be extremely wary of the possible domestic consequences of endorsing the Government's novel redefinition of the term "combatant."

B. The Government's disregard for the law endangers American soldiers and personnel

Compliance with the law of war is necessary to protect the safety and welfare of American soldiers and civilians. As Secretary of State Dulles testified during the Senate's consideration of the Geneva Conventions, America's "participation is needed to . . . enable us to invoke them for the protection of our nationals." *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations*, 84th Cong. 1st Sess. 3-4 (1955). Senator Alexander Smith added, "I cannot emphasize too strongly that the one nation which stands to benefit the most from these four conventions is the United States." 101 Cong. Rec. 9962 (1955).

Time and again, the United States' adherence to the Conventions and their precursors has saved American lives. In World War II, for example, "The American Red Cross attributed . . . the survival of 99 percent of the American prisoners of war held by Germany . . . to compliance with the [1929] Convention." Howard S. Levie, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 10 n.44 (1977). The fact that millions of POWs from all camps returned home was "due exclusively to the observance of the Geneva Prisoners of War Convention." Josef L. Kunz, *The*

Chaotic Status of the Laws of War and the Urgent Need for Their Revision, 45 AM. J. INT'L L. 37, 45 (1951).

To safeguard its own troops, the United States has been steadfast in applying the Geneva Conventions even to combatants whose governments insisted the Conventions did not bind them. Thousands of American soldiers taken prisoner during the Vietnam War benefited from the United States' commitment to afford all enemy POWs the protections of the Conventions to secure "reciprocal benefits for American captives." Maj. Gen. George S. Prugh, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-73, at 63 (1975). The United States provided those protections not only to North Vietnamese soldiers but also to the Viet Cong, who did not subscribe to the laws of war. *Id.*

The Executive Branch has emphatically demanded – and rightly so – that these protections be accorded to Americans captured or detained overseas, and has joined in condemnations of behavior that violates them. U.N.S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N.Doc. S/RES/674 (1990). The Defense Department took pains to "remind the Iraqis . . . [t]hat there are very clear obligations under the Geneva Convention to treat prisoners humanely." Statement of Deputy Secretary of Defense Paul Wolfowitz, Mar. 23, 2003, Interview with New England Channel News (Mar. 23, 2003). In objecting to the televised display of captured American soldiers, President Bush stated his insistence that prisoners be afforded the protections of international law. President George W. Bush, Remarks (Mar. 23, 2003).

The Legal Adviser to the Department of State commented on the consequences to American forces that would arise from a departure from these rules, "[a]ny small benefit from reducing further [the application of the Geneva Conventions] will be purchased at the expense of the men and women in our armed forces that we send into

combat." William H. Taft IV, Legal Adviser, Dep't of State, Memorandum to Counsel to the President (Feb. 2, 2002).

Denying Guantanamo detainees the protections of the law of war is a departure from past practice that weakens the United States' ability to demand that the Conventions be applied to Americans captured during armed conflicts abroad.

The lives of American military and civilian personnel are endangered by the United States' failure to grant foreign prisoners in its custody the same rights that the United States insists be accorded to American prisoners held by foreigners.

CONCLUSION

The Government's position in this case is inconsistent with decades of sound military law and policy. If endorsed by this Court, it will do considerable violence to that vital body of law that protects soldiers, civilians, and all those caught up in war. After resolving the threshold jurisdictional issues, this Court should hold that Petitioners are entitled to habeas relief because the CSRTs used inadequate procedures and an unauthorized definition of "combatant" not supported by the law of war.

August 24, 2007

Respectfully submitted.

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64 47p

(K) (21)

Nos. 06-1195 and 06-1196

FILED

AUG 24 2007

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL.,
Petitioners,

v.

GEORGE W. BUSH,
President of The United States, ET AL.,
Respondents.

KHALED A. F. AL ODAH, Next Friend of FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTEREST OF AMICI[1]

Amici curiae, listed fully in the Appendix, are 24 professors of constitutional law and federal jurisdiction with expertise in the constitutional law of habeas corpus. They submit this brief to demonstrate both the unconstitutionality of the court of appeals' interpretation of § 7 of the Military Commissions Act of 2006 and the availability of habeas corpus to alien detainees being held at the Guantanamo Bay Naval Base.

SUMMARY OF ARGUMENT

Petitioners were seized and transported halfway around the world to be held at the Guantanamo Bay Naval Base, Cuba. Three years ago, this Court held in *Rasul v. Bush*, 542 U.S. 466 (2004), that they had a right to habeas corpus review of the lawfulness of their detention. Respondents now claim that Congress abolished petitioners' right by enacting the Military Commissions Act of 2006 (MCA), and acted constitutionally in doing so. The court of appeals agreed, reasoning that the MCA abridged no rights protected by the Suspension Clause, because "the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government." *Boumediene v. Bush*, 476 F.3d at 981, 990-91 (D.C. Cir. 2007).

Abolishing petitioners' rights to habeas corpus without providing an adequate and effective alternative remedy would violate the Suspension Clause of the Constitution, Article I, § 9. The Suspension Clause prohibits permanent abrogation of the writ for a category of claims within its scope. Aliens, like citizens, have a constitutional right to habeas corpus,

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than Amici and their counsel, has made a monetary contribution to the preparation or submission of this brief.

which historically has included the right of enemy aliens and prisoners of war to challenge the legality of their detention. Even during a war on terror, absent a valid suspension, the writ "has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law." *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion).

This constitutional requirement cannot be evaded by detaining petitioners on Guantanamo. As *Rasul* established, although the United States lacks ultimate sovereignty at Guantanamo, it has exclusive governing authority there, exercising complete jurisdiction and control. Under the rationale of the *Insular Cases*, fundamental constitutional rights apply to both citizens and foreign nationals in such a location. The courts have consistently so held in comparable territories, where the United States has exercised sovereign powers without titular sovereignty. Nor would enforcing petitioners' fundamental constitutional right to habeas corpus at Guantanamo be "impracticable and anomalous." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring).

Petitioners were deliberately transported to a highly secure base at the very threshold of the United States, to be detained, interrogated, tried and perhaps even executed. Serious questions exist regarding the basis for their detention. What would be anomalous is authorizing the United States indefinitely to evade the Constitution by imprisonment in such a "rights-free zone," with no possibility for habeas review.

I. AS INTERPRETED BY THE COURT BELOW, MCA § 7 IS AN UNCONSTITUTIONAL PERMANENT ABROGATION OF THE WRIT

"The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient

cause. It is in the nature of a writ of error, to examine the legality of commitment." *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-202 (1830) (Marshall, C.J.). The "Privilege of the Writ of Habeas Corpus" was one of the few constitutional rights enshrined by the Framers in the original Constitution of 1787. The Suspension Clause of Article I, § 9, prohibits Congress from suspending the writ "unless when in Cases of Rebellion or Invasion the public Safety may require it." Congress's power to define the jurisdiction of the lower federal courts accordingly is subject to the explicit limit of the Suspension Clause. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1393, 1397 (1953).

The Framers narrowly defined the legislature's power to suspend in order to preserve the writ against both temporary and permanent evisceration. Yet the court of appeals interpreted MCA § 7 as permanently eliminating petitioners' access to habeas corpus, regardless of whether it provides an adequate alternative remedy. As so interpreted, the statute clearly violates the Suspension Clause.[2]

A. MCA § 7 Permanently Abrogates Habeas Corpus

The MCA provides: "No court, justice or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." MCA § 7 (amending 28

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[2] For the reasons stated by the dissenting opinions in the court below, 476 F.3d at 1005-07 (Rogers, J., dissenting), and in *Bismullah v. Gates*, ___ F.3d ___, 2007 WL 2067938, at *13-14 (D.C. Cir. July 20, 2007) (Rogers, J., concurring), Amici doubt that the Detainee Treatment Act is capable of providing an adequate and effective alternative means for reviewing the lawfulness of petitioners' detention.

U.S.C. § 2241(e)(1)). While its precise scope has not been determined, MCA § 7 plainly is not, and does not purport to be, an exercise of Congress's authority to suspend the writ temporarily "in cases of Rebellion or Invasion." Its language does not speak of suspension. Opponents of the legislation repeatedly stated, without contradiction, that there was no current "Rebellion or Invasion" that could justify suspending the writ. *See, e.g.*, 152 Cong. Rec. S10368 (daily ed. Sept. 28, 2006) (Sen. Specter) ("Fact No. 3, uncontested. We do not have a rebellion or an invasion.").

The MCA's prohibition of habeas corpus jurisdiction is permanent, not limited to a particular span of years or the duration of a particular emergency. Instead, it permanently alters the federal habeas corpus statute. The legislative history confirms that the proponents of the MCA did not intend to enact a temporary measure. *See* 152 Cong. Rec. S10404 (daily ed. Sept. 28, 2006) (Sen. Sessions) ("We are legislating through this law for future generations [and] future wars"); *id.* at S10270 (daily ed. Sept. 27, 2006) (Sen. Kyl) ("all future conflicts").[3]

B. The Suspension Clause Prohibits Permanent Abrogation Of The Writ

Permanently abolishing the writ of habeas corpus for certain persons violates the Suspension Clause on its face. By limiting Congress's power to suspend habeas to cases of

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[3] Neither can MCA § 7 be viewed as limited to the lower federal courts, leaving unimpaired the jurisdiction of this Court and the state courts. The Act's plain language bars jurisdiction by any "court, justice or judge" in relevant cases, and nowhere invites reconsideration of the long-established doctrine denying the power of state courts to review federal detention. *See Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872). Moreover, the constitutional limits on this Court's original jurisdiction would forbid the Court to serve as a court of initial jurisdiction for habeas inquiry into executive detention in such cases. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100-101 (1807).

"Rebellion or Invasion" where "the public Safety may require it," the Clause necessarily precludes other abridgments of the writ. Logically, personal liberty would be even more threatened by a power of permanent abrogation than by a broad power of temporary suspension. Reading the Suspension Clause as prohibiting permanent abridgements *a fortiori* is also consistent with the interpretation of other constitutional provisions, such as the Takings Clause.[4]

This Court has always understood the Suspension Clause as prohibiting permanent deprivation, as well as limiting temporary withdrawal, of the writ. *See, e.g., Ex parte Bollman*, 8 U.S. at 95 (asserting that the Suspension Clause obligates Congress to provide for the writ).[5] The Court has repeatedly viewed statutes permanently modifying habeas jurisdiction as raising potential Suspension Clause problems. *INS v. St. Cyr*, 533 U.S. 289 (2001); *Swain v. Pressley*, 430 U.S. 372, 381 (1977). State supreme courts concur that parallel state constitutional provisions deny any power to permanently abrogate the writ.[6]

Proponents of the federal Constitution fully understood that the Suspension Clause prohibited permanent abrogation.

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[4] Although the Takings Clause of the Fifth Amendment expressly states only "nor shall private property be taken for public use without just compensation," it has traditionally been understood as prohibiting all takings without a public purpose. *See Kelo v. City of New London*, 545 U.S. 469, 484 (2005).

[5] As this Court has made clear, Chief Justice Marshall's suggestion in *Bollman* that habeas corpus jurisdiction must be vested in the federal courts by statute, 8 U.S. at 93-95, in no sense implies that Congress has the power simply to abrogate the writ. *See St. Cyr*, 533 U.S. at 304 n.24.

[6] *See, e.g., Maryland House of Corr. v. Fields*, 703 A.2d 167, 175 (Md. 1997). All state constitutions have suspension clauses, usually modeled on the federal version. *See* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 Colum. Hum. Rts. L. Rev. 555, 585-87 (2002).

Alexander Hamilton affirmed the Constitution's "establishment of the writ of habeas corpus" in *The Federalist* No. 84, at 511 (Clinton Rossiter ed. 1961), and insisted that habeas corpus was "provided for in the most ample manner in the plan of the convention." *Id.* No. 83, at 499. Governor Edmund Randolph assured the Virginia ratifying convention that the "privilege is secured here by the Constitution, and is only to be suspended in cases of extreme emergency."[7]

In *INS v. St. Cyr*, this Court recently rejected the sole suggestion to the contrary. Although a dissenting opinion in that case briefly argued that the Suspension Clause was intended to regulate only temporary suspensions, not total abrogations, of the writ,[8] the majority squarely rejected that interpretation, 533 U.S. at 300-301 & 304 n.24, and the dissenter himself appears to have abandoned it three years later.[9] History firmly rebuts that dissenting argument. While four state ratifying conventions included habeas corpus clauses in the bills of rights that they proposed to add to the Constitution, these amendments mainly reflected their desire to guarantee habeas in plain language.[10] The Antifederalists

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[7] *Virginia Convention, Debates* (June 10, 1788), *reprinted in 9 The Documentary History of the Ratification of the Constitution* 1092, 1099 (John P. Kaminski & Gaspare J. Saladino eds., 1990). Early commentators, such as James Kent, William Rawle, and Joseph Story, agreed. *See* sources cited in Neuman, *supra* note 6, at 582-83 (2002).

[8] 533 U.S. at 336-38 (2001) (Scalia, J., dissenting).

[9] *Hamdi*, 542 U.S. at 554, 558, 575 (Scalia, J., dissenting).

[10] Thus, the bill of rights proposed by Virginia included a provision stating "That every freeman restrained of his liberty is entitled to a remedy to enquire into the lawfulness thereof, and to remove the same, if unlawful, and that such remedy ought not to be denied nor delayed." *Virginia Convention, Debates* (June 22, 1788), *reprinted in 10 Documentary History, supra* note 7, at 1550, 1552 ¶ 10. *See also* William F. Duker, *A Constitutional History of Habeas Corpus* 134-35 (1980) (explaining that this provision denied Congress the power to suspend the

who argued that the Constitution should not permit even temporary suspensions of the writ would undoubtedly have objected even more forcefully to a claim that the Constitution permitted total abrogations.

II. LIMITING MCA § 7 TO ALIENS ALLEGED TO BE ENEMY COMBATANTS DOES NOT CURE THE CONSTITUTIONAL INFIRMITY

Nor is Congress constitutionally entitled to abolish petitioners' right to the writ simply because they are noncitizens or even alleged alien enemies. The writ has always been afforded to aliens, in times of war and peace, including alleged and conceded enemy aliens and prisoners of war. The MCA nowhere defines the term "enemy combatant" for purposes of § 7, nor does any other statutory provision. But existing case law regarding the analogous categories of enemy aliens and prisoners of war demonstrates that aliens accused of being enemy combatants must have some opportunity to challenge the legality of their detention. Indeed, precisely because the concept of "enemy combatant" and the scope of the "war on terror" are ambiguous, there is even greater need for such detentions to be reviewed by an independent court.

A. The Suspension Clause Protects Aliens

This Court has observed that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)). At the same time, this Court has left open the degree to which subsequent developments in habeas corpus doctrine may also be protected by the Suspension Clause. 533 U.S. at 300-301. Some subsequent developments have resulted from reasoned doctrinal elaboration of the

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writ at all); Neuman, *supra* note 6, at 573-80 (describing the origins of the habeas corpus provisions in the proposed bills of rights).

significance of habeas corpus in a system with a written Constitution.

In either case, there can be no question that aliens enjoy the protection of the writ. Both at common law and throughout this Nation's history, habeas corpus has been available to aliens. *St. Cyr*, 533 U.S. at 301. This includes both aliens who have entered the country voluntarily and aliens, like petitioners, brought involuntarily within its domain. *See, e.g., id.* at 302 n.16 (citing *Sommersett v. Stewart*, 20 How. St. Tr. 1, 79-82 (K.B.1772); *Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K.B.1810); *King v. Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K.B.1759)); *see also* notes 15 and 17 *infra*.

The protection of noncitizens by the Suspension Clause is consistent with other fundamental constitutional guarantees. As this Court held in *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), the Equal Protection and Due Process Clauses of the Fourteenth Amendment are "universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *See also Plyler v. Doe*, 457 U.S. 202, 215 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (even if presence "unlawful, involuntary, or transitory"); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2681-82 (2006) (Roberts, C.J.) (quoting *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)). As set forth below, even noncitizen security detainees, such as enemy aliens and prisoners of war, have been entitled to the writ.

B. Enemy Aliens Are Entitled To Habeas Corpus

The concept of "enemy alien" reflects an earlier international practice permitting expulsion or detention of nationals of an enemy state during a declared war.[11] *See Brown v.*

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[11] International law now imposes greater restrictions on the detention of enemy civilians in wartime, in accordance with the Fourth Geneva Convention, which the United States ratified in 1955. *See* Convention

United States, 12 U.S. (8 Cranch) 110, 122-26 (1814) (Marshall, C.J.). The Alien Enemies Act of 1798 broadly authorized the President to detain, relocate, or deport aliens who were "natives, citizens, denizens, or subjects of the hostile nation." Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577 (current version codified at 50 U.S.C. §§ 21-24). Yet as early as 1813, in an unpublished judgment on circuit, Chief Justice Marshall released a conceded enemy alien on habeas because he had been detained without an opportunity to relocate, as required by the controlling regulations.[12] This Court itself ordered the release of a detained enemy alien on habeas corpus in *United States ex rel. Jaegeler v. Carusi*, 342 U.S. 347 (1952), finding that Congress's termination of the war against Germany in 1951 ended the power of the Executive under the Alien Enemies Act.[13]

Ever since the Act was first invoked, in the War of 1812, courts have permitted detained enemy aliens to challenge on habeas corpus whether their detention complied with the statutory framework.[14] In *Lockington's Case*, Brightly 269 (Pa. 1813), the Pennsylvania Supreme Court reviewed the

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(No. IV) Relative to the Protection of Civilian Persons in Time of War, arts. 38, 42, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[12] *See* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 Green Bag 2d 39 (2005).

[13] The Court rejected the government's claimed authority to execute removal orders that had been issued against dangerous enemy aliens before termination of the war. *See* Brief for Respondents, *United States ex rel. Jaegeler v. Carusi*, 342 U.S. 347 at 26-27.

[14] The Court has upheld the scheme of the Act against constitutional challenge, citing its lengthy historical pedigree, but has never accepted the theory that enemy aliens lack constitutional rights. *See Ludecke v. Watkins*, 335 U.S. 160, 171-72 (1948); *cf. Von Moltke v. Gillies*, 332 U.S. 708 (1948) (vindicating on habeas the Sixth Amendment rights of an enemy alien prosecuted in 1943). The Court also held in *Ludecke*, 335 U.S. at 166-70, that authority under the Act continued beyond the apparent end of hostilities until formal termination of the war.

detention of a British subject, concluding that the Act gave the executive the option whether or not to seek judicial assistance in enforcing its policy.

In *Ludecke v. Watkins*, 335 U.S. 160 (1948), Justice Frankfurter summarized habeas practice under the Alien Enemies Act in the First and Second World Wars—the last occasions on which it was ever applied. The Court made clear that detained individuals were entitled "to challenge the construction and validity of the statute" and the factual predicates for applying it to them, including "the existence of the 'declared war,'" and "whether the person restrained is in fact an alien enemy fourteen years of age or older." *Id.* at 171 & n.17. Accordingly, federal courts in the 1940s permitted German enemy aliens to challenge the government's effort to remove them to Germany without giving them an opportunity to depart voluntarily for another destination.[15]

Most importantly, individuals detained as enemy aliens have been permitted to challenge on habeas the determination of their enemy alien status, either on the ground that they were in fact citizens, or because they were aliens but not natives or nationals of an enemy power. *See Ludecke*, 335 U.S. at 171 n.17, 165 n.8 and cases cited therein.

Finally, enemy aliens have always had access to the writ, whatever the reason for their detention. During the War of 1812, a federal court entertained, though later denied on the merits, habeas writs filed by British subjects in the U.S. army

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[15] *See, e.g., United States ex rel. Hoehn v. Shaughnessy*, 175 F.2d 116 (2d Cir. 1949) (finding adequate opportunity to depart); *United States ex rel. Ludwig v. Watkins*, 164 F.2d 456 (2d Cir. 1947) (granting the writ); *United States ex rel. von Heymann v. Watkins*, 159 F.2d 650 (2d Cir. 1947) (granting the writ). The two latter cases involved German nationals who had been brought to the United States involuntarily and detained as dangerous enemy aliens.

seeking release from military service.[16] When the federal government sought to deport enemy alien internees under the immigration laws, the courts permitted them access to the writ.[17] Habeas corpus was also available to enemy aliens prosecuted for war-related crimes in Article III courts.[18]

C. Prisoners Of War Are Entitled To Habeas Corpus

Both historical and modern practice make clear that habeas corpus is available even to foreign prisoners of war to test the lawfulness of their detention. Where genuine issues arise, habeas corpus has been made available to foreign prisoners of war who dispute their classification or who challenge the military's power to try them for war crimes.[19] As this Court noted in *Rasul v. Bush*, 542 U.S. 466, 481 n.11 (2004), in one Eighteenth Century case, the King's Bench employed the writ to determine and reject a challenge to detention by a Swedish sailor who had been forced to serve on the crew of a French privateer. *King v. Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K.B. 1759). In the *Case of Three Spanish Sailors*, 2 W. Bl. 1324, 96 Eng. Rep. 775 (C.P. 1779), the court entertained a motion for the writ by three captured prisoners of war who had been tricked into working on a British ship. The court

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[16] *Wilson v. Izard*, 30 F. Cas. 131 (C.C.D.N.Y. 1815) (No. 17,810). For similar cases from later wars, see *United States ex rel. Cascone v. Smith*, 48 F. Supp. 842 (D. Mass. 1943); *United States ex rel. Warm v. Bell*, 248 F. 1002 (E.D.N.Y. 1918).

[17] *See, e.g., United States ex rel. Bradley v. Watkins*, 163 F.2d 328 (2d Cir. 1947) (granting the writ to former internee, who had been forcibly brought to the United States from Greenland); *United States ex rel. Sommerkamp v. Zimmerman*, 178 F.2d 645 (3d Cir. 1949) (denying the writ on the merits to former internee who had been forcibly brought to the United States from Guatemala).

[18] *See Von Moltke v. Gillies*, 332 U.S. 708 (1948) (espionage).

[19] The clarity of the right to detain helps to explain why proceedings were not brought on behalf of German soldiers brought to the United States as prisoners of war in the Second World War.

held on the merits that, by their own showing, they were not entitled to be released, thus confirming the availability of the writ to prisoners of war who claim wrongful detention.[20]

In three landmark cases, this Court has exercised habeas corpus jurisdiction over conceded prisoners of war—whether privileged or unprivileged combatants—challenging their trial by military commission.[21] In *Ex parte Quirin*, 317 U.S. 1, 24-25 (1942), the Court passed quickly to the merits and ruled against the petitioners. *In re Yamashita*, 327 U.S. 1 (1946), which involved an enemy soldier in the U.S. overseas territory of the Philippines, rejected the government's objection to habeas corpus jurisdiction, holding that absent a

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[20] Although these cases have sometimes been misunderstood as indicating that prisoners of war lack standing to apply for the writ, the British cases have actually turned on the merits determination

> that the applicant is both in fact and in law a prisoner of war detained by authority of the Crown. The application discloses no cause for the writ to issue, and it will be dismissed on that basis. If, however, it appears that the applicant may have been improperly detained as a prisoner of war, or is a prisoner of war on licence and detained for some other cause, the court will investigate the propriety of the detention. Capacity to apply has nothing to do with the matter: it is purely a question of whether a case can be made out for the remedy

R.J. Sharpe, *The Law of Habeas Corpus* 116 (2d ed. 1989) (footnote omitted).

Lockington's Case, Brightly 269 (Pa. 1813), is also consistent with the right of individuals who dispute their classification as prisoners of war to the writ, because Lockington's British nationality was unquestioned and even a dissenting judge who equated enemy aliens with prisoners of war would have permitted such a prisoner to challenge his enemy status by affidavit. Brightly's Rep. at 295-96, 298-99 (Brackenridge, J.).

[21] *Accord United States ex rel. Wessels v. McDonald*, 265 F. 754 (E.D.N.Y. 1920), *appeal dismissed by stipulation*, 256 U.S. 705 (1921). The German naval officer's challenge to the authority to try him by court-martial became moot after Congress terminated wartime powers. *See* J. Res. 66th Cong. (Mar. 3, 1921), 41 Stat. 1359; 32 U.S. Op. Atty. Gen. 505.

suspension of the writ, the courts had "the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus."[22] In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), this Court ruled in favor of an alleged "enemy combatant" held at Guantanamo both on jurisdiction and on the merits. Emphasizing "'the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty,'" *id.* at 2772 (quoting *Quirin*, 317 U.S. at 19), this Court invalidated the proceeding as unauthorized by law.

Absent a legitimate suspension, the traditional scope of the writ must also extend to alleged "enemy combatants." Indeed, the Government's expansive interpretations of the concepts of "enemy combatant" and the "war on terror," and the very real factual questions surrounding some of the detentions, heighten the specter of imprisonment by Executive fiat and the corresponding importance of habeas.[23]

III. ALIENS IN TERRITORY UNDER THE COMPLETE JURISDICTION AND CONTROL OF THE UNITED STATES, SUCH AS GUANTANAMO, ARE PROTECTED BY THE SUSPENSION CLAUSE

Without disproving any of the foregoing, the court of appeals simply denied that petitioners are entitled to any constitutional protection whatsoever, because Guantanamo Bay Naval Base lies outside the formal borders of the United

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[22] *Id.* at 9 (Stone, C.J.). *See also id.* at 30 (Murphy, J., dissenting) (agreeing that the government's "obnoxious" jurisdictional argument had been "rejected fully and unquestionably").

[23] *Cf. Hamdi v. Rumsfeld*, 542 U.S. at 516, 522 n.1; *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 474-76 (D.D.C. 2005) (discussing the tenuous links to hostile organizations and persons that the Executive considered sufficient to support classification as an "enemy combatant"), *rev'd on other grounds sub nom. Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

States. The court below reasserted its own prior analysis in *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), despite its previous rejection by this Court in *Rasul v. Bush*, 542 U.S. 466 (2004). The court failed to acknowledge this Court's case law and the history of governance of overseas territories, which plainly demonstrate that fundamental constitutional limitations such as the Suspension Clause apply to foreign nationals detained at Guantanamo.[24]

As this Court observed in *Rasul*, the United States does not possess ultimate sovereignty over Guantanamo, but occupies that territory under an unusual indefinite lease, which provides that "'the United States shall exercise complete jurisdiction and control over and within said areas'" during the period of occupation. 542 U.S. at 471 (citation omitted). At Guantanamo, the United States is accountable only to itself. U.S. law is the only law recognized.

This Court held in *Rasul v. Bush* that the presumption against extraterritoriality of U.S. law had no application at Guantanamo, because petitioners were being "detained within 'the territorial jurisdiction' of the United States." 542 U.S. at 480 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). The *Rasul* Court found *Johnson v. Eisentrager*, 339 U.S. 763 (1950)—which the court of appeals has nonetheless continued to view as controlling—distinguishable in numerous critical respects, most fundamentally that "the United States exercises exclusive jurisdiction and control" at Guantanamo. 542 U.S. at 476. Justice Kennedy also found *Eisentrager* inapposite, emphasizing that "Guantanamo Bay is in every practical respect a United States territory." 542 U.S. at 487 (Kennedy, J., concurring in the judgment).

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[24] *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2094-95 (2007) (foreign nationals at Guantanamo are constitutionally entitled to habeas).

Although this Court's ultimate holding in *Rasul v. Bush* was statutory and jurisdictional, the Court noted the merit of petitioners' claims to constitutional protection in a key footnote.[25] *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 462.

As discussed herein, our history records other examples of territory outside U.S. territorial borders and sovereignty, but still under the complete jurisdiction and control of the United States: most prominently, the Canal Zone in Panama and the Trust Territory of the Pacific Islands. In each, the United States gained full jurisdiction and control over the territory without ever acquiring actual sovereignty. U.S. courts found that fundamental constitutional limitations apply to aliens in such territory, without regard to whether the United States is sovereign over it.

A. Fundamental Rights Apply In Territories Under Complete U.S. Jurisdiction And Control

"The United States is entirely a creature of the Constitution. Its power and authority have no other source." *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion) (footnote omitted); *id.* at 74 (Harlan, J., concurring in the result); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring). The question before this Court is

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[25] *See Rasul v. Bush*, 542 U.S. at 483 n.15 ("Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U. S. § 2241(c)(3). Cf. *United States v. Verdugo-Urquidez*, 494 U. S. 259, 277-278 (1990) (Kennedy, J., concurring), and cases cited therein."). The citation to Justice Kennedy's opinion in *Verdugo-Urquidez*, discussed *infra*, makes clear that the Court was referring to constitutional violations.

thus not whether the Constitution is "in force" on Guantanamo, but rather, which particular constitutional limitations apply there.

In the Nineteenth Century, this Court fully applied the Bill of Rights to all federally-governed territories. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1879); *Springville v. Thomas*, 166 U.S. 707 (1897). In 1901, however, in the *Insular Cases*,[26] a majority of the Court held that only "fundamental" constitutional rights extended by their own force to "unincorporated" territories. The *Insular Cases* concluded that constitutional provisions do not extend to particular territory by the will of Congress, but rather, as a result of the *relationship* that Congress creates between the United States and the territory. *Downes v. Bidwell*, 182 U.S. 244, 289 (1901) (opinion of White, J.); *Dorr v. United States*, 195 U.S. 138, 142 (1904). The *Insular Cases* struck a compromise between the forces of constitutionalism and the forces of empire by guaranteeing that the Constitution's most fundamental rights would be honored wherever the United States possesses governing authority. In such cases, it is the exercise of complete U.S. jurisdiction and control, not nominal sovereignty, that justifies the application of a correlative set of fundamental rights.

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[26] The series of *Insular Cases* established the constitutional framework for "unincorporated" overseas territories. The doctrine first expounded in Justice Edward White's concurring opinion in *Downes v. Bidwell*, 182 U.S. 244, 287 (1901), gained the adherence of the majority in *Dorr v. United States*, 195 U.S. 138 (1904). It distinguished earlier cases as involving territories "incorporated" into the United States, and held that not all constitutional limitations extended to "unincorporated" territories acquired during the Spanish-American War. Despite steady criticism, this Court has never repudiated the *Insular Cases*. *See Torres v. Puerto Rico*, 442 U.S. 465 (1979); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990); *Rayphand v. Sablan*, 95 F. Supp. 2d 1133 (D.N.Mar.I. 1999), *aff'd mem. sub nom. Torres v. Sablan*, 528 U.S. 1110 (2000).

The court of appeals denied the relevance of these cases, reasoning that the political branches had defined Guantanamo as outside the scope of the "United States" for purposes of the Detainee Treatment Act. 476 F.3d at 992 (citing DTA § 1005(g)). But the precise lesson of the *Insular Cases* is that Congress cannot turn the Constitution on and off at will. Congress can no more "turn off" the Constitution for Guantanamo than it can nullify the Constitution in the District of Columbia by a statutory definition placing the District outside the "United States." It is the objective relationship that the political branches create between the United States and a particular tract of territory, not Congress's expressed desire to exclude a particular right, that determines how the Constitution applies there.[27]

Before the Second World War, this Court also assumed that constitutional rights were unavailable to both citizens and aliens in territory not governed by the United States. This obsolete assumption reflected the rigidly territorial methodology of turn-of-the-century conflict of laws. *Compare, e.g., In re Ross*, 140 U.S. 453, 464 (1891) (Field, J.), *with Pennoyer v. Neff*, 95 U.S. 714, 722 (1878) (Field, J.). But reliance on that assumption became untenable after the

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[27] The court of appeals also misconstrued *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948), as conditioning applicability of the U.S. Constitution and laws on the assertion of U.S. sovereignty over a territory, and therefore making it nonjusticiable. *See* 476 F.3d at 992. In fact, *Vermilya-Brown* emphasized that whether legal norms apply to overseas bases is a justiciable issue, depending on the objective conditions created by prior governmental action. 335 U.S. at 380. The Court further observed that the extent of Congress's powers to regulate overseas bases under the Article IV "Territory or other Property" clause did *not* depend upon obtaining "sovereignty in the political or any sense." *Id.* at 381. For the purpose of applying U.S. wage regulations, the Court perceived no dividing line separating a modern base leased from the United Kingdom in Bermuda from the earlier acquisitions of Guantanamo, the Canal Zone or island territories like Puerto Rico and Guam. *Id.* at 386-90.

Second World War, as new global circumstances prompted, and new technology facilitated, broader extraterritorial activity.

By the middle of the Cold War, this Court had decisively repudiated its geographically restricted approach to the Bill of Rights for citizens in *Reid v. Covert*, 354 U.S. 1 (1957), and *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (providing majority for the plurality position in *Reid v. Covert*). Those cases held that the government must provide the safeguards of Article III and the Fifth and Sixth Amendments before inflicting punishment on civilian citizens accompanying U.S. armed forces abroad. Justice Black wrote for four Justices favoring literal application of the Bill of Rights, while Justices Frankfurter and Harlan applied a "'fundamental right' test . . . . simila[r] to analysis in terms of 'due process.'" 354 U.S. at 53 (Frankfurter, J., concurring in the result); *id.* at 75 (Harlan, J., concurring in the result).

Justice Harlan's separate opinion explained the *Insular Cases* doctrine as resulting from a more general principle that particular constitutional limitations should not be applied "overseas" under circumstances that would render such application "altogether impracticable and anomalous." *Id.* at 74. He viewed this principle as relevant both to U.S. governance of noncontiguous territories and to U.S. action in foreign countries, at least with regard to U.S. citizens.[28]

Justice Kennedy followed Justice Harlan's approach in providing the crucial fifth vote to form the majority in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). That decision held only that the Fourth Amendment does not govern searches of nonresident aliens' property in a foreign country such as Mexico. *Id.* at 261, 274-75. Justice Kennedy, disa-

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[28] This case does not require the Court to address the applicability of constitutional limitations to U.S. government action with regard to foreign nationals in territory under foreign governance, and Amici take no position on that issue here.

greeing with important elements of the plurality's reasoning, inquired instead whether application of particular constitutional limitations "abroad," or in territories with wholly dissimilar traditions and institutions, would be "impracticable and anomalous." *Id.* at 277-78 (Kennedy, J, concurring).

In territories under long-term exclusive U.S. governance, the fundamental rights standard of the *Insular Cases* and the "impracticable and anomalous" inquiry converge. In such locations, where the United States has the ability to structure its own institutions, requiring government officials to respect a fundamental right creates no constitutional anomaly.

The practice of the courts with regard to the Canal Zone and the Trust Territory of the Pacific Islands, also non-sovereign territories under the complete jurisdiction and control of the United States, confirms this conclusion. U.S. courts have, by extrapolation from the *Insular Cases,* found fundamental constitutional rights to be applicable to citizens and aliens within those territories.[29] The same conclusion should apply to Guantanamo.

1. *The Canal Zone*

The Canal Zone shares much common history with Guantanamo. In Panama as in Cuba, early last century, the United States acquired legal rights for a particular purpose in territory within a newly independent state, while reserving underlying sovereignty to the foreign state. *See* Isthmian Canal Convention of 1903, T.S. No. 431, arts. II & III. As the century progressed, resentment of U.S. presence in the Canal Zone led to tensions with Panama, and ultimately to the return of jurisdiction over the Canal Zone under the Panama Canal Treaty of 1977, T.I.A.S. No. 10030.

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[29] For fuller details of these historical precedents, see Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 Loyola L. Rev. 1, 15-32 (2004).

The mode of U.S. governance of the Canal Zone exhibited striking parallels to Guantanamo.[30] It was "in effect one great government reservation." Richard R. Baxter, *The Law of International Waterways* 86 (1964). The Canal Zone government was wholly non-elective; its Governor, traditionally chosen from the Army Corps of Engineers, exercised extensive quasi-legislative and executive powers, subject to a Canal Zone Code enacted by the U.S. Congress and the oversight of the Secretary of the Army and the President. 2 C.Z. Code § 31. The presence of both U.S. citizens and foreign nationals within the Canal Zone was "at the suffer[a]nce of the U.S. Government," *Lucas v. Lucas*, 232 F. Supp. 466 (D.C.Z. 1964), and citizens and aliens alike were subject to deportation from the Zone under broad criteria of public interest. *See* 2 C.Z. Code § 841; 35 C.F.R. § 59.1 (1976).

As the era of colonialism receded, the courts came to protect rights in the Canal Zone just as they treated them in unincorporated territories of the United States.[31] Although

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[30] Both governmental and nongovernmental sources have often emphasized the analogy between Guantanamo and the Canal Zone. *See, e.g., Law of the Sea and International Waterways: Canals*, 1977 *Digest of United States Practice in International Law* § 7, at 593-94 (John A. Boyd ed.); 35 Op. Att'y Gen. 536 (1929); George Stambuk, *American Military Forces Abroad* 19-20 (1963) (analyzing Guantanamo and Canal Zone rights in parallel); Helmut Rumpf, *Military Bases on Foreign Territory, in* 3 *Encyclopedia of Public International Law*, 381, 382-83 (1997) (same); Sedgwick W. Green, *Applicability of American Laws to Overseas Areas Controlled by the United States*, 68 Harv. L. Rev. 781, 792 (1955) (describing the status of Guantanamo as "in substance identical with that in the Canal Zone").

[31] In the first years of the Canal Zone, the courts had maintained that the Constitution was not in force there, *see Canal Zone v. Coulson*, 1 C.Z. 50, 55-56 (1907), *writ of error dismissed for want of jurisdiction*, 212 U.S. 553 (1908), but that approach was abandoned long ago. *See, e.g., Canal Zone v. P. (Pinto)*, 590 F.2d 1344, 1351 (5th Cir. 1979) (United States "occupies but does not own the Canal Zone"; therefore nonfundamental aspects of Confrontation Clause not applicable); *United States v.*

some decisions have relied on a statutory bill of rights set out by Congress in the Canal Zone Code, *e.g., Canal Zone v. Bender*, 573 F.2d 1329 (5th Cir. 1978) (statutory Fourth Amendment), others have subjected U.S governmental actions, including federal statutes, directly to constitutional scrutiny.[32]

The doctrine of the *Insular Cases* concerned the status of territories, not of persons. Fundamental constitutional rights were equally applicable to United States citizens and aliens present in the Canal Zone and other unincorporated territories. *See, e.g., Examining Bd. of Eng., Architects and Surveyors* v. *Flores de Otero*, 426 U.S. 572 (1976) (Puerto Rico). The Fifth Circuit recognized this equality of rights in *Canal Zone* v. *Scott*, 502 F.2d 566, 568 (5th Cir. 1974) ("[N]on-citizens and citizens of the United States resident in such territories are treated alike, since it is the territorial nature of

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Husband R. (Roach), 453 F.2d 1054, 1057 (5th Cir. 1971) (characterizing Canal Zone as "unincorporated territory" for constitutional purposes), cert. denied, 406 U.S. 935 (1972); *see also Canal Zone v. Scott*, 502 F.2d 566, 570 (5th Cir. 1974); *Kemp v. Canal Zone*, 167 F.2d 938, 940 & n.1 (5th Cir. 1948) (Confrontation Clause probably not applicable to Canal Zone under the *Insular Cases*); *cf. United States v. Hyde*, 37 F.3d 116, 121 (3d Cir. 1994) (stating that the status of the Virgin Islands, Puerto Rico and the Canal Zone were "not materially different").

[32] *See, e.g., Jimenez v. Tuna Vessel "Granada"*, 652 F.2d 415 (5th Cir. 1981) (holding that due process applies in the Canal Zone); *In re Gayle*, 136 F.2d 973 (5th Cir. 1943) (Canal Zone Code construed against its literal meaning to avoid a due process violation), *cert. denied*, 320 U.S. 806 (1943); *Walker v. Chief Quarantine Officer*, 69 F. Supp. 980 (D.C.Z. 1943) (applying Thirteenth Amendment and due process to a civilian employee of Army); *Canal Zone v. Castillo*, 568 F.2d 405 (5th Cir. 1978) (recognizing that due process applies in Canal Zone, but upholding vagrancy provision of the Code against vagueness challenge), *cert. denied*, 436 U.S. 910 (1978).

the Canal Zone and not the citizenship of the defendant that is dispositive.").[33]

2. *The Trust Territory of the Pacific Islands*

U.S. courts have similarly held that the federal government must respect the fundamental constitutional rights of noncitizen inhabitants of the Trust Territory of the Pacific Islands ("TTPI").[34] After liberating Micronesia in the Second World War, the United States sought to retain strategic control there by establishing a special trust territory under the supervision of the United Nations Security Council. Like the Guantanamo lease, the Trusteeship Agreement gave the United States "full powers of administration, legislation, and jurisdiction." T.I.A.S. No. 1665, art. 3.

Although the TTPI was deemed a "foreign country" for statutory purposes,[35] during the Trusteeship, the United States exercised complete jurisdiction and control over the TTPI

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[33] *See also United States v. Husband R. (Roach)*, 453 F.2d at 1058 ("In areas under the jurisdiction of the United States to which the Fifth Amendment is applicable, an alien is entitled to its protection to the same extent as a citizen."). The Fifth Circuit has also subjected independent congressional legislation as applied in the Canal Zone, allegedly discriminating against noncitizens, to constitutional review. *See Raven v. Panama Canal Co.*, 583 F.2d 169 (5th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979).

[34] The history of the Trust Territory is complex. *See Morgan Guar. Trust Co. v. Republic of Palau*, 924 F.2d 1237, 1238-39 (2d Cir. 1991); Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 487-513 (1989); Stanley K. McLaughlin, Jr., *The Law of United States Territories and Affiliated Jurisdictions* 461-78 (1995).

[35] *See Callas v. United States*, 253 F.2d 838, 839-40 (2d Cir.), *cert. denied*, 357 U.S. 936 (1958) (holding TTPI a "foreign country" for Federal Tort Claims purposes). Persons born in the Trust Territory were aliens in relation to the United States, not United States citizens or United States nationals. *Id.* at 842 (Hincks, J., concurring).

without being sovereign there, much as it does on Guantanamo today.

Accordingly, federal courts have regularly held that the Constitution bound the federal government in its treatment of TTPI inhabitants and other aliens in the Trust Territory.[36] In *Ralpho v. Bell*, 569 F.2d 607, 618-19 (D.C. Cir. 1977), the court held that a congressionally created federal agency in Saipan was limited by the Due Process Clause in its adjudication of inhabitants' claims. The court concluded that because TTPI inhabitants were as fully subject to American governing power as those of an unincorporated territory, fundamental constitutional rights vis-à-vis the federal government extended to the territory.[37] Courts similarly held that other fundamental constitutional rights protected noncitizens there.[38]

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[36] The cases cited above and in the following notes involve direct application of fundamental constitutional rights to noncitizens in the TTPI. Other, local cases were decided under a statutory Bill of Rights in the Trust Territory Code, which bound the Trust Territory government but did not bind Congress or the Secretary of the Interior. The enumerated rights included all the fundamental rights applicable in unincorporated territories under the *Insular Cases*, and the Trust Territory courts interpreted the Code rights as affording at least that level of protection, *see, e.g., Ichiro v. Bismark*, 1 T.T.R. 65 (H.C.T.T. Tr. Div. 1953) (due process right in Trust Territory Code must be interpreted as in United States), but these statutory cases are not the ones on which Amici rely.

[37] The court expressly noted that under the *Insular Cases*, the locality and not the nationality of the plaintiff was determinative. 569 F.2d at 618 n.65 (*citing Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974)).

[38] *See, e.g., Juda v. United States*, 6 Cl. Ct. 441 (1984) (Claims Court held that the Takings Clause extended to the Marshall Islands, and protected the noncitizens there as well as United States citizens); *Temengil v. Trust Territory*, 33 Fair Empl. Prac. Cas. (BNA) 1027, 1058-60, 1983 U.S. Dist. Lexis 18384, at *112-121 (D.N.Mar.I. 1983) (finding Fifth Amendment equal protection and due process requirements directly applicable to salary discrimination in TTPI government employment),

B. Because Guantanamo Is Territory Under Complete U.S. Jurisdiction And Control, Aliens There Are Protected By The Suspension Clause

Like the Canal Zone and the Trust Territory, Guantanamo is a territory where, although the United States is not sovereign, fundamental constitutional rights apply to citizens and aliens alike by virtue of complete U.S. jurisdiction and control.

Guantanamo Bay Naval Base has a total area of over forty-five square miles, thirty-one of them on land.[39] Its land area is roughly the size of St. Thomas, V.I.; it is larger than Manhattan.[40] "The base is entirely self-sufficient, with its own water plant, schools, transportation, and entertainment facilities."[41] In 2003, the base commander described it as "small-town America." Carol Rosenberg, *New chief brings Guantanamo up to date,* Miami Herald (Oct. 25, 2003), 2003 WLNR 14804541. The detention facilities are "hidden away in a restricted area, behind armed checkpoints, several ridgelines away from downtown," and seem not to "disturb the tranquility" of the base. Matthew Hay Brown, *Oldest U.S. Base Overseas Harbors Hometown Feel,* Orlando Sentinel (Dec. 22, 2003), 2003 WLNR 15569954.

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aff'd in part, rev'd in part on other grounds, 881 F.2d 647 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990).

[39] *See* Navy Office of Information, *Statistical Information, U.S. Naval Base, Guantanamo Bay, Cuba* (1985); Wayne S. Smith, *The Base from the U.S. Perspective, in Subject to Solution: Problems in Cuban-U.S. Relations*, 97, 98 (Wayne S. Smith & Esteban Morales Dominguez, eds. 1988).

[40] *See The New Columbia Encyclopedia*, 772, 1681, 2900-901 (William H. Harris & Judith S. Levy, eds. 1975) (32 and 22 square miles, respectively).

[41] Smith, *supra*, note 39, at 98-99.

The unusual extent of U.S. power at Guantanamo reflects the origins of the base during the period of colonialism, when such arrangements were more common. *See* Stambuk, *supra* note 30, at 19-22; Rumpf, *supra* note 30, at 382-83. Guantanamo is the only U.S. overseas base without a Status of Forces Agreement defining the allocation of civil and criminal jurisdiction over military and other personnel. Given the totality of U.S. territorial jurisdiction over the base, and the lack of access to the rest of Cuba since 1959, no such agreement is needed.

The fact that Guantanamo is occupied as a military naval base does not prevent the application of fundamental constitutional rights to aliens detained there.[42] The United States also possesses several "unorganized" insular territories without permanent inhabitants, some of which—such as Wake Atoll—are operated as military installations, but in all of which fundamental constitutional rights apply. *See* General Accounting Office, *U.S. Insular Areas: Application of the U.S. Constitution*, GAO/OGC-98-5, at 7-10, 39-63 (1997). The other non-sovereign territories in which U.S. courts have applied constitutional rights have also had military features.[43]

To accept the lower court's denial of all constitutional rights to aliens at Guantanamo would affect far more than alleged enemy combatants. First, for more than a century,

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[42] Justice Edward White, in first expounding his theory that only fundamental constitutional limitations extend to "unincorporated" territories, explicitly mentioned the applicability of his theory to areas like Guantanamo—"a naval station or a coaling station on an island"—and the Canal Zone—an "inhabited strip of land" adjoining "an interoceanic canal." *Downes v. Bidwell*, 182 U.S. 244, 311 (1901) (opinion of White, J.).

[43] The Canal Zone was a quasi-military reservation administered under Army supervision, subject to access restrictions even for U.S. citizens. The Pacific Islands were the sole example of a "strategic trust territory" created under Article 82 of the United Nations Charter, which the United States administered for defensive purposes and for nuclear testing.

operation of the base has traditionally been dependent on foreign labor, and the United States has employed hundreds of foreign nationals at Guantanamo, including Cubans and Jamaicans and more recently Filipinos whom the decision below would leave without legal recourse.[44]

Second, in the 1990s the Government repeatedly used Guantanamo as a holding center for thousands of asylum seekers captured at sea from Haiti and Cuba, as well as from China.[45] In litigation over the rights of detained asylum seekers, the Second and Eleventh Circuits pointedly disagreed about the applicability of the Bill of Rights to aliens at Guantanamo. *Compare Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992) (affirming preliminary injunction because plaintiffs were likely to succeed on their constitutional claims), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993), *with Cuban-American Bar Ass'n v. Christopher*, 43 F.3d 1412 (11th Cir. 1995) (denying that rights exist).[46] Although the Second Circuit decision was eventually vacated as moot, Amici submit that it

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[44] *See* Associated Press, *In Cuba, U.S. Relies on Low-Paid Help of Non-Americans*, Commercial Appeal (Memphis, TN), Feb. 1, 2002, at A7, 2002, WLNR 7300249 (noting presence of 1000 foreign workers); *Filipino residents register to vote*, 63(34) Guantanamo Bay Gazette 4 (Aug. 25, 2006),www.cnic.navy.mil/navycni/groups/public/@pub/@southc/@guantanomobay/documents/document/cnic_048662.pdf (700 Philippine nationals on Guantanamo registered to vote in home country).

[45] *See, e.g., United States v. Li*, 206 F.3d 56, 69 n.1 (1st Cir.) (Torruella, C.J., dissenting), *cert. denied*, 531 U.S. 956 (2000) (noting government's use of Guantanamo as an interim detention center for interdicted Chinese).

[46] In *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), this Court rejected a statutory and treaty-based challenge to the Government's authority to return asylum seekers to Haiti directly from interdiction on the high seas, but did not address any legal issues relating to Guantanamo.

remains the better-reasoned opinion.[47] To this day, the U.S. Coast Guard continues to bring Cubans and Haitians to Guantanamo for detention pending possible resettlement.[48]

Third, the Government has now built a permanent prison on the base. If this Court were to hold that foreign nationals lack any rights on Guantanamo, the Government could use that prison not just for suspected enemies, but also for extra-territorial arrest and punishment of suspected drug traffickers, smugglers, or other alleged criminals, all outside the constitutional safeguards of the criminal justice system. Even after a later Administration had ceased to use the prison for security detainees, it would remain as an option susceptible to abuse.

In the past, the United States has exercised criminal jurisdiction over both citizens and aliens at Guantanamo, to the exclusion of Cuban law, and has traditionally brought civilian criminal defendants to the United States for prosecution, with

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[47] Respondents were fully aware of the Second Circuit's ruling, and of the possibility that the courts would eventually hold that fundamental constitutional limitations apply to detainees at Guantanamo, before they began transporting detainees there. *See* Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Att'y Gens., Office of Legal Counsel, to William J. Haynes, II, Gen. Counsel, Dep't of Defense, *Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba* (Dec. 28, 2001), http://www.texscience.org/reform/torture/philbin-yoo-habeas-8dec01.pdf. (concluding in December 2001, after a review of existing case law, that "a detainee could make a non-frivolous argument that [habeas] jurisdiction does exist over aliens detained at [Guantanamo Bay, Cuba], and we have found no decisions that clearly foreclose the existence of habeas jurisdiction there."). Indeed, nearly two decades earlier, the Justice Department's Office of Legal Counsel had found that the base came within the federal Anti-Slot Machine Act. *Installation of Slot Machs. on U.S. Naval Base, Guantanamo Bay*, 6 Op. Off. Legal Counsel 236, 237, 242 (1982). It would be anomalous if the base did not equally fall within the habeas corpus laws.

[48] *See* Assistant Secretary Sauerbrey Discusses Humanitarian Assistance, USINFO Webchat transcript (Nov. 17, 2006), http://usinfo.state.gov/usinfo/Archive/2006/Nov/20-718507.html.

full constitutional protection. *United States v. Lee*, 906 F.2d 117 (4th Cir. 1990) (Jamaican national); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975) (U.S. citizen). Yet under the Government's current reasoning, the United States could have prosecuted and convicted foreign nationals before military tribunals on Guantanamo, or even executed them there without ever affording them any constitutional rights, including habeas corpus.

Nor can there be any doubt as to the fundamentality of the right to habeas corpus, which the Government must make available to Guantanamo detainees. Zechariah Chafee rightly called it the "most important human right in the Constitution."[49] "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom." *Ex parte Yerger*, 75 U.S. 85, 95 (1868). It was one of the few rights that even the Federalists considered necessary to safeguard in the 1787 Constitution; Hamilton emphasized its presence as one of the reasons why a fuller Bill of Rights would not be needed. *The Federalist* No. 84. Every state constitution guarantees it. *See supra* note 6. *See also In re Yamashita*, 327 U.S. 1, 9 (1946) (emphasizing "the duty and power" of the courts to inquire into the lawfulness of trials by military commission in the Philippines, absent suspension of the writ).

To the extent that a relevant consideration is whether the right is "a fundamental right in the international sense,"[50] habeas corpus satisfies that criterion as well. With or without its Latin name, the right to a judicial remedy against unlawful

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[49] Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. Rev. 143, 143 (1952).

[50] *See Rayphand v. Sablan*, 95 F. Supp. 2d 1133, 1138 (D.N.Mar.I. 1999), *aff'd mem. sub nom. Torres v. Sablan*, 528 U.S. 1110 (2000) (finding that the right to an equally apportioned Senate was not fundamental in this sense, and thus did not apply in unincorporated territories).

detention has become part of the common heritage of mankind. The Covenant on Civil and Political Rights and the European and American regional human rights conventions all include it with similar wording.[51]

Nor may application of the Suspension Clause at Guantanamo reasonably be characterized as "impracticable and anomalous." The base is securely under military governance, and access to it is tightly controlled. Indeed, that is a principal reason why the Government has transported prisoners halfway around the world to hold them there. It would be "practicable" for the United States Government to implement an orderly process of judicial review for detainees there, as it has done in other island territories or with respect to its criminal jurisdiction on Guantanamo itself.

In sum, application of the Suspension Clause to petitioners, who have been subject to long term detention at the Guantanamo Bay Naval Base, would be neither "impracticable" nor "anomalous." What would be anomalous is authorizing the United States Government to create and run an offshore

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[51] International Covenant on Civil and Political Rights, art. 9(4), Dec. 19, 1966, 999 U.N.T.S. 171 ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."); [European] Convention for the Protection of Fundamental Rights and Freedoms, art. 5(4), Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights, art. 7(6), July 17, 1987, 1144 U.N.T.S. 123. Under the American Convention, the right is so fundamental as to be considered nonderogable, i.e., not subject to suspension in emergency situations. *Id.* art. 27(2). Thus, Justice Jackson's passing suggestion in *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950), that the right to habeas corpus was "generally unknown" outside the Anglo-American world was mistaken at the time, and is now thoroughly obsolete. Even *Eisentrager* conceded that enemy aliens convicted of war crimes in an unincorporated territory (namely, the Philippines) were entitled to habeas corpus. *Id.* at 779-80.

prison camp in a "rights-free zone" for the express purpose of evading constitutional restrictions.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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37 pp Nos. 06-1195 and 06-1196

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

KHALED A.F. AL ODAH, *et al.*,
Petitioners,

v.

UNITED STATES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RETIRED GENERALS AND ADMIRALS, WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AND THE NATIONAL DEFENSE COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

Amici address the following questions only:

1. Whether aliens detained as enemy combatants at Guantanamo Bay, Cuba have rights under the Suspension Clause of Article I, Section 9 of the Constitution.

2. Whether, if aliens detained at Guantanamo Bay have such rights, the Military Commissions Act of 2006 (MCA), Pub. L. No, 109-366, 120 Stat. 2600, violates the Suspension Clause.

3. Whether Petitioners may challenge the adequacy of the judicial review available under the MCA and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, before they have exhausted such review.

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INTERESTS OF *AMICI CURIAE*

Amici curiae are seven individuals who are retired generals or admirals in the U.S. armed forces, and several organizations with an interest in national security issues.[1]

Major General John Altenburg, U.S. Army (Ret.), served two years as an enlisted man and 28 years as an Army lawyer. His Military Justice and Combat Operations and Peacekeeping Law experience included service or legal oversight in Vietnam, Special Operations, Operation Desert Storm-Kuwait/Iraq, Operation Restore Hope-Somalia, Operation Uphold Democracy-Haiti, Operation Joint Endeavor/Guard-Bosnia, and Joint Guardian-Kosovo, followed by four years as the Deputy Judge Advocate General (1997-2001). He served as the Appointing Authority for Military Commissions from March 2004 to November 2006.

Rear Admiral James J. Carey, U.S. Navy (Ret.), served 33 years in the U.S. Navy and Naval Reserve, including service in Vietnam. He is a former Chairman of the U.S. Federal Maritime Commission and current Chairman of the National Defense Committee (NDC), which is also joining in this brief. The NDC is a grass roots pro-military organization supporting a larger and stronger military and the increased participation by veterans in public service.

Rear Admiral Steven B. Kantrowitz, U.S. Navy (Ret.), served on active duty and in the Reserve of the U.S. Navy from September 1974 through January 2005. He retired as a Rear Admiral in the Judge Advocate General's Corps. During active duty, he served as a judge advocate performing duties involving the full reach of military law practice. This includes service for three years as Special Assistant and Aide to the

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief. *Amici* are filing with the consent of all parties. Letters of consent have been lodged with the Clerk.

Judge Advocate General of the Navy. At the time of his selection to flag rank, he served as commanding officer of an international and operational law unit. As a Flag officer, he served as the Assistant Deputy Advocate General of the Navy and Deputy Commander, Naval Legal Service Command. He represented the Judge Advocate General, both in the Washington area and at various national and international forums. He was intimately involved in all practice areas, including military justice and international and operational law. Rear Admiral Kantrowitz provided advice on certain issues concerning detained enemy combatants.

Major General Michael J. Marchand, U.S. Army (Ret.), was serving as the Assistant Judge Advocate General of the Army at the time of his retirement on July 1, 2005. As the Number 2 uniformed lawyer in the Army, General Marchand was intimately involved in detainee matters at the Army, Department of Defense, and congressional levels.

Major General Michael J. Nardotti, U.S. Army (Ret.), served 28 years on active duty as a soldier and lawyer. A decorated combat veteran, he served in Vietnam as an Infantry platoon leader and was wounded in action. General Nardotti later earned his law degree and performed duties as a Judge Advocate in world-wide assignments for two decades. He culminated his service as The Judge Advocate General, the senior military lawyer in the Army, from 1993 to 1997.

Rear Admiral William L. Schachte, Jr., U.S. Navy (Ret.), served for over 30 years as a Naval Officer. His first duty assignments were as an unrestricted line officer. A decorated Vietnam volunteer, he served in combat as the Officer-in-Charge of a SWIFT Boat and later as Executive/Operations Officer for Coastal Division 14, Vietnam. He later received a law degree and transferred to the Navy JAG Corps. After receiving an LLM degree (International and Comparative Law) from the George Washington University Law School, he was assigned to the International Law Division in the Pentagon and

began serving in various JAG billets of increasing responsibility. When selected for promotion to Rear Admiral (Lower Half) he was serving as Director of the International Law Division. He was also appointed by the Secretary of Defense as the DoD Representative for Ocean Policy Affairs (DODREPOPA), representing both the Chairman of the Joint Chiefs of Staff and the Secretary of Defense domestically and in bilateral or multilateral international negotiations. After receiving his second star he was assigned as the Deputy Judge Advocate General of the Navy and began serving as the Commander of the Naval Legal Service Command while continuing to serve as DODREPOPA. When he retired, Admiral Schachte was serving as the senior uniformed lawyer in the Department of the Navy.

Brigadier General Thomas L. Hemingway, U.S. Air Force (Ret.), served at the time of his retirement in May 2007 as the Legal Advisor to the Convening Authority in the Department of Defense Office of Military Commissions. He was commissioned as a second lieutenant in 1962 and entered active service in 1965 after obtaining a law degree. He has served as a staff judge advocate at the group, wing, numbered air force, major command, and unified command level. He had also been an associate professor of law at the U.S. Air Force Academy and a senior judge on the Air Force Court of Military Review.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Demore*

v. Kim, 538 U.S. 510 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001). WLF also filed briefs in this matter when it was before the court of appeals.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

Amici are concerned that, if the federal courts attempt to exert jurisdiction over the types of claims raised in these cases, the Executive and Legislative Branches will be deprived of the flexibility necessary to confront the imminent threats posed to national security by terrorist groups throughout the world. *Amici* do not mean to denigrate the liberty interests being asserted by Petitioners. Nonetheless, *amici* do not believe that a federal habeas corpus proceeding is the proper forum for reviewing those interests, particularly given the determination of the elected branches of government that the CSRT process provides the proper balance between Petitioners' claims and national security concerns.

INTRODUCTION AND STATEMENT OF THE CASE

The United States has been at war with militant Islamists for many years, and most actively since September 11, 2001, when al Qaeda's murderous and unprovoked attack on American civilians resulted in nearly 3,000 deaths. Immediately thereafter, Congress enacted a resolution expressing its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force ("AUMF"), Pub.L. No. 107-40, 115 Stat. 224 (2001). President Bush has determined that al Qaeda and the Taliban are such

organizations; he has authorized the use of force against al Qaeda, the Taliban, and their operatives in Afghanistan and throughout the world. The military campaign against al Qaeda and the Taliban continues unabated, and they continue to pose a substantial threat to national security. Based in part on the authority granted under the AUMF, the U.S. military has taken into custody numerous al Qaeda and Taliban operatives. Several hundred of those operatives, including each of the Petitioners, are being detained at U.S. military facilities in Guantanamo Bay, Cuba.

The United States can justly be proud of the humane and fair manner in which it has treated those prisoners. In particular, the Executive Branch and Congress have worked together to devise a system for ensuring that prisoners not charged with crimes do not remain in detention – a detention which, pursuant to the law of war, will end no later than the conclusion of hostilities – unless review tribunals confirm both their enemy combatant status and that they continue to pose a threat to United States national security interests. Those review proceedings are unparalleled in the history of warfare. They have resulted in a number of determinations that prisoners should be set free because the prisoners do not meet the criteria for enemy combatant status. Many other prisoners have been set free because they were deemed no longer to pose a threat to the United States. Most notably, Congress and the President have provided that detainees may appeal adverse review tribunal decisions to the U.S. Court of Appeals for the District of Columbia Circuit – an appeal right that this Court held in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), is not constitutionally required even for U.S. citizens.

Petitioners are asking the Court to second-guess the joint determination of the elected branches of government regarding how to handle the claims of detainees being held at Guantanamo Bay. The Court should decline that invitation. It already determined in *Hamdi* that the elected branches of

government are entitled to employ proceedings outside the federal court system to handle the factual-innocence claims of those (including Americans) being held as enemy combatants. The President and Congress are much better situated than is this Court to determine how best to balance fairness to detainees with the need to conduct proceedings in a manner that does not compromise national security interests. Our tradition of judicial review provides the Court with the raw power to overturn not only the considered judgments of the elected branches but also centuries of judicial precedents rejecting recognition of habeas corpus rights under these circumstances. But such an undemocratic exercise of raw power would stain the Court's reputation, a stain that could take many years to erase.

This Court ruled in *Rasul v. Bush*, 542 U.S. 466 (2004), that the federal habeas corpus statute, 28 U.S.C. § 2241, provided the federal courts with jurisdiction over the habeas claims of enemy combatants being held at Guantanamo Bay. Within several months thereafter, virtually every Guantanamo Bay detainee had filed a habeas corpus action in U.S. District Court for the District of Columbia, seeking release from custody.

In July 2004, the United States established an administrative procedure whereby Guantanamo Bay detainees (including all of the Petitioners) could challenge the military's determination that they had engaged in hostilities against the United States or its coalition partners. The procedures permit a detainee to go before a Combatant Status Review Tribunal ("CSRT"), be informed of the factual basis for his detention, submit evidence in an effort to demonstrate that he has not fought against the United States, and obtain the assistance of a translator and a "Personal Representative" in presenting his case. *See* July 7, 2004 Order of Deputy Secretary of Defense,

Pet. App. 81a-82a.[2] Since that date, all Guantanamo Bay detainees have had CSRT proceedings offered to them, and a number have been released after CSRT determinations that they were not, in fact, enemy combatants.[3]

Congress responded to the flood of post-*Rasul* habeas filings by adopting the Detainee Treatment Act of 2005 ("DTA"), Pub.L. No. 109-148, Tit. X, 119 Stat. 2739. Section 1005(e)(1) of the DTA amended the federal habeas statute to provide that "no court, justice, or judge shall have jurisdiction" over habeas petitions filed by Guantanamo Bay detainees. Section 1005(e)(2) provides that "exclusive jurisdiction to determine the validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant" resides in the U.S. Court of Appeals for the District of Columbia Circuit. Many Guantanamo detainees whose detention has been upheld by a CSRT (including all of the Petitioners) have sought review pursuant to the DTA in the D.C. Circuit.

In 2006, this Court ruled in *Hamdan* that § 1005(e)(1), which eliminated jurisdiction over habeas claims filed by Guantanamo detainees, did not apply to habeas claims (including Petitioners') pending on the date of the DTA's enactment. *Hamdan*, 126 S. Ct. at 2762-69. Congress responded to *Hamdan* by adopting the Military Commissions Act of 2006 (MCA), Pub. L. No, 109-366, 120 Stat. 2600 (2006). Section 7(a) of the MCA amended the federal habeas corpus statute to make absolutely clear that Congress intended to deprive federal courts of jurisdiction to hear: (1) habeas

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[2] References herein to "Pet. App." are to the Petition Appendix in No. 06-1196.

[3] Those releases were in addition to the many Guantanamo Bay detainees who have been released because the military determined (in connection with separate, on-going review proceedings) that they no longer posed a threat to national security.

claims of any alien determined by the United States to have been properly detained as an enemy combatant or who is awaiting such a determination; and (2) any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or condition of confinement of such an alien – except as provided in the DTA.[4] Section 7(b) of the MCA stated that the jurisdiction-limiting provisions of § 7(a) would take effect immediately upon enactment of the MCA. *See* 28 U.S.C. § 2241(e)(1) & (2).

The DTA and MCA were adopted while Petitioners' habeas petitions were pending before the D.C. Circuit. In February 2007, the D.C. Circuit dismissed the petitions, holding that the MCA deprived the federal courts of jurisdiction to hear them. Pet. App. 1a-50a. The court rejected Petitioners' claim that the MCA did not apply to them, stating, "Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule *Hamdan*." *Id.* 6a.

The court went on to hold that, in depriving federal courts of jurisdiction over the habeas petitions filed by Guantanamo detainees, Congress had not violated the Suspension Clause, U.S. Const., art. I, § 9, cl. 2.[5] *Id.* 9a-19a. The court said that the Suspension Clause "protects the writ 'as it existed in 1789.'" *Id.* at 10a (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)). Noting that Petitioners are aliens being held outside the sovereign territory of the United States, the Court said, "The detainees cite no case and no historical treatise showing that the English common law writ of habeas corpus extended

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[4] *E.g.*, DTA § 1005(e)(2)'s grant of jurisdiction to the D.C. Circuit to review final decisions of a CSRT.

[5] The Suspension Clause states, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

to aliens beyond the Crown's dominions." *Id.* 11a. The court also cited decisions from this Court holding that "the Constitution does not confer rights on aliens without property or presence within the United States." *Id.* 14a (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)). The court rejected Petitioners' efforts to distinguish *Eisentrager* on its facts. *Id.* 16a.[6]

SUMMARY OF ARGUMENT

In adopting the MCA, Congress and the President acted to eliminate federal court jurisdiction over habeas claims filed by Petitioners and other Guantanamo detainees. Their actions are fully consistent with the Suspension Clause, which protects jurisdiction over the writ as it existed in 1789. A fair reading of English and colonial history can only lead one to conclude that Eighteenth Century detainees similarly situated to Petitioners would not have had access to the writ. Although the parties dispute the meaning of a handful of historical precedents, one fact stands out among all others: Petitioners can point to *no case arising in a military context* in which an English court entertained a habeas petition filed by an overseas alien. Given the ten of thousands of aliens taken into custody overseas by the British military as alleged enemy combatants in the centuries preceding 1789, one would think that there would have been at least one recorded challenge to such custody if, indeed, British courts had had jurisdiction to hear such habeas claims.

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[6] In dissent, Judge Rogers would have held that: (1) the MCA's efforts to restrict federal habeas corpus jurisdiction violated the Suspension Clause; and (2) CSRT proceedings are not an adequate substitute for the searching review of government detention to which Petitioners are entitled in habeas proceedings. *Id.* 21a-50a.

Given the high level of deference normally afforded by the federal courts to the national security determinations of the elected branches of government, it would be extraordinary for this Court to invoke the Suspension Clause to override the considered judgment of the other branches that Petitioners' claims are best handled by means of CSRT proceedings. But it would be all the more extraordinary to do so in light of an unbroken line of Supreme Court precedent rejecting assertions by overseas aliens that the Constitution protects their right to file habeas claims. Petitioners citation to *Rasul* in support of their claim is unfounded. The Court stated repeatedly in *Rasul* that the only question it was deciding was the reach of the habeas corpus statute, 28 U.S.C. § 2241. *See, e.g., Rasul,* 542 U.S. at 475. Now that Congress and the President have amended § 2241 to overturn the result in *Rasul* and *Hamdan*, the Court must decide an issue that *Rasul* pointedly declined to address – whether the Constitution protects the right of Guantanamo detainees to seek habeas relief in federal court. Indeed, *Rasul* strongly supports the federal government's position. It distinguished *Eisentrager* by stating that *Eisentrager* had decided the constitutional issue and had not directly focused on the statutory issue raised in *Rasul.* 542 U.S. at 477-79. Accordingly, *Rasul* makes clear that the Court cannot accept Petitioner's interpretation of the Suspension Clause without either overruling or ignoring *Eisentrager.* Moreover, *amici* (who include seven retired generals and admirals) have serious concerns that a decision recognizing Petitioners' habeas claims could compromise American military effectiveness.

If the Court rejects the decisions of Congress, the President, and this Court in *Eisentrager* by ruling that Petitioners have a right to seek habeas relief in the federal courts, it should nonetheless decline to exercise jurisdiction because Petitioners have failed to exhaust remedies available to them. By creating the CSRT procedure, Congress and the

President have provided Petitioners with a means of challenging their detention. Those proceedings have led to the release of numerous Guantanamo detainees. Moreover, those such as Petitioners who were determined by a CSRT to be enemy combatants are entitled to seek review of those determinations in the D.C. Circuit. Petitioners contend that those proceedings are constitutionally inadequate. At a minimum, that contention is premature because Petitioners have not yet obtained a ruling from the D.C. Circuit on their claims. Under those circumstances, basic notions of interbranch comity at the federal level weigh heavily against exercise of the Court's equity jurisdiction. Petitioners cite individual instances in which they contend that detainees were not treated fairly by a CSRT. If so, that might be grounds for overturning an individual CSRT decision, but it would not be grounds for condemning the entire CSRT procedure.

ARGUMENT

I. ALIENS DETAINED OVERSEAS AS ENEMY COMBATANTS ARE NOT DEPRIVED OF ANY RIGHTS UNDER THE SUSPENSION CLAUSE BY BEING DENIED THE RIGHT TO SEEK HABEAS RELIEF

As the appeals court recognized, Pet. App. 6a-9a, the MCA unambiguously expresses Congress's intent to deprive the federal courts of jurisdiction over Petitioners' habeas claims. Accordingly, the only substantial question is whether, in doing so, Congress has deprived Petitioners of rights guaranteed them under the Suspension Clause.

The Suspension Clause is not a one-way ratchet; that is, it does not operate to enshrine every expansion of federal court habeas jurisdiction adopted by Congress over the past 220 years. Rather, the Suspension Clause "protects the writ as it

existed in 1789." *St. Cyr*, 533 U.S. at 301. The constitutionality under the Suspension Clause of the MCA's limitation on habeas jurisdiction "therefore turns on whether the writ was generally available to those in [Petitioners'] position in 1789 (or possibly thereafter) to challenge detention." *Demore v. Kim*, 538 U.S. 510, 538 (2003) (O'Connor, J., concurring in part and concurring in the judgment).

The D.C. Circuit concluded, "The detainees cite no case and no historical treatise showing that the English common law writ of habeas corpus extended to aliens beyond the Crown's dominions. Our review shows the contrary." Pet. App. 11a. Citing many of the same historical materials they cited to the appeals court, Petitioners dispute the appeals court's conclusion. *See, e.g.*, Boumediene Pet. Br. 10-15; Al Odah Pet. Br. 13-16. They assert, for example (and the federal government disputes), that British courts in India had authority to grant writs of habeas corpus to Indian petitioners even before Britain asserted formal sovereignty over India in 1813. The parties dispute at length the meaning of virtually every English case cited by either side; to avoid repetition, we will not elaborate on that historical debate.

We limit ourselves to one observation: Petitioners can point to *no case arising in a military context* in which a court entertained a habeas petition filed by an overseas alien. For example, the Indian cases on which Petitioners rely involved Indian petitioners being detained by either the East India Company or Indian rulers, not by British government officials. In particular, Petitioners point to no such case in which British judges in India asserted habeas jurisdiction over the claim of an alien being held by the British military. Given the ten of thousands of aliens taken into custody overseas by the British military as alleged enemy combatants in the centuries preceding 1789, one would think that there would have been at least one recorded challenge to such custody if, indeed, British courts had had jurisdiction to hear such habeas claims.

A. Substantial Deference Is Due Congress's and the President's Determination That Petitioners' Claims Are Best Handled by Means of CSRT Proceedings

Following the attack on America by islamic extremists on September 11, 2001, Congress adopted the AUMF – which authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." *Hamdi* determined that the authorization granted by the AUMF includes authorization to detain, for the duration of hostilities, those associated with al Qaeda and the Taliban. *Hamdi*, 542 U.S. at 517-19. As the *Hamdi* plurality explained:

> [D]etention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incidence to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use. [¶] The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war."

Id. at 518 (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

Petitions are being detained pursuant to that congressionally authorized power. As noted above, Congress and the President have further concluded that those detainees who wish to contest their status as enemy combatants should do so pursuant to the CSRT procedures. Even without express authorization from Congress, the President's actions in the fields of foreign policy and national security are entitled to substantial deference from the courts. *See, e.g., Quirin*, 317 U.S. at 25 ("[T]he detention and trial of petitioners – ordered

by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and grave public danger – are not to be set aside by the Courts without clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.").

Given Congress's explicit authorization of detention (through its adoption of the AUMF) and its endorsement of the CSRT procedures (through its adoption of the DTA and the MCA), the deference due the elected branches of government in this case is particularly strong. As the Court has recognized, when "the President acts pursuant to an express or implied authorization from Congress," his actions are "'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion . . . rest[s] heavily upon any who might attack it.'" *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 632 (1952) (Jackson, J., concurring)). *See also Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) ("heightened deference to the judgments of the political branches with respect to foreign policy" is particularly warranted with respect to terrorism-related issues).

Given the high level of deference normally accorded by the federal courts to the national security determinations of the elected branches of government, it would be extraordinary for this Court invoke the Suspension Clause to override the considered judgment of the other branches that Petitioners' claims are best handled by means of CSRT proceedings. Indeed, senior Executive Branch officials have told the D.C. Circuit that even the detention review procedures established by the DTA create serious national security concerns. CIA Director Michael V. Hayden told the appeals court that

providing government materials requested by the court in connection with its ongoing review of CSRT enemy combatant determinations posed "an extremely grave risk to the national security" by "disclos[ing] the classified details of the CIA's counterterrorism operations" and "reveal[ing] the CIA's sensitive intelligence sources and methods." *See* Sept. 6, 2007 Declaration of Michael V. Hayden in support of Respondent's Petition for Rehearing, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir.). Deputy Secretary of Defense Gordon R. England told the court that gathering requested materials was imposing "an immense burden on the Department of Defense," leading to "compromise of resources necessary for the war effort, and diversion of significant manpower from the war time mission." *See* Sept. 7, 2007 Declaration of Gordon A. England in support of Respondent's Petition for Rehearing, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir.). Yet, Petitioners are asking the Court to require full-blown habeas corpus review of each and every detention decision, a review that all agree would be far more intrusive than the CSRT review that is already raising serious national security concerns.

This Court is ill-equipped to second-guess Congress's and the President's determination that national security considerations require the more limited judicial review provided by DTA § 1005(e)(2). The expansive interpretation of the Suspension Clause being pressed by Petitioners is inconsistent with the courts' traditional deference to the elected branches of government on foreign policy issues.

B. Petitioners' Suspension Clause Claims Are Inconsistent with *Eisentrager* and Other Decisions of This Court

Petitioners' Suspension Clause claims are inconsistent with *Eisentrager* and other decisions of this Court. Those

claims cannot be accepted without repudiating a long line of Court decisions.

More than 50 years ago, the Supreme Court held in *Eisentrager* that the U.S. Constitution provides no protection for the habeas corpus claims of aliens being held overseas by the United States, when the aliens at no time have been within the territorial jurisdiction of the United States. In the ensuing years, the Supreme Court has on numerous occasions cited *Eisentrager* with approval, and has given no indication that its continued vitality is in doubt.

At no relevant times have Petitioners had any meaningful connection with the United States. They were taken into custody in overseas locations and later transferred to Cuba. None of the Petitioners makes any claim to citizenship, resident alien status, ownership of property in the United States, or any other connection with this country. Accordingly, *Eisentrager* dictates a finding that nothing in the U.S. Constitution provides the federal courts with jurisdiction over Petitioners' challenges to their continued detention. Petitioners' numerous efforts to distinguish *Eisentrager* are unavailing.

Eisentrager involved habeas corpus petitions filed by 21 German citizens being held in an American-controlled prison in post-war Germany. They had been employed in China by *civilian* agencies of the German government at the time of Germany's surrender in April 1945. They were being held because a military tribunal had determined that, in violation of the terms of surrender (which required Germans to cease hostile activities at once), they collaborated with the Japanese government, which controlled the portion of China in which they were stranded at the time of the German surrender. *Eisentrager*, 339 U.S. at 765-66. They challenged the propriety of the military tribunal that had imposed sentence on them and denied their guilt; they contended that their imprisonment violated numerous provisions of the U.S.

Constitution. *Id.* at 767. Their case reached the Supreme Court nearly five years after the surrender of all Axis powers and the cessation of combat.

The D.C. Circuit (which heard the case in 1949) had recognized that the federal habeas *statute* did not provide jurisdiction over the Germans' claims because their custodian was not located within the territorial jurisdiction of any federal court. It nonetheless held that federal court must be deemed to possess such jurisdiction "as part of the judicial power of the United States" because anyone being detained by the U.S. government in violation of constitutional right ought to be permitted to seek relief in some federal court. *Eisentrager v. Forrestal*, 174 F.2d 961, 963-65 (D.C. Cir. 1949).

The Supreme Court reversed that constitutional ruling, stating, "We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction." *Eisentrager*, 339 U.S. at 768.

Eisentrager repeatedly expressed the limits on federal court jurisdiction not in terms of "control" over the petitioner and the place of his confinement (the nomenclature used by the D.C. Circuit), but in terms of whether aliens seeking access to the courts are within the territorial jurisdiction of the United States. For example, in describing the historical limits of federal court jurisdiction, the Court explained:

> [I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act. In the pioneer case of *Yick Wo v. Hopkins*, the Court said of the Fourteenth Amendment, "These provisions are universal in their application, *to all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of

> nationality; * * *." (Italics supplied.) 118 U.S. 356 [(1886)].

Eisentrager, 339 U.S. at 771.[7]

In rejecting claims that the Germans were entitled under the U.S. Constitution to file habeas petitions in federal court, this Court stated, "We have pointed out that the privilege of litigation has been extended to aliens, *whether friendly or enemy*, only because permitting their presence in this country implied protection." *Id.* at 777-78 (emphasis added). The Court said that the Germans could not invoke such "implied protection" jurisdiction because they were at no relevant time "within any jurisdiction over which the United States is sovereign" but rather "were beyond the territorial jurisdiction of any court of the United States." *Id.* at 778.

The Court on several occasions in recent years has cited *Eisentrager* with approval. In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990), the Court held that aliens with "no voluntary attachment to the United States" were not permitted to invoke the Fourth Amendment to challenge a search by American authorities in Mexico. In support of that holding, the Court cited *Eisentrager* for the proposition that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign

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[7] In other words, aliens seeking to enter the United States but excluded on the basis of the immigration laws are not entitled to constitutional protections, regardless whether they are deemed friendly aliens or enemies. *See, e.g., United States ex rel. Knauf v. Shaughnessy*, 338 U.S. 537, 543 (1950) ("Whatever the rule may be concerning the deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the government to exclude a given alien.").

territory of the United States." *Id.* at 269.[8] More recently, the Court cited both *Eisentrager* and *Verdugo-Urquidez* for the proposition that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders." *Zadvydas*, 533 U.S. at 693.

Petitioners' numerous efforts to distinguish *Eisentrager* are unavailing. Petitioners allege that controlling significance should be attached to several factual distinctions between them and the German detainees in *Eisentrager*:

> [Guantanamo detainees] are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two [now almost six] years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Boumediene Pet. Br. 16 (quoting *Rasul*, 542 U.S. at 476).

The distinctions Petitioners cite either no longer exist or are of no legal relevance to the legal issues raised by this case:

(1) It is true that the U.S. is not at war with the nations of which Petitioners are citizens. But the military situation here renders Petitioners' claims far less appealing than

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[8] Petitioners on several occasions state that Justice Kennedy's concurring opinion in *Verdugo-Urquidez* is the "controlling opinion" in that case regarding the extraterritorial application of constitutional rights. *See, e.g.*, Boumediene Pet. Br. 47. As Petitioners are well aware, that statement is false. The "controlling opinion" in that case is the majority opinion. Justice Kennedy's views are entitled to the same respectful consideration as any other separate opinion of a Supreme Court justice. But the majority opinion in *Verdugo-Urquidez* is the one that serves as binding precedent in this Court.

did the military situation facing the Court in *Eisentrager*. In that case, although a formal peace treaty had not yet been signed, the Axis had surrendered and fighting had been over for five years. Here, the United States continues to face active military resistance from the organizations with which Petitioners have been found to be affiliated. *See, e.g.*, Griff Witte, "Pakistan Seen Losing Fight Against Taliban and Al-Qaeda," *Washington Post*, Oct. 3, 2007, at A01.

(2) Petitioners deny that they engaged in acts of aggression against the United States, but so did the German petitioners. *See Eisentrager*, 339 U.S. at 785 (Germans claimed to have acted solely in civilian roles and that the charge against them was not a "charge of an offense against the law of war").

(3) Petitioners' claims that they were not enemy combatants had not been adjudicated by any tribunal at the time that *Rasul* was decided in 2004. But they have now had hearings before CSRTs, which determined that they are, in fact, enemy combatants. Petitioners complain about both the composition and the fairness of the CSRTs, but the German petitioners had similar complaints about the tribunal that determined their guilt. Moreover, unlike the Germans (who had no legal recourse other than their habeas claims), Petitioners have been granted a right to appeal the adverse CSRT decisions to the D.C. Circuit.

(4) Petitioners are being held at a facility (Guantanamo Bay) over which the United States exercises exclusive jurisdiction and control. But the German petitioners likewise were being held in a facility (Landsberg Prison) over which the United States exercised exclusive jurisdiction and control. In neither case did the United States claim the land as sovereign U.S. territory. In both instances the sovereign was/is incapable of interfering with U.S. detention decisions. It is certainly unrealistic to think

that a defeated, post-war West Germany was in any position in 1950 to take action against the United States to interfere with its decision to continue to detain Eisentrager and the other German petitioners or to contest U.S. control over Landsberg Prison.

Moreover, *Eisentrager* made clear that the factual distinctions to which Petitioners cite were not relevant to its decision. For example, although the German petitioners were technically still "alien enemies" (because Germany and the United States still had not signed a peace treaty in 1950), the Court explained that the United States was quite willing to extend "the privilege of litigation" to *any* alien, "whether friendly or enemy," so long as it could be "implied" that the United States had offered "protection" to that alien. *Eisentrager*, 339 U.S. at 777-78. The German petitioners were denied "the privilege of litigation" not because they were "alien enemies" but because they were aliens who at no relevant times were within the "sovereign" territory of the United States or within "the territorial jurisdiction of any court of the United States." *Id.* Similarly, Petitioners are not entitled to "the privilege of litigation" – even though (despite their demonstrated hostility to the United States) they are not technically "enemy aliens" – because they have no relevant ties to sovereign U.S. territory or to any area within the jurisdiction of a federal court.

As noted above, the Court relied on *Eisentrager* to hold in *Verdugo-Urquidez* that aliens with "no voluntary attachment to the United States" were not permitted to invoke the Fourth Amendment to challenge a search by American authorities in Mexico, even though the same search would have been constitutionally protected if the defendant had been a U.S. citizen or resident alien. *Verdugo-Urquidez*, 494 U.S. at 274-75. Indeed, *Verdugo-Urquidez* expanded Eisentrager's holding by denying constitutional rights to a nonresident alien even after he was brought involuntarily to the U.S. to stand

trial. Accordingly, even if it could plausibly be claimed that Guantanamo Bay is somehow the equivalent of sovereign U.S. territory, *Verdugo-Urquidez* strongly supports an argument that Petitioners' involuntary presence and detention at Guantanamo Bay (a detention undertaken solely to prevent them from waging war against the United States) does not create a sufficient relationship between themselves and the United States to entitle them to "the privilege of litigation."

Petitioners contend that *Rasul* calls into question the continued viability of *Eisentrager*. *See, e.g.*, Al Odah Pet. Br. 20 (citing *Rasul*, 542 U.S. at 483 n.15). That contention is without merit. First, the language in *Rasul* to which Petitioners point was unquestionably *dicta*; the Court stated repeatedly that the *only* issue it was deciding was the scope of the federal habeas statute. *See, e.g., id.* at 475, 485. Second, the factual allegations cited in Footnote 15 (*e.g.*, extended detention without access to counsel and without a formal basis for detention) are now demonstrably incorrect: Petitioners have all been granted access to counsel; and not only have they been classified as enemy combatants, those classifications have been confirmed by military tribunals.

More importantly, by distinguishing *Eisentrager* as a case primarily focused on constitutional guarantees of habeas corpus, *Rasul* confirms that *Eisentrager* is controlling here. The federal government in *Rasul* had argued that *Eisentrager* stood for the proposition that the federal habeas statute, 28 U.S.C. § 2241, did not extend jurisdiction to overseas aliens lacking any ties to the United States. *Rasul* rejected that interpretation of *Eisentrager*. The Court noted that in 1948 (two years before *Eisentrager* was decided), it had interpreted § 2241 as prohibiting a district court from exercising habeas jurisdiction unless the petitioner was physically present within the district court's territorial jurisdiction. *See Ahrens v. Clark*, 335 U.S. 188 (1948). As recounted in *Rasul*, when Eisentrager's petition reached the D.C. Circuit in 1949, that

court realized (based on *Ahrens*) that the federal courts lacked any statutory basis for exercising habeas jurisdiction over aliens detained in Germany. *Rasul*, 542 U.S. at 477. Thus, *Rasul* explained, the D.C. Circuit was able to exercise jurisdiction only by asserting that Eisentrager had a constitutional right under the Suspension Clause to seek habeas relief without regard to any statutory impediment, "reasoning that 'if a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an omission in a federal jurisdictional statute.'" *Id.* at 477-78 (quoting *Eisentrager v. Forrestal*, 174 F.2d at 965). *Rasul* explained that this Court's central holding in *Eisentrager* was its rejection of the D.C. Circuit's constitutional analysis and that it simply had assumed without deciding that § 2241 did not extend habeas jurisdiction to overseas aliens lacking ties to the United States. *Id.* at 478 & n.8.[9]

Accordingly, *Rasul* strongly supports our understanding of *Eisentrager*: that it explicitly rejected an assertion that the U.S. Constitution (and specifically, the Suspension Clause) protects the right of aliens being held overseas by the U.S. government and lacking ties to the United States to seek habeas relief in the federal courts. Because, as explained above, Petitioners' situation cannot meaningfully be distinguished from that of Eisentrager and the other German prisoners, *Rasul* reinforces *Eisentrager*'s teaching that Petitioners lack any constitutional basis for challenging Congress's decision to abolish federal court habeas jurisdiction over the claims of Guantanamo detainees.

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[9] *Rasul* ultimately decided the statutory issue in favor of the Guantanamo detainees by finding that *Ahrens* had been overruled in 1973 by *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 485 (1973), which held that the prisoner's presence within the territorial jurisdiction of the district court is not "an invariable prerequisite" to the exercise of jurisdiction under § 2241. *Id.*

The preceding discussion, by demonstrating the absence of any constitutional violation, renders moot consideration of whether a finding that Petitioners actually possess rights protected under the Suspension Clause is a prerequisite to deciding whether the federal government has violated the Suspension Clause. *Amici* nonetheless agree with the D.C. Circuit that the absence of such rights precludes further consideration of the issue. *See* Pet. App. 17a-19a. The dissenting D.C. Circuit judge had argued that the Suspension Clause is a limitation on congressional power rather than a constitutional right and thus that it is enforceable by the Court without regard to whether the detainee is someone entitled to lay claim to constitutional protections. *Id.* 22a-23a. But as the majority explained, "This [distinction between a limitation on congressional power and a constitutional right] is no distinction at all. Constitutional rights are rights against the government and, as such, *are* restrictions on government power." *Id.* 17a. Petitioners are unable to point to a single case in which the courts have struck down a congressional action as unconstitutional in the absence of evidence that the plaintiff's rights under some specific constitutional provision had been violated and that the violation had injured her in some way. The Court has repeatedly stressed that federal courts lack jurisdiction to hear a case in which the plaintiff has failed to demonstrate standing in this manner. *See, e.g., Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007).

In sum, Petitioners' Suspension Clause claims are incompatible with *Eisentrager* and other decisions of this Court. Accordingly, an exercise of jurisdiction over Petitioners' habeas claims would require the Court to reject the national security-related determinations not only of Congress and the President but of prior Supreme Court justices as well.

C. *Amici* Have Serious Concerns That a Decision Recognizing Petitioners' Habeas Claims Could Undermine American Military Effectiveness

Before the Court recognizes the habeas corpus rights sought by Petitioners, *amici* submit that it should think very carefully about the practical effects of such a decision. Such rights for overseas military detainees have never previously been recognized in the annals of warfare and are far more extensive than anything contemplated under the Geneva Conventions.

The retired generals and admirals who have joined this brief collectively have several hundred years of experience in the armed services, both in combat operations and in conducting military legal proceedings. They understand from experience that capturing and detaining enemy combatants in times of war is essential to effective military operations. While *amici* recognize the need for the military to at least consider the claims of innocence of those captured abroad, they have serious concerns that granting those detainees full-fledged habeas rights could compromise American military effectiveness. Based on their experience, they are concerned that American soldiers and sailors cannot be as effective in carrying out their combat missions if they will now also be asked to document the circumstances of every capture to the extent necessary to meet the rigors of habeas review. As one of the *amici* posed the issue in a recent law review article:

> Is the military to become obligated to document all facts surrounding a capture of an enemy, to document the basis for such capture, to produce soldiers to appear in an adversarial setting to be cross-examined by a detainee's counsel, and to provide the manpower and support necessary to conduct formal, legal hearings in all cases of warfare detention . . .? If so, America's war-fighting ability

> will be markedly and adversely affected if the duties of our soldiers as warriors are forced to compete with the obligation to act as investigators.

Gen. Thomas L. Hemingway, *Wartime Detention of Enemy Combatants: What if There Were a War and No One Could Be Detained Without an Attorney?*, 34 DENV. J. INT'L L. & POL'Y 63, 85 (2006).

If habeas rights are extended overseas to Guantanamo Bay, the logic of Petitioners' argument will soon demand that those rights also be extended to detainees held in military facilities controlled by the United States in Afghanistan and elsewhere around the world. *Amici* respectfully submit that such unprecedented steps could be perilous for American national security

II. THE COURT SHOULD DECLINE TO EXERCISE JURISDICTION BECAUSE PETITIONERS HAVE FAILED TO EXHAUST THEIR REMEDIES

If the Court rejects the decisions of Congress, the President, and this Court in *Eisentrager* by ruling that Petitioners have a Suspension Clause right to seek habeas relief in the federal courts, it should nonetheless decline to exercise jurisdiction because Petitioners have failed to exhaust remedies available to them. A ruling on Petitioners' Suspension Clause claim will require evaluation of the adequacy of the CSRT procedure as a substitute for habeas corpus. *Amici* submit that that evaluation cannot meaningfully be undertaken until after the D.C. Circuit's review process has been completed. Under those circumstances, basic notions of interbranch comity at the federal level weigh heavily against exercise of the Court's equity jurisdiction.

The injunctive relief sought by Petitioners is equitable in nature. Thus, even assuming that the Court possesses subject matter jurisdiction to hear Petitioners' claims:

> There remains the question of equitable jurisdiction, a question concerned, not with whether the claim falls within the limited jurisdiction conferred on the federal courts, but with whether consistently with the principles governing equitable relief the court may exercise its remedial powers.

Schlesinger v. Councilman, 420 U.S. 738, 753 (1975). *Amici* respectfully submit that, under the equitable principles set forth in *Schlesinger* and elsewhere, the federal courts should abstain from hearing Petitioners' habeas claims until after the CSRT process – including any judicial review under the DTA – has been allowed to run its course.

Schlesinger strongly counseled against entertaining habeas challenges to ongoing court-martial proceedings involving members of the American military. The Court stated that requiring military defendants to exhaust all military remedies before seeking federal court relief served the same purposes of rules requiring exhaustion of remedies before administrative agencies. *Id.* at 756-57. Such rules are:

> [B]ased on the need to allow agencies to develop the facts, to apply the law in which they are particularly expert, and to correct their own errors. The rule ensures that whatever judicial review is available will be informed and narrowed by the agencies' own decisions. It also avoids duplicative proceedings, and often the agencies' ultimate decision will obviate the need for judicial intervention.

Id. The Court also held that exhaustion requirements are particularly important in the context of military proceedings and "counsel strongly" against premature federal court intervention in such proceedings. *Id.* at 757. The Court explained that comity is required because "[t]he military is 'a specialized society separate from civilian society' with 'laws

and traditions of its own [developed] during its long history.'" *Id.* (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)).[10]

Each of the factors cited above counsel strongly against interference with the CSRT process before completion of that process. Petitioners have cited what they view as shortcomings in specific CSRTs. But by delaying habeas review until after the CSRT process has been completed, the Court will provide an opportunity for any such errors to be corrected in the manner contemplated by Congress and the Executive Branch, without creating the inevitable friction that arises when Courts strike down a process established by the elected branches. Imposing an exhaustion requirement is particularly appropriate in the military context, given the federal courts' lack of familiarity with the laws and traditions of military society. Whether a particular set of military procedures is fair to a detainee may well not be apparent until after the entire review process has been completed.

The federal courts routinely defer consideration of the habeas claims of state prisoners until after those prisoners have exhausted remedies made available in the state courts. *See* 28 U.S.C. § 2254(b)(1); *Rose v. Lundy*, 455 U.S. 509, 515-516 (1982). Similar considerations counsel imposition of an exhaustion requirement in this case as well.

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[10] As the Court explained elsewhere, requiring exhaustion also serves to eliminate potentially needless friction between the military and the judicial branch:

> If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved.

Gusik v. Schilder, 340 U.S. 128, 132 (1950).

Petitioners should not be heard to complain that inordinate delays in the CSRT process require that their habeas claims be heard immediately. First, much of the delay is attributable to Petitioners themselves, who until recently were shunning the CSRT process – preferring to place all their eggs in the habeas basket.

Second, there is nothing facially inadequate about the CSRT process. For example, it provides for independent D.C. Circuit review of a CSRT's factual determination that a detainee is an enemy combatant. Such federal court review is far more extensive than has been allowed from the decisions of military tribunals in the past. In *In re Yamashita*, 327 U.S. 1 (1946), the Court refused to re-examine *any* of the findings of a military commission, explaining:

> If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision based on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.

Yamashita, 327 U.S. at 8.

Petitioners complain about specitic procedures employed by CSRTs, such as the use of hearsay evidence. But the Court only three years ago endorsed use of truncated evidentiary rules by military tribunals to determine whether a detainee is properly classified as an enemy combatant -- even when the detainee is an American citizen. *Hamdi*, 542 U.S. at 533-34 (plurality)(endorsing use of hearsay evidence and adoption of a presumption in favor of the government's evidence); *id.* at 594 (Thomas, J., dissenting). Whatever constitutional rights nonresident aliens being detained at Guantanamo Bay may ultimately be determined to possess, one can safely surmise that those rights are not as extensive as those of similarly situated U.S. citizens. Even when it has extended

constitutional protection to aliens, the Court has routinely applied a more relaxed standard of review when the plaintiffs are aliens than when the plaintiffs are citizens. *See, e.g., Demore*, 538 U.S. at 510; *Verdugo-Urquidez*, 494 U.S. at 273. Accordingly, at the very least the CSRT procedures are not so facially deficient as to warrant overlooking exhaustion requirements.

In sum, Petitioners have supplied no justification for permitting an end-run around the CSRT process before that process has been provided a full opportunity to work. As the Court has warned in the past, there is a significant danger that allowing enemy combatants access to our courts to contest their detention will "hamper the war effort" by requiring our military leaders to "divert [their] efforts and attention from the military offensive abroad to the legal defensive at home." *Eisentrager*, 339 U.S. at 779. Congress has authorized detainees one means of access to the federal courts; there can no justification for permitting detainees to open up a second front.

CONCLUSION

Amici curiae respectfully request that the Court affirm the judgment of the appeals court.

Respectfully submitted,

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Dated: October 9, 2007

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FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(21) (22)

Nos. 06-1195, 06-1196

In the Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., *Petitioners,*
v.
GEORGE W. BUSH, ET AL., *Respondents.*

KHALED A.F. AL ODAH, ET AL., *Petitioners,*
v.
UNITED STATES, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are retired military officers. Each has extensive experience with U.S. military regulations and the Laws of War. Each believes that the mission of the Nation's Armed Forces must be consistent with the rule of law.

The purpose of this brief is to explain the profound ramifications, from a military point of view, of the government's position that foreign prisoners at the United States Naval Base at Guantanamo Bay, Cuba may be held indefinitely without any meaningful judicial review of their imprisonment. Amici are concerned that foreigners capturing American forces in current or future conflicts will use the example of Guantanamo as justification for indefinite detention of American captives.

Brigadier General David M. Brahms served in the Marine Corps from 1963 through 1988, with a tour of duty in Vietnam. During the 1970s, he served as the principal legal advisor for POW matters at Headquarters Marine Corps, and in that capacity, he was directly involved in issues relating to the return of American POWs from Vietnam. General Brahms was the senior legal advisor for the Marine Corps from 1985 through 1988, when he retired. He is currently in private practice in California and was formerly a member of the Board of Directors of the Judge Advocates Association. He also served as the Technical Advisor for the film *A Few Good Men*.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been lodged with the Clerk.

Rear Admiral Donald J. Guter was a line officer in the United States Navy from 1970 through 1974. After a break for attending law school, he returned to the Navy in 1977 and remained in the Navy until 2002, when he retired from the military. He served as the Navy's Judge Advocate General from June 2000 through June 2002. Admiral Guter was in the Pentagon when it was attacked by terrorists on September 11, 2001. He is currently the Dean of Duquesne University School of Law.

Rear Admiral John D. Hutson served in the United States Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. He is the Dean and President of the Franklin Pierce Law Center in Concord, New Hampshire.

SUMMARY OF ARGUMENT

For more than 200 years, the United States has been at the forefront of international efforts to safeguard the rights of prisoners captured in wartime. Those efforts resulted, after World War II, in the Geneva Conventions of 1949, which the Senate ratified in 1955. Key provisions of those Conventions have been incorporated in Army Regulation 190-8, including the requirement that the status of captured persons be determined by a competent tribunal shortly after capture if there is any doubt about whether the captives are prisoners of war. Persons found to be innocent civilians are released.

The Combatant Status Review Tribunals ("CSRTs") created in the wake of *Rasul* v. *Bush*, 542 U.S. 466 (2004), and *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), occurred years after the detainees were captured and do not even measure up to the streamlined battlefield procedures established by Regulation 190-8, let alone the protections provided by the writ of habeas corpus. Unlike hearings under Regulation 190-8, command influence and the permissible use of evidence obtained by torture tainted the CSRTs at issue here. The result is a "procedure" that lacks the integrity of Regulation 190-8 hearings and permits individuals to be detained for the

rest of their lives as "enemy combatants" based on the flimsiest of evidence. There is no legitimate justification for providing such a grossly deficient process years after the detainees' capture and thousands of miles away from any battlefield. The severely constricted review of CSRT findings permitted by the Detainee Treatment Act of 2005 ("DTA") provide no meaningful opportunity for detainees to challenge their potentially lifelong imprisonment.[2]

Providing Guantanamo prisoners with meaningful judicial review of their imprisonment is especially important to the members of the United States Armed Forces. If the United States detains "enemy combatants" without providing a fair and meaningful hearing, it increases the likelihood that foreign forces capturing American troops in the future will ignore the Geneva Conventions entirely—thereby putting the lives of American prisoners at risk. And even if our enemies do not comply with the Geneva Conventions, it is important for our military to do so. Adhering to U.S. law and upholding traditional American values are well-established hallmarks of the American military tradition; they also provide moral authority that is critically important to the ability of our soldiers to wage and win war with a minimum of resistance.

The government contends that it is not required to provide detainees with meaningful judicial review because the Guantanamo base is not under United States sovereignty. This Court rejected that position in *Rasul*, recognizing that the governing agreements with Cuba provide the United

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[2] The petitioners' briefs and other amicus briefs address whether or not some detainees are subject to military jurisdiction at all. This brief does not discuss that issue, but compares the CSRTs to the military procedures provided at the time of capture for persons properly subject to military jurisdiction.

States with "complete jurisdiction and control" over the base in perpetuity. Military officials have long regarded the lease, executed in 1903, as interrupting Cuban sovereignty; Cuba's sovereignty will resume if the United States ever decides to return the base to Cuba. In the meantime, the United States acts as the "pro tanto sovereign" of the base, as the State Department's Office of the Solicitor concluded in 1912.

ARGUMENT

I. The United States Has Played A Leading Role In Developing International Standards To Safeguard The Rights Of Captured Prisoners.

For more than 200 years, the United States has "been a leader in * * * bettering the humanitarian principles invoked in the treatment of prisoners of war." Gen. J.V. Dillon, *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War*, 5 MIAMI L.Q. 40, 41 (1950). A 1785 treaty between the United States and Prussia "probably constituted the first international attempt to provide in time of peace for the protection of prisoners of war." Howard S. Levie, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 5-6 (1977). In 1863, Abraham Lincoln commissioned Dr. Francis Lieber to draft a code of conduct for the Union Army in treating prisoners of war. *Id.* at 7. The Lieber Code "was perhaps the first formal codification of rules governing the treatment to be accorded prisoners of war." Dillon, 5 MIAMI L.Q. at 42.

Among other things, the Lieber Code provided that "[a] prisoner of war is subject to no punishment for being a public enemy." Art. 56, *U.S. Army General Order No. 100* (1863). The Lieber Code became the "quarry from which all subsequent codes were cut" and the "basis of every convention and revision on the subject" of conduct toward prisoners of war. Geoffrey Best, HUMANITY IN WARFARE 129 (1980). It had a "significant influence" on other nations and on the Hague Conventions of 1899 and 1907, Dillon, 5

MIAMI L.Q. at 42, which were "the first effective multilateral codification[s] of the law of war." Levie, PRISONERS OF WAR, at 8. After World War I, the United States and Germany entered into an agreement concerning the treatment of prisoners of war. Dillon, 5 MIAMI L.Q. at 42. The subsequent 1929 Geneva Convention Relative to the Treatment of Prisoners of War, signed by the United States and more than 40 other nations, bore "a striking resemblance to the United States-German agreement." *Id.* at 43.

The Geneva Convention of 1929 played a significant role during World War II. The fact "that millions of prisoners of war from all camps, notwithstanding the holocaust, did return, is due exclusively to the observance of the Geneva Prisoners of War Convention." Josef L. Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity For Their Revision*, 45 AM. J. INT'L L. 37, 45 (1951). "The American Red Cross attributed the fact of the survival of 99 percent of the American prisoners of war held by Germany during World War II to compliance with the 1929 Convention." Levie, PRISONERS OF WAR, at 10 n.44.

The treatment of POWs during World War II also indicated that the Geneva Convention of 1929 required substantial revision to broaden and clarify the circumstances under which its protections would apply. Levie, PRISONERS OF WAR, at 10-11. Some countries had argued that the 1929 Convention did not apply when the invading country had not formally declared war. Germany had claimed that the Convention did not apply to Polish prisoners because the Polish government had ceased to exist and that the Convention did not apply to French prisoners because France ceased to be a belligerent after signing an armistice with Germany. *Id.* at 11-12. Moreover, the 1929 Convention did not establish a procedure for determining whether a captive is a prisoner of war: "[d]uring World War II the decision that an individual was not entitled to prisoner-of-war status had

frequently been made summarily and by persons of very low rank." Levie, PRISONERS OF WAR, at 55.

Following World War II, at the suggestion of an American general, the International Committee of the Red Cross convened "a meeting of experts on prisoner of war affairs of the various belligerent nations." Dillon, 5 MIAMI L.Q. at 43. The United States went on to play "a major role both in the prepatory steps and in the conference proceedings." *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Committee on Foreign Relations*, 84th Cong., 1st Sess., at 3-4 (1955) ("Senate Hearing") (statement of Robert Murphy, Deputy Under Secretary of State). Meetings involving the United States and other nations resulted in the four Geneva Conventions of 1949, including the Geneva Convention Relative to the Treatment of Prisoners of War. Dillon, 5 MIAMI L.Q. at 43.

The debate on the 1949 Conventions shows that two basic principles animated the Senate's decision to ratify. First, the United States had to lend its moral authority to the Conventions and provide a model for other nations to follow in treating prisoners of war. In urging Senate approval, Secretary of State John Foster Dulles stated that American "participation is needed to enlist the authority of the United States in the[] interpretation and enforcement" of the Conventions. Senate Hearing at 61. Secretary Dulles went on to express the view that "United States ratification of the Geneva Conventions, by lending further support to their standards, should influence favorably future behavior toward prisoners of war." *Id.* at 68.

Second, by treating prisoners of war in accordance with the 1949 Conventions, the United States believed that it would encourage its enemies to reciprocate in their treatment of American prisoners of war. Deputy Under Secretary of State Murphy informed the Senate Committee on Foreign Relations that although neither North Korea nor the United

States had ratified the 1949 Conventions at the time of the Korean War, "the moral acceptance of the conventions as a general norm did have some effect on" North Korea's treatment of American prisoners during the war. *Id.* at 5. Looking to future conflicts, Secretary Dulles explained that American "participation is needed to * * * enable us to invoke them for the protection of our nationals." *Id.* at 61. Similarly, Senator Mike Mansfield stated that "it is to the interest of the United States that the principles of these conventions be accepted universally by all nations." 101 Cong. Rec. 9960 (July 6, 1955). Senator Mansfield explained that American "standards are already high. The conventions point the way to other governments. Without any real cost to us, acceptance of the standards provided for prisoners of war, civilians, and wounded and sick will insure improvement of the condition of our own people as compared with what had been their previous treatment." *Ibid.* Senator Alexander Smith concurred: "I cannot emphasize too strongly that the one nation which stands to benefit the most from these four conventions is our own United States. * * * To the extent that we can obtain a worldwide acceptance of the high standards in the conventions, to that extent will we have assured our own people of greater protection and more civilized treatment." *Id.* at 9962.

One important protection is Article 5 of the Third Geneva Convention Relative to the Treatment of Prisoners of War ("GPW") (Aug. 12, 1949, 6 U.S.T. 3316), which provides:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [defining POWs], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

The same requirement has been part of American military regulations for decades:

> All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.

United States Dep't of Army, Regulation 190-8, §1-5(a)(2) (Oct. 1, 1997).[3] The regulation further provides (*id.* §1-6):

> (a) In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated under Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.
>
> (b) A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

Hearings under Regulation 190-8 are designed to occur shortly after a prisoner's capture. Anyone determined to be an innocent civilian is "immediately returned to his home or

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[3] Regulations for the other branches of the military contain the same provisions discussed in the text. See OPNAVINST 3461.6 (Navy); AFJI 31-304 (Air Force); MCO 3461.1 (Marine Corps). Predecessor versions of Regulation 190-8 also included these provisions.

released." Reg. 190-8, §1.6(e)(10)(c). Prisoners of war are released when the active military conflict ends. Geneva Convention, Art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities").

It has been Defense Department policy to comply with the Laws of War, including the Geneva Conventions, in conducting "military operations and related activities in armed conflict, *however such conflicts are characterized.*" Judge Advocate General's School, OPERATIONAL LAW HANDBOOK 10 (O'Brien, ed. 2003) (emphasis added); see also Department of Defense Directive No. 5100.77, ¶5.3.1 (Dec. 9, 1998). Thus, the military instructs its Judge Advocates that they "should advise commanders that, regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of the GPW Convention (GPW , at least until their status may be determined." OPERATIONAL LAW HANDBOOK at 22. See also U.S. Marine Corps, The Basic School Training Command, LAW OF WAR/CODE OF CONDUCT 10 (Dec. 2002) (instructing new Marine Corps officers that "[e]veryone who is captured or detained during a conflict should therefore be treated as the Geneva POW Convention requires until the proper tribunal can judge his or her case").

II. CSRTs Do Not Comport With Military Law Principles.

Although the model of Regulation 190-8 was invoked by some members of Congress to justify ousting the courts of habeas jurisdiction and replacing habeas with limited judicial review of the CSRTs, there are fundamental differences between CSRTs and hearings under Regulation 190-8—differences that cannot be corrected under the severely

circumscribed review provided by the DTA, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739.[4] The CSRTs depart significantly from standards followed by the military for decades.

First, the CSRTs conducted after *Rasul* were irretrievably infected with the pernicious effects of command influence—the pressure that superiors exert over military subordinates. Command influence eliminates "a forum where impartiality is not impaired"; it is the "mortal enemy of military justice." *United States* v. *Thomas*, 22 M.J. 388 (CMA 1986). Its effect is so harmful to the objectivity and the validity of any military tribunal that it is prohibited by the Code of Military Justice and the rules governing courts-martial. 10 U.S.C. § 837(a) (barring any attempt "to coerce" or "influence the action of a court-martial or any other military tribunal"); Manual of Courts-Martial, Rule 2-104 (2005) ("No person" may "coerce" or "influence" the actions of any military tribunal "with respect to such authority's judicial acts").

Command influence is inextricably intertwined with the CSRT process in both form and practice. The CSRT Order itself proclaimed that "[e]ach detainee" receiving a CSRT already "*has been determined to be an enemy combatant* through multiple levels of review." CSRT Order §a (July 7, 2004) (emphasis added). Even before the CSRT Order, the President labeled the detainees as "killers" and "terrorists." Bronwen Maddox, *Truth is casualty in fog of the Afghan*

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[4] The DTA also directed the Department of Defense to establish new rules, *inter alia*, to "ensure" that "to the extent practicable" future CSRTs assess whether any statement "derived from or relating to [the] detainee" was obtained by torture or coercion and "the probative value (if any) of any such statement." *Id.* §1005(b)(1). But the DTA provided that such new rules would apply only "with respect to any proceeding beginning on or after the date of the enactment of this Act," *i.e.*, December 30, 2005. All of the petitioners' CSRTs were held before then.

war, THE TIMES (London), May 8, 2002. More recently, the President reiterated that "a lot" of Guantanamo detainees "are killers." Maura Reynolds, *No Tax Hike For Bridges*, L.A. TIMES, Aug. 10, 2007, at A12. On a visit to the Guantanamo base in January 2002, former Secretary of Defense Donald Rumsfeld described the detainees as "among the most dangerous, best trained, vicious killers on the face of the earth." Christine Lowe, *Guarding Gitmo*, MARINE TIMES, Feb. 11, 2002, at 211. Statements like these made it exceedingly unlikely that a CSRT would reach a contrary conclusion. Indeed, in a naked assertion of command influence, in some of the rare cases where a detainee was found by his CSRT panel not to be an enemy combatant, higher ranking officials in the chain of command insisted on another bite at the apple—a "do-over" by the same panel or a new panel—until the CSRT reached the "correct" result: an enemy combatant finding. *Al-Odah* v. *Bush*, No. 06-1196, Reply to Opp. to Pet. for Rehearing, Decl. of Lt. Col. Stephen Abraham ¶23.

Second, CSRTs were allowed to consider evidence against a detainee procured by torture. The CSRT Order permitted CSRT decisions to be based on "any information [the panel] deems relevant and helpful to a resolution of the issue before it," including hearsay evidence obtained through interrogation procedures prohibited by the Geneva Conventions. CSRT Order §g(9). Regulation 190-8 hearings, by contrast, bar evidence obtained by torture. Army Reg. 190-8, Ch. 2-1a(1)(d) ("The use of physical or mental torture or any coercion to compel prisoners to provide information is prohibited"). The government's ability in the CSRTs to use evidence procured by torture stacked the deck even more heavily in its favor: an out-of-tribunal statement uttered by an unknown individual under coercion—the content of which was kept secret from the detainee—could result in a detainee's indefinite imprisonment.

Third, Regulation 190-8's stripped-down procedures are necessary for the battlefields on which they were intended to operate, where captured people must be sorted quickly. See Regulation 190-8, Chs. 2-3. That justification does not apply to CSRTs for individuals held thousands of miles from an active theatre of war, years after their capture. See *Hamdi*, 542 U.S. at 534 (plurality opinion) (distinguishing the process due when "continu[ing] to hold those who have been seized" compared to "initial captures on the battlefield"); *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring) ("Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker").

Fourth, an erroneous determination under the CSRT process has repercussions far more severe than an error in a Regulation 190-8 hearing. A prisoner-of-war finding means that the person is held until the end of hostilities. But given the nature of the "war on terror"—which may last indefinitely—an "enemy combatant" label imposed by a CSRT may result in imprisonment for the rest of a detainee's life. Our Nation's military tradition does not permit imposing a life sentence on a suspected enemy without substantially greater procedural protections than the CSRTs provide.

Taken together, these differences show that CSRT proceedings are little more than a façade, without even the substantive protections that ensure compliance with Article 5 of the Geneva Conventions and that invest 190-8 tribunals with legitimacy in the eyes of the world. Hearings conducted by the U.S. military under Article 5 have long been models of fairness, as evidenced by the large numbers of detainees released as non-combatants during past conflicts following such hearings conducted in the field. For example, in the 1991 Gulf War, nearly 1,200 hearings resulted in the release

of about 75% of those initially detained. Dep't of Defense, *Final Report to Congress: Conduct of the Persian Gulf War* L-3 (1992). In contrast, the CSRT regime is heavily tilted in favor of an enemy combatant finding, which undermines the legitimacy of the military justice system.

These serious defects are compounded by the sharply limited judicial review the DTA provides for CSRT findings. The DTA limits the D.C. Circuit to deciding whether the findings were "consistent with the standards and procedures" for CSRTs. DTA §1005(e)(2)(C)(i). This tautology does not remedy the defects in the "standards and procedures" of the CSRT program. While the statute provides that the D.C. Circuit may consider the Constitution "to the extent * * * applicable," §1005(e)(2)(C)(ii), the government's view is that *no* Constitutional provisions apply to the detainees held at Guantanamo. Br. Opp. 19-25. If the Court rejects that position, as it should, then it should reject the Government's reliance on the CSRT results. In light of the possibility of what amounts to a life sentence, the CSRT procedures and limited DTA review do not measure up to Constitutional standards, as a number of other briefs explain.

III. Holding Guantanamo Detainees Indefinitely Without Any Meaningful Judicial Review Increases The Risk To American Armed Forces.

The significant deficiencies of the CSRTs may well have an adverse effect on the members of America's armed forces. If the United States holds prisoners indefinitely—potentially lifetime imprisonment—based on sham CSRT proceedings and without providing meaningful judicial review of their imprisonment, enemies in current or future conflicts may use that as an excuse to mete out similar treatment to captured American military forces.

This risk is greater today than it was in 2004, when the Court decided *Rasul*. Since then, American standing in the world has plummeted. Guantanamo and the government's

treatment of the prisoners there have become lightning rods for anti-American sentiment, fostering the perception that the United States no longer stands for the rule of law. Upholding potentially lifelong imprisonment of Guantanamo detainees based on CSRTs that are widely viewed as preordained proceedings could make the world a great deal more perilous for American servicemen and women captured abroad.

This Court has observed that "[t]he United States frequently employs Armed Forces outside this country—over 200 times in our history—for the protection of American citizens or national security." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). In recent decades, American armed forces have been engaged somewhere abroad nearly every year. It is inevitable that some American military personnel operating abroad will be captured or taken prisoner. When that happens, the United States government and the families and friends of detained servicemen and women will share a strong interest: ensuring that American personnel are treated fairly and returned promptly when the conflict is over.

In past and present conflicts, the United States has insisted that American soldiers held by the enemy be accorded the basic protections of the Geneva Conventions. Ironically, Deputy Secretary of Defense Paul Wolfowitz invoked the Conventions when objecting to Iraqi treatment of American POWs: "We've seen those scenes on Al Jazeera that others have seen. We have reminded the Iraqis * * * that there are very clear obligations under the Geneva Convention to treat prisoners humanely." Dep't of Defense News Transcript, *Deputy Secretary Wolfowitz Interview with New England Cable News* (Mar. 23, 2003). Similarly, when American troops captured during NATO military action against Serbia in 1999 were shown on Serbian television, beaten and humiliated, the United States immediately demanded their treatment as prisoners of war under the Geneva Conventions. Steven Lee Myers, *Serb Officer, Captured by Rebels, Held by*

U.S., N.Y. TIMES, Apr. 17, 1999, at A9. The United States had the same reaction during Vietnam. See 64 Dep't of State Bull. 10 (Jan. 4, 1971) (announcing President Nixon's call for applying the 1949 Geneva Conventions to ease "the plight of American prisoners of war in North Viet-Nam and elsewhere in Southeast Asia").

The United States has demanded that captured U.S. service personnel be treated in accord with the Geneva Conventions even in situations where the Conventions technically did not apply. After the 1993 capture of U.S. Warrant Officer Michael Durant by forces under the control of Somali warlord Mohamed Farah Aideed, the United States demanded assurances that Durant's treatment would be consistent with the protections afforded by the Conventions, even though "[u]nder a strict interpretation of the Third Geneva Convention's applicability, Durant's captors would not be bound to follow the convention because they were not a 'state.'" Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War On Terror,"* 44 HARV. INT'L L.J. 301, 310 (Winter 2003).[5]

Invoking international human rights standards, the United States has condemned foreign governments that have held detainees incommunicado o. deprived them of the ability to seek judicial review of their confinements. For example, the United States objected when Liberia arrested journalist Hassan Bility and held him incommunicado on the purported

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[5] American invocation of the Geneva Conventions evidently had its desired effect. "Following these declarations by the United States, heavy-handed interrogations of Durant appeared to cease, * * * and he was subsequently released by Aideed as a 'gesture of goodwill.'" 44 HARV. INT'L L.J. at 310.

ground that he was an "illegal combatant" involved in terrorist activity. *Liberia; Journalist Tortured, Envoy Blaney Discloses, Wants Gov't to Honor Terms of Agreement*, AFRICA NEWS, Jan. 3, 2003 (available on Nexis). The United States Ambassador in Monrovia explained that "[a]n honest and competent civil court" should have judged whether Bility was guilty of a crime, "not any individual or official." John W. Blaney, Jan. 2, 2003 Statement (http://usembassy.state.gov/monrovia/wwwhsp010203.html). Similarly, the State Department expressed "deep concern" over the trial of a Chinese democracy activist who was held incommunicado for six months and whose "trial was conducted in secret, raising questions about the nature of the evidence against him and the lack of due process." State Department, Daily Press Briefing, February 10, 2003 (http://www.state.gov/r/pa/prs/dpb/2003/17590.htm). See also Jeffrey K. Cassin, *United States' Moral Authority Undermined: The Foreign Affairs Costs of Abusive Detentions*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 421, 440-445 (2006) (noting that in recent years, the United States has censured Cuba, Turkmenistan, Uzbekistan, and Burma for holding dissidents or suspected terrorists incommunicado and/or without due process of law).

Yet even as American officials condemn other nations for detaining people indefinitely, authoritarian regimes have pointed to U.S. treatment of the Guantanamo prisoners as justification for such actions. Liberia's former President Taylor defended Bility's treatment by maintaining that Bility was being treated in the same manner as the U.S. treats its own "terrorists." Bill K. Jarkloh, *U.S. Against Government Failure to Produce Bility, Others*, THE NEWS (NIGERIA), July 10, 2002 (available on Nexis). Eritrea's Ambassador to the United States defended his government's roundup of journalists by claiming that their detention without charge was consistent with the United States' detention of material witnesses and aliens suspected by the United States of terrorist activities. Fred Hiatt, *Truth-Tellers in a Time of*

Terror, WASH. POST, Nov. 25, 2002, at A15. See also Shehu Sani, *U.S. Actions Send a Bad Signal to Africa: Inspiring Intolerance*, INT'L HERALD TRIB., Sept. 15, 2003, at 6 ("indefinite detention in Guantanamo Bay * * * helps justify Egypt's move to detain human rights campaigners as threats to national security, and does the same for similar measures by the governments of Ivory Coast, Cameroon and Burkina Faso").

If indefinite detention of the Guantanamo prisoners—based on sham CSRT proceedings and without any meaningful judicial review of the factual and legal basis of their imprisonment—is regarded as precedent for similar actions by countries with which we are at peace, it obviously may be similarly regarded by enemies who capture American soldiers in an existing or future conflict. *E.g.*, *Iran Denies British Sailors Mistreated, Claims "Pressure,"* AGENCE FRANCE PRESSE, Apr. 7, 2007 (available on Nexis) (quoting a spokesperson for Iranian President Ahmadinejad, defending Iran's March 2007 seizure of 15 British sailors captured in Iraqi waters, by noting that the Guantanamo detentions have made "the United States * * * the biggest hostage taker"). As a result, the lives of captured American military forces may well be endangered by our Nation's failure to permit Guantanamo detainees to pursue the habeas corpus petitions filed after this Court decided *Rasul*.

The importance of reciprocal treatment of a country's own citizens or soldiers and those of an enemy has an ancient pedigree. Nearly 800 years ago, the Magna Carta provided that foreign merchants from countries at war with England

> "shall be attached without harm of body or goods, until it be known unto us, or our chief justice, how our merchants be entreated who are then found in the land making war against us; and if our merchants be well intreated there, theirs shall be likewise with us."

Johnson v. *Eisentrager*, 339 U.S. 763, 783 n.11 (1950) (quoting Magna Carta, chapter 30, in 3 THE COMPLETE STATUTES OF ENGLAND 27 (Halsbury's Laws of England 1929)).

Shortly after World War II ended, General Eisenhower explained to Soviet Marshal Zhukov why German POWs received the same rations as American soldiers:

> Well, in the first place my country was required to do so by the terms of the Geneva Convention. In the second place the Germans had some thousands of American and British prisoners and I did not want to give Hitler the excuse or justification for treating our prisoners more harshly than he was already doing.

Dwight D. Eisenhower, CRUSADE IN EUROPE 469 (1949).[6]

In Vietnam, the American decision to apply the Geneva Conventions' principles to captured enemy soldiers was driven in part by the desire to obtain "reciprocal benefits for American captives." Maj. Gen. George S. Prugh, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-1973, at 62-63 (Dep't of the Army 1975). Our insistence that the enemy apply the Geneva Conventions to American POWs in Vietnam saved American lives:

> [A]pplying the benefits of the Convention to those combat captives held in South Vietnam did enhance the opportunity for survival of U.S. service members held by the Viet Cong and North Vietnamese. While

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[6] On the Russian front, in contrast, the belligerents did not follow the Geneva Conventions, with horrific results. The consensus is that at least 55% of Soviet POWs died in German captivity, while some 38% of German POWs held by the Soviets perished. Evan Mawdsley, THUNDER IN THE EAST: THE NAZI-SOVIET WAR 1941-1945 103, 238 (2005).

> the enemy never officially acknowledged the applicability of the Geneva Convention, and treatment of American POWs continued to be brutal, more U.S. troops were surviving capture. Gone were the days when an American advisor was beheaded, and his head displayed on a pole by the Viet Cong. On the contrary, the humane treatment afforded Viet Cong and North Vietnamese Army prisoners exerted constant pressure on the enemy to reciprocate, and the American POWs who came home in 1973 survived, at least in part, because of [that].

Col. Fred L. Borch, *Review of Honor Bound*, 163 MIL. L. REV. 150, 152 (2000).

In current debates about the Guantanamo detainees and prisoners from the conflicts in Afghanistan and Iraq, military officers, government officials, and commentators have pointed out that "[t]he Geneva Conventions operate on the principle of reciprocity," Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT'L & COMP. L. REV. 303, 317 (2002), and that if the United States does not apply the Geneva Conventions, it heightens the risk that captured Americans will be denied the protection of the Conventions by foreigners. In recent Senate hearings, Defense Secretary Gates, General Petraeus, and Commander Fallon all testified that standards for detainee treatment must be based on the principle of reciprocity, and all agreed that the manner in which we treat our own detainees may directly affect the treatment of captured U.S. soldiers. Statement of Gen. David H. Petraeus, Senate Committee on Armed Services (Dec. 5, 2006); Statement of Dr. Robert M. Gates, Senate Committee on Armed Services (Jan. 23, 2007); Statement of Adm. William J. Fallon, Senate Committee on Armed Services (Jan. 30, 2007) (all available at http://armed-services.senate.gov/ hearings.cfm).

Similarly, William H. Taft IV, the State Department's Legal Adviser, wrote the President in 2002 that "[a]ny small benefit from reducing further [the application of the Geneva Conventions] will be purchased at the expense of the men and women in our armed forces that we send into combat." Mem. to Counsel to the President (Feb. 2, 2002) (www.fas.org/sgp/othergov/taft.pdf). See also, *e.g.*, Wesley K. Clark, *The Next Iraq Offensive*, N.Y. TIMES, Dec. 6, 2005, at A27 ("among retired officers, there is deep concern that the Bush administration's attitude on the treatment of detainees has jeopardized not only the safety of our troops but the moral purpose of our effort"); P.X. Kelly & Robert F. Turner, *War Crimes and the White House: The Dishonor in a Tortured New 'Interpretation' of the Geneva Conventions*, WASH. POST, July 26, 2007, at A21 ("The Geneva Conventions provide important protections to our own military forces when we send them into harm's way. Our troops deserve those protections, and we betray their interests when we gratuitously 'interpret' key provisions of the Conventions in a manner likely to undermine their effectiveness"). The danger that captured Americans might be mistreated is increased for those American forces overseas, some in Afghanistan for example, who do not always wear military uniforms.

In addition to the interest in obtaining reciprocal benefits for our own captured soldiers, adherence to traditional legal principles furthers the United States' moral authority, which decreases the ability of our enemies to turn civilian populations against us and in turn increases the ability of our troops to wage and win war with a minimum of casualties. See Letter from Gen. David H. Petraeus to Multi-National Force–Iraq (May 10, 2007) (http://tinyurl.com/35wpe7) ("Adherence to our values distinguishes us from our enemy. This fight depends on securing the population, which must understand that we—not our enemies—occupy the moral

high ground"). As General John Vessey wrote in comments echoed by Secretary of State Colin Powell:

> I continue to read and hear that we are facing a "different enemy" in the war on terror; no matter how true that may be, inhumanity and cruelty are not new to warfare nor to enemies we have faced in the past. In my short 46 years in the Armed Forces, Americans confronted the horrors of the prison camps of the Japanese in World War II, the North Koreans in 1950-53, and the North Vietnamese in the long years of the Vietnam War, as well as knowledge of the Nazi's holocaust depredations in World War II. Through those years, we held to our own values. We should continue to do so.

Letter from Gen. John W. Vessey (Ret.) to Sen. John McCain (Sept. 12, 2006), quoted in 152 Cong. Rec. S10412 (daily ed. Sept. 28, 2006); Letter from Colin Powell to Sen. John McCain (Sept. 13, 2006), quoted *ibid.*; see also U.S. Senate Judiciary Committee Hearing on Detainee Trials (Aug. 2, 2006) ("Even in a conflict like this where you don't expect particularly good treatment, * * * we have to set the standard; I think that's our obligation as a country * * *") (statement of General Richard Myers, former Chairman of the Joint Chiefs of Staff).

Nearly 80 years ago, Justice Brandeis warned:

> Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. * * * If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that * * * the end justifies the means * * * would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Olmstead v. *United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). The United States still serves as an example to the world. Our concern is that, in this instance, the government is setting an example that is not only fundamentally at odds with the rule of law, but that puts our own troops in greater peril.

IV. Constitutional Protections Apply To Detainees Held At The Guantanamo Base.

The government attempts to justify the wholly inadequate procedures offered to Guantanamo detainees by asserting that ordinary principles of habeas corpus and due process do not apply because the government is holding the detainees outside the sovereign territory of the United States. Br. Opp. 19-24. This argument rests on the February 1903 lease agreement between the United States and Cuba, which provides in pertinent part:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.

T.S. No. 418, Art. III, 6 Charles I. Bevans, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 1113, 1114 (State Dep't 1971).

In *Rasul*, this Court rejected the contention that the rights of Guantanamo detainees depended on the technicalities of sovereignty. The Court held that "the reach of the writ" of habeas corpus has always "depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the [government].'" 542 U.S. at 482. As

Justice Kennedy concluded in his concurring opinion: "What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States." *Id.* at 487. In short, "Guantanamo Bay is in every practical respect a United States territory." *Ibid.*

The *Rasul* Court was correct. But even if "formal notions of territorial sovereignty" (*Rasul*, 542 U.S. at 482) were relevant, government officials and legal scholars have long rejected the contention that the United States "is not sovereign over Guantanamo Bay." Br. Opp. 24.

1. The Guantanamo lease "is no ordinary lease. Its term is indefinite and at the discretion of the United States." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring). To our knowledge, Guantanamo is the only military base located in another country that the United States is legally entitled to keep in perpetuity. Every other American base overseas is leased for a specific term, and when that term expires, either the base must be closed or the agreement renegotiated—a process in which the host countries may seek a variety of diplomatic, political, and economic concessions in exchange for continued American use of the base. See Robert E. Harkavy, GREAT POWER COMPETITION FOR OVERSEAS BASES 3, 5, 206-209 (1982). That type of "bargained diplomatic exchange" (*id.* at 5) is entirely absent with Guantanamo—the United States may stay at Guantanamo as long as it desires. Cuba has no say in the matter whatsoever. The Castro government has repeatedly objected to the base, but the United States has remained for more than a century.

2. The government's current interpretation of Article III of the 1903 lease—and of the "ultimate sovereignty" provision in particular—is fundamentally at odds with the interpretation that has long held sway among those in the

U.S. military charged with responsibility for Guantanamo and for negotiating and administering other base leases.

The most striking evidence of this is found in a history of the Guantanamo Naval Station written in 1953—long before this dispute arose—by Rear Admiral Marion E. Murphy, the Commander at Guantanamo at the time. Marion E. Murphy, THE HISTORY OF GUANTANAMO BAY (1953). Rear Admiral Murphy's history was published by the Navy and is posted to this day on the official U.S. Navy web site (http://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistmurphy/gtmohistmurphyintro), which describes the history as a "monumental work," although it adds that the history is not "presented as 'official documentation' * * * by the United States Government or its agencies."

Rear Admiral Murphy's understanding of the lease's "ultimate sovereignty" provision could not have been clearer:

> "Ultimate," meaning final or eventual, is a key word here. *It is interpreted that Cuban sovereignty is interrupted during the period of our occupancy, since we exercise complete jurisdiction and control*, but in case occupation were terminated, the area would revert to the ultimate sovereignty of Cuba.

HISTORY OF GUANTANAMO BAY at 6 (emphasis added). Thus, Rear Admiral Murphy explained,

> it is clear that at Guantanamo Bay we have a Naval reservation which, *for all practical purposes, is American territory*. Under the foregoing agreements, *the United States has for approximately fifty years exercised the essential elements of sovereignty over this territory*, without actually owning it.

Id. at 7 (emphasis added). "Unless we abandon the area or agree to a modification of the terms of our occupancy, we can continue in the present status as long as we like." *Id.* at 7-8.

The same practical understanding of the lease is reflected in an analysis published in 1961 by Rear Admiral Robert D. Powers, Jr., then Deputy and Assistant Judge Advocate General of the Navy. *Caribbean Leased Bases Jurisdiction*, 15 JAG J. 161 (Oct.-Nov. 1961).[7] Rear Admiral Powers began by observing that in marked contrast to other American military bases, which "have been leased for a finite term with fixed provisions as to use and jurisdiction," the "bases at Guantanamo Bay in Cuba and the Canal Zone in Panama are unique in their grants of jurisdiction and their indefinite terms of occupancy." *Id.* at 161. Rear Admiral Powers went on to explain:

> IT MAY BE said that the words used regarding sovereignty in the [Guantanamo and the Panama Canal Zone] treaties grant to the United States the complete right in each case to act as the sovereign, with titular or residual sovereignty in the grantor nation. * * * *If merely ultimate sovereignty is recognized by both parties as remaining in Cuba, then the exercise of present or actual sovereignty must be vested in the United States.*

Id. at 163 (emphasis added). While acknowledging "that *all* the rights of sovereignty" might "not pass" to the United States given the lease's recognition of Cuba's "*ultimate* sovereignty," *ibid.*, Rear Admiral Powers recognized that Cuba retained "at most a 'titular' sovereignty," *id.* at 166, a concept that William Howard Taft, as Secretary of War, characterized as "'a barren ideality,'" *id.* at 164. Like the

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[7] As a Navy lawyer, Rear Admiral Powers was directly involved in negotiating and administering base leases, serving, for example, as the legal adviser to the U.S. Negotiating Group in connection with obtaining base rights through agreements with other countries. 15 JAG J. at 161 n.*.

original Panama Canal treaty, the Guantanamo lease provided the United States with a "complete grant of jurisdiction and control, with only a possibility of reversionary or residual jurisdiction in the grantor." *Id.* at 163. The United States thus is "entitled to treat the territory as subject to such laws and administration as it may make applicable." *Id.* at 166.

3. The conclusion that the United States exercises at least some sovereign powers at Guantanamo is found as well in a 54-page Memorandum prepared in 1912 by the State Department's Office of the Solicitor in connection with negotiations then ongoing between the United States and Cuba to extend the boundaries of the Guantanamo base. After reviewing the negotiating history leading up to the 1903 lease, as well as the provision in the lease affording the United States the power of eminent domain, the Solicitor concluded: "[i]t would thus appear that this Government, upon the approval of this Agreement [the 1903 lease] by Cuba, might well have gone into possession immediately and, as *pro tanto sovereign*, have appropriated under the right of eminent domain the private land found within the leased areas." May 7, 1912 Memorandum at 4 (emphasis added), National Archives, Record Group 59, document no. 811.34537/95. In short, "the Cuban Government is furnishing to this Government the naval reservation and is giving to this Government the *quasi-sovereign rights* granted without any compensation other than the payment of this nominal rent." *Id.* at 10 (emphasis added).

4. Scholars likewise have concluded that the terms of the 1903 lease provide the United States with some type of sovereignty over Guantanamo. Some have concluded that the United States has "territorial sovereignty" over Guantanamo as a result of the lease. See William W. Bishop, Jr., INTERNATIONAL LAW: CASES AND MATERIALS 300 (1953) (noting that "[a]t times one state has acquired by lease rights corresponding more or less closely to territorial sovereignty

over parts of the territory of another state," and citing the Guantanamo lease as an example); Robert L. Montague, III, *A Brief Study of Some of the International Legal and Political Aspects of the Guantanamo Bay Problem*, 50 KY. L.J. 459, 488 (1962) ("the rights conferred upon the United States under this lease amount to 'territorial sovereignty'").

Other scholars agree with Rear Admiral Murphy's view that Cuba's "ultimate" sovereignty over the base means "eventual" sovereignty, *i.e.*, reversionary sovereignty that will become effective only if the United States decides to relinquish the base. See Martin J. Scheina, *The U.S. Presence in Guantanamo*, 4 STRATEGIC REVIEW 81, 82 (Spring 1976) (the lease "recognized Cuba's continuance of ultimate (final or eventual) sovereignty"); Joseph Lazar, *International Legal Status of Guantanamo Bay*, 62 AM. J. INT'L L. 730, 735, 740 (1968) (Article III of the 1903 lease "is an express recognition by the parties that Cuban sovereignty over the leased areas rests suspended"; "Cuba has not yet been given the 'ultimate sovereignty' over Guantanamo"); Mary Ellene Chenevey McCoy, *Guantanamo Bay: The United States Naval Base and its Relationship with Cuba* 51 (unpublished Ph.D. dissertation, University of Akron, 1995) (on file at the University of Michigan) ("[t]he word 'ultimate' was interpreted to mean that Cuban sovereignty was interrupted during the U.S. occupancy").

5. Cuban authorities, too, have recognized implicitly that Cuba does not exercise complete sovereignty over the base as a result of the lease. The Cuban Supreme Court held more than 70 years ago that "the territory of that Naval Station is *for all legal effects regarded as foreign*." *In re Guzman and Latamble*, Annual Digest & Reports of Pub. Int'l Law Cases, 1933-34, Case No. 43, at 112, 113 (emphasis added). Just six weeks after signing the lease, Cuban President Tomas Estrada Palma told the Cuban Senate that the base had been "cede[d]" to the United States. PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES ("Foreign

Relations"), 1903, at 357. In 1912, the United States and Cuba signed an agreement to expand the base that characterized the 1903 lease as a "cession in lease" by which the base was "ceded in lease" to the United States. Foreign Relations, 1912, at 295, 297. (The 1912 agreement never went into effect because the Cuban Senate failed to ratify it. Scheina, 4 STRATEGIC REVIEW at 82.) And a book published "under the auspices" of the Cuban government stated that the base had been "formally ceded" to the United States. 5 Willis Fletcher Johnson, THE HISTORY OF CUBA, page following cover page, 89 (1920).[8]

6. As the long history of Guantanamo demonstrates, Cuba does not presently have—and has not had for more than 100 years—sovereignty in any meaningful sense over the American base at Guantanamo. "'Sovereignty' is a term used in many senses and is much abused," but in general "it implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there." RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES §206 cmt b (1987). Or as this Court has recognized, "[a] basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens." *Duro* v. *Reina*, 495 U.S. 676, 685 (1990). Cuba has no such power—indeed, it has no power whatever—over Guantanamo. See also *United States* v. *Rice*, 17 U.S. 246, 254 (1819) (Story, J.) (during the British occupation of Castine, Maine in 1814 and 1815, "[t]he

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[8] A "cession" is the "act of relinquishing property rights"—the "relinquishment or transfer of land from one state to another, esp. when a state defeated in war gives up the land as part of the price of peace." BLACK'S LAW DICTIONARY 221 (7th ed. 1999).

sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there").

It is the United States that acts as sovereign at Guantanamo, for it is United States law that applies there. And it is the United States—and the United States alone—that has the power to enforce its law at Guantanamo over all who set foot within the naval station, including citizens of Cuba. When the United States and Cuba negotiated detailed terms to implement the February 1903 lease, Cuba proposed excluding Cuban citizens from the application of U.S. law: "Cuban citizens who may have committed any crime or misdemeanor within the boundaries of said statio[n] shall be delivered to the Cuban authorities, for trial under the laws and by the tribunals of Cuba." Art. V, draft of proposed Cuban lease terms transmitted by Herbert Squiers, U.S. minister in Havana, to Secretary of State John Hay, Despatch No. 549, June 6, 1903, 7 Despatches from the United States Ministers to Cuba, 1902-1906, National Archives. But the United States rejected that proposal, June 20, 1903 telegram, Minister Squiers to Secretary Hay, *id.*, Despatch No. 572, and the proposed exclusion was dropped from the final agreement of specific lease terms signed by the United States and Cuba in July 1903. Instead, that document provided that *all* "fugitives from justice charged with crimes or misdemeanors amenable to United States law, committed within [the naval station], taking refuge in Cuban territory, shall on demand, be delivered up to duly authorized United States authorities." T.S. No. 426, Art. IV, 6 Bevans at 1121.

* * *

Less than three months after the United States and Cuba signed the Guantanamo lease, President Theodore Roosevelt wrote Secretary of State Hay that "we regard the [Cuban] coaling stations as ours." Theodore Roosevelt to John Hay, May 12, 1903, Theodore Roosevelt Papers, Library of

Congress, Manuscript Division, microfilm reel 416. The United States has treated Guantanamo "as ours" ever since—and it is perfectly entitled to continue to "exercise complete jurisdiction and control" (T.S. No. 418, Art. III, 6 Bevans at 1114) over the base as long as it likes. Under these unique circumstances, the Court should reject the government's argument that the petitioners have no rights under the U.S. Constitution because Cuba is "sovereign" at Guantanamo.

CONCLUSION

It is a sad fact that the United States is no longer recognized as a leader in the development of international standards for the treatment of captured prisoners. Instead, it is regarded by many around the world as an outlaw nation, using a rigged process to reach a predetermined result that is effectively immune from independent judicial review. That perception increases the risk to American military forces unfortunate enough to be captured by enemies abroad. Only by rejecting the government's position and upholding the Guantanamo detainees' right to pursue the habeas petitions filed after *Rasul* will the Court demonstrate that our Nation's adherence to the rule of law remains alive and well.

The judgment of the court of appeals should be reversed and the cases remanded for consideration of the detainees' habeas corpus petitions on the merits.

Respectfully submitted.

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AUGUST 2007

64 105P (16) (23)

Nos. 06-1195 & 06-1196

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

KHALED A.F. AL ODAH, NEXT FRIEND OF FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTERESTS OF AMICI[1]

In an interdependent world threatened by transnational terrorism and linked by converging rule-of-law norms, all peoples are affected by the process the United States affords to foreign nationals who fall under its control. As much as any other nation, Israel has a vital stake in assuring that the United States pursues its struggle against terrorism successfully within the bounds of the law. Israel also has decades of experience that bears directly on the issues posed in these cases: Israel guarantees detainees—including suspected unlawful combatants—unimpeded, fully independent judicial review within fourteen days, access to counsel within thirty-four days, and periodic review of the basis for their detention, in a fully adversarial proceeding, at least once every six months.

As specialists in Israeli military law and constitutional law, *amici* draw on Israel's experience with this system in urging this Court to ensure that all detainees, regardless of nationality, be afforded prompt, independent judicial review of the basis for their detention. *Amici* are:

Ariel L. Bendor, Professor of Law and former Dean of the Faculty of Law at the University of Haifa; lieutenant colonel (reserve duty), military judge since 1994;

Eyal Benveniste, Anny and Paul Yanowicz Professor of Human Rights, Tel Aviv University, Faculty of Law;

Emanuel Gross, Professor of Law at the University of Haifa; colonel (ret.) Israel Defense Forces, military lawyer and military judge (1967-1970, 1972-1993); President of the Military Tribunal for the Southern Command (Gaza) (1987-1993);

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1. This brief has been authored in its entirety by undersigned counsel for the *amici curiae*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief and their letters of consent are being lodged herewith.

Asher Maoz, Professor of Law at the University of Tel Aviv, Fellow of the Whitney R. Harris Institute for Global Legal Studies, Washington University Law School, St. Louis;

Barak Medina, Professor of Law and Vice Dean at the Hebrew University, Jerusalem;

Yuval Shany, Professor of Law, Hersch Lauterpacht Chair in Public International Law, and Academic Director, Minerva Center for Human Rights at the Hebrew University, Jerusalem;

Amos Shapira, former Dean and Professor of Law emeritus at the University of Tel Aviv.

SUMMARY OF ARGUMENT

Judicial review of executive and military detention, the indispensable core of habeas corpus, need not be sacrificed to protect public safety and national security, even in the face of an unremitting terrorist threat. Israel has demonstrated that security detainees and prisoners of war, including alleged unlawful combatants, can and should be afforded the opportunity for prompt, independent judicial review of the factual basis for their confinement. Israeli experience demonstrates unambiguously that providing such review to Guantánamo detainees would not be "impracticable and anomalous." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

For more than fifty years, Israel has faced mortal threats to its national survival and countless acts of terrorism against its civilian population, with devastating losses of life. Yet even as terrorist attacks have intensified, Israel has strengthened its commitment to unimpeded judicial review of detention, recognizing that "human rights are constantly

threatened by the war-like situation." Asher Moaz, *Defending Civil Liberties Without a Constitution—The Israeli Experience*, 16 Melb. U. L. Rev. 815, 829 (1988). Prompt access to the courts extends not only to criminal suspects but also to security detainees and unlawful combatants, regardless of nationality, including those seized in territories under military occupation and those captured in battle on foreign soil. All such detainees have access to counsel within a matter of days or, at most, weeks, and all have the right to have their detention reviewed promptly by an independent judicial authority empowered to order release when the facts warrant.

Over the course of many decades, Israel has been able to address its security concerns and meet its pressing need for timely intelligence while preserving independent judicial review and access to counsel. Consequently, Israeli experience makes clear that these safeguards are by no means impracticable. With Guantánamo currently holding over 300 detainees, however, the United States Government has raised the specter of an administrative nightmare, contending in these cases that detainee litigation is "consuming enormous resources and disrupting the day-to-day operation of the Guantánamo Bay Naval Base." (Cert. Opp., p. 4.) Yet in operations on the West Bank in May of 2002, the Israel Defense Forces ("IDF") seized nearly 7000 suspected enemy combatants, quickly processed and released over 5000, and gave the remaining 1600 suspects access to defense counsel and to independent courts within a matter of weeks.[2] The contention that the United States military, with vastly greater resources, cannot provide comparable process to far fewer detainees, even years after their seizure, does not comport with Israeli experience. *Cf. Rasul v. Bush*, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring in the judgment) ("Perhaps,

2. HCJ 3239/02 *Marab v. IDF Commander in the West Bank* [2003] IsrSC 57(2) 349, ¶ 1.

where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.").

The safeguards provided under Israeli law, though denied to Guantánamo detainees, are not only workable but also are essential components of the rule of law. No process that lacks these core features can be considered an adequate substitute for time-honored forms of judicial review, such as the traditional writ of habeas corpus. Israeli authorities, executive as well as judicial, support these rights as necessary elements of the response to terrorism in a resilient democratic society governed by law.

ARGUMENT

A. For decades, Israel has faced an unremitting, mortal threat to its survival.

Though well known, Israel's security problems bear emphasis. From its founding in 1948 to the present day, the State has been formally at war with one or more nations on its immediate borders. In addition, it has confronted active insurgencies against its occupation forces in the West Bank and Gaza, and it has been the frequent target of lethal suicide bombings in the civilian population centers of Israel itself.[3] Such attacks have caused enormous casualties and widespread disruption and fear in civilian life.

For a small country, the scale of these losses remains staggering, even against the background of the attacks of September 11, 2001. Since January 2001, Israelis have been the target of 148 suicide terror attacks, claiming the lives of 545 Israelis; during the same time period, 1067 Israelis have perished in terror attacks overall, while another 6333 have been

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3. *See generally* Asher Moaz, *War and Peace—An Israeli Perspective*, 14(2) Const. F. 35 (2005).

wounded.[4] On a per capita basis,[5] those casualties and injuries would translate to approximately 49,000 American deaths and over 290,000 Americans wounded over a seven-year period.

Israelis believe that terrorist organizations responsible for these attacks "have set Israel's annihilation as their goal," literally the complete destruction of the State of Israel. HCJ 5100/94 *Pub. Comm. Against Torture in Israel v. State of Israel* [1999] IsrSC 53(4) 817, ¶ 1.[6] Moreover, the threat is perceived

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4. *See* State of Israel, Ministry of Foreign Affairs, Victims of Palestinian Violence and Terror since September 2000, http://www.mfa.gov.il/MFA (follow "Terrorism: Terror since 2000" hyperlink; then follow "Victims of Palestinian Violence and Terror since September 2000" hyperlink") (last visited Aug. 22, 2007) (providing bar graphs and a chronological summary of casualties); *see also* Israel Defense Forces Spokesman, Main Terrorist Attacks Against Israeli Civilians and IDF Soldiers since the Onset of Ebb and Flow, *available at* http://www.mfa.gov.il/MFA (follow "Terrorism: Terror since 2000" hyperlink; then follow "Victims of Palestinian Violence and Terror since September 2000" hyperlink; then follow "Main terrorist attacks against Israeli civilians and IDF soldiers since Sept 2000 (IDF Spokesman)" hyperlink) (chronicling over 120 terrorist attacks since 2000) (last visited Aug. 22, 2007).

5. Based on an Israeli population of 6.5 million and an American population of 300 million. *See* State of Israel, Ministry of Foreign Affairs, Israel in Brief, http://www.mfa.gov.il/MFA (follow "Facts About Israel: Israel in Brief" hyperlink) (last visited Aug. 22, 2007); U.S. Census Bureau, Population Estimates—National, *available at* http://www.census.gov/popest/states/NST-ann-est.html (follow "Excel" hyperlink) (last visited Aug. 22, 2007).

6. In this brief, citations to Israeli Supreme Court decisions identify the procedural role played by the Israeli Supreme Court; the case number; the case name; the year of the decision; the volume and part of the official reporter, Piskei Din; the first page of the case; and the page or paragraph cited. The Israeli Supreme Court functions as a Court of Appeals, hearing both civil appeals and criminal appeals from Israel's five district courts, and serves as a High Court of Justice, hearing constitutional and administrative cases in the first instance. Citations to decisions of the Israeli Supreme Court identify whether the Court was

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in highly personal terms. As a former Israeli Attorney General noted, "Israel is much more vulnerable [than other nations] . . . . In our case, the danger extends not only to national existence, but to our very survival as individuals. The Holocaust, which decimated the Jewish people a short time ago, lends an awesome reality to the danger." Itzhak Zamir, *Human Rights and National Security*, 23 Isr. L. Rev. 375, 376 (1989). For the Justices of the Supreme Court, that threat is very real. As Chief Justice Aharon Barak has put it, "Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror." HCJ 2056/04 *Beit Sourik Vill. Council v. Gov't of Israel* [2004] IsrSC 58(5) 807, ¶ 86. From the Israeli perspective, both national and individual survival require the strongest antiterrorism responses compatible with law. The circumstances Israel faces leave little if any room for avoidable risks or mistakes.

B. Despite this unremitting terrorist threat, Israeli courts have discerned no practical obstacle to exercising jurisdiction and guaranteeing the rule of law, regardless of the petitioner's nationality or location.

Access to the Israeli courts is never refused simply because of the personal status or geographical location of the petitioner. Alleged unlawful combatants and enemy aliens, even when seized in combat on foreign soil, retain the right to be treated in accordance with the rule of law and are always entitled to access to Israeli courts. *See generally, e.g.*, HCJ 4219/02 *Gussin v. IDF Commander in the Gaza Strip* [2002] IsrSC 56(4) 608 (Heb.) (claims regarding the demolition of homes); HCJ 5591/02 *Yassin v. Commander of Kziot Military Camp* [2002] IsrSC 57(1) 403 (claims of suspected Palestinian terrorists challenging detention conditions at the Kziot detention facility). The Israeli Supreme Court applies this principle not only within the

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hearing a civil appeal ("CA"), a criminal appeal ("CrimA"), an administrative detention appeal ("ADA"), or was acting as the High Court of Justice ("HCJ").

occupied territories but also to IDF actions on enemy soil, in Lebanon for example. *See generally, e.g.*, CrimA 8780/06, 8984/06 *Srur v. State of Israel* [2006] IsrSC (unpublished) (Heb.) (claims of Hezbollah fighters captured during IDF 2006 combat operations in southern Lebanon considered and rejected on the merits); HCJ 4887/98 *Assaf v. State of Israel* [1998] IsrSC (unpublished) (Heb.) (claims of Lebanese citizens arrested by South Lebanon Army and held on Lebanese soil considered and rejected on the merits); HCJ 574/82 *Al Nawar v. Minister of Defense* [1985] IsrSC 39(3) 449 (Heb.) (civil suit by Lebanese national for injuries sustained during IDF combat operations in Lebanon considered and rejected on the merits).

For decades, the Israeli Supreme Court's guiding principle has been that even in combat "there is no more potent weapon than the rule of law. . . . This court will never accept the contention that while [exercising] power on behalf of the State anywhere in the world, a soldier or civil servant might repudiate these standards . . . ." HCJ 320/80 *Kawasme v. Minister of Defense* [1980] IsrSC 35(3) 113, 127, 132 (Heb.). The Court continues to endorse this approach, as epitomized by its recent holding that segments of the security fence constructed along Israeli-Palestinian borders are unlawful, despite the fact that the fence was designed to prevent terrorist penetration into Israeli territory in a context of armed conflict. *Beit Sourik*, 58(5) ¶¶ 60-62. The Court there ruled that all Israeli soldiers, even when acting outside the State's territory, are exercising State authority and thus must remain within the limits on that authority. *Id.* ¶ 24. As Chief Justice Barak expressed:

> [E]very Israeli soldier carries, in his pack, the provisions of public international law regarding the laws of war and the basic provisions of Israeli administrative law. . . . There is no security without law.

Id. ¶¶ 24, 86 (internal quotations and citation omitted).

C. Despite great danger and pressing needs for intelligence, Israel affords all detainees prompt, independent judicial review of their detention, protected by procedural safeguards and aided by access to counsel.

The Israeli experience demonstrates a democratic society's capacity to develop a practical, workable system of judicial review of detention orders, notwithstanding powerful countervailing interests of national security. Far from being anomalous, Israel's decision to extend substantive and procedural safeguards to detainees—including alleged enemy combatants—places Israel squarely within the customary practices of the democratic world.

Under Israeli law, all detainees, regardless of nationality or the circumstances of their seizure, have a right of access to counsel and to independent courts empowered to review the basis for their detention and, when warranted, to order their release. In the words of the Ministry of Justice, "[A] detainee always has access to a court empowered to rule without delay on the lawfulness of his detention." State of Israel, Ministry of Justice, Foreign Relations & Int'l Org. Dep't, The Legal Framework for the Use of Administrative Detention as a Means of Combating Terrorism 4 (March 2003) [hereinafter Ministry of Justice, The Legal Framework]. If the Israeli court finds no basis for detention, or if it concludes that alternative means would suffice to meet the State's security needs, the Israeli court will order the detainee's immediate release.

Israeli law establishes several distinct regimes regarding the treatment of administrative detainees. The regimes that govern within the State of Israel proper are distinct from those which apply in the occupied territories, as these areas (portions of the West Bank and, until recently, Gaza) are under military administration and are juridically distinct from Israel itself. In both cases, the rules applicable to criminal prosecution can differ from those applicable to administrative detention. In 2002, Israel also enacted a distinct framework for detention of "unlawful combatants," regardless of their place of seizure.

As described below, each of these regimes—which govern detentions in the State of Israel, detentions in the occupied territories, and detentions of unlawful combatants—protects basic rights that the United States Government denies to Guantánamo detainees. Specifically, individuals detained by Israeli civilian or military authorities always have (1) the right to judicial review of the basis for their detention within no more than fourteen days of their seizure; (2) the right to have that review conducted by a judicial officer independent of the executive who is empowered, when the evidence warrants, to order their release; (3) the benefit of a standard that permits detention only when an individual poses a threat to State security and when no other means are available to neutralize that threat; (4) the right to have the government's evidence subjected to a searching examination by the court; (5) the right to judicial review without having coerced testimony used against them; (6) the right to have a judge independently evaluate any claim that classified information offered to support detention cannot be disclosed to them; (7) the right of access to counsel within no more than thirty-four days; and (8) the right to have the basis for their detention independently reviewed every six months at a fully adversarial hearing. Though the United States affords Guantánamo detainees none of these safeguards, Israel has proved through experience that each of them is workable and that each of them is essential to maintaining the rule of law. *See* Appendix II.[7]

1. Unlike the United States, Israel provides suspected unlawful combatants the right to judicial review of the basis for their detention within no more than 14 days of their seizure.

Providing access to a judicial forum, to afford an independent check on executive power to incarcerate the individual, is an obligation incumbent on a civilized society

7. In order to emphasize the significant features of the Israeli regime, we attach as Appendix II a chart contrasting Israeli law, on which *amici* are experts, with United States law.

and is one of the most long-standing and fundamental elements of the rule of law.[8] The Israeli Supreme Court, observing that, "[j]udicial intervention stands before arbitrariness; it is essential to the principle of rule of law," *Marab*, 57(2) ¶ 26,[9] has scrupulously and consistently enforced this right.

Criminal suspects in the State of Israel. When an individual is detained in connection with criminal proceedings within Israel proper, a judge ordinarily must approve any detention within

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8. *See, e.g.*, Int'l Covenant on Civil & Political Rights ("ICCPR"), art. 9, ¶ 4, Dec. 16, 1966, 999 U.N.T.S. 171 (stating that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide *without delay* on the lawfulness of his detention and order his release if the detention is not lawful" (emphasis added)); Office of the United Nations High Commissioner for Human Rights, Int'l Covenant on Civil & Political Rights, Ratifications & Reservations, *available at* http://www.ohchr.org/english/countries/ratification/4.htm (last visited Aug. 22, 2007) (noting that the United States ratified the ICCPR on June 8, 1992); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 56 (1991) (citing *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975), for the proposition that States must provide a determination of probable cause by a judicial officer either before or promptly after an arrest, and concluding that such determinations, when conducted within forty-eight hours of arrest, generally comply with the U.S. Constitution). This principle is consistent with those set forth by European nations. *See, e.g.*, European Convention for the Protection of Human Rights & Fundamental Freedoms, Nov. 4, 1950, arts. 5-3, 5-4, 213 U.N.T.S. 221 ("Everyone arrested or detained . . . shall be brought promptly before a judge [to have] the lawfulness of [their] detention . . . decided speedily by a court."); *Aksoy v. Turkey*, App. No. 21987/93, 23 Eur. Ct. H.R. 553, ¶¶ 70, 78, 81, 83, 84 (1996) (extra-judicial detention for periods exceeding fourteen days is impermissible even in responding to terrorist threats that constitute a "public emergency threatening the life of the nation"); *Brogan v. United Kingdom*, App. No. 11209/84, 11 Eur. Ct. H.R. 117, ¶ 58 (1988) ("Judicial control of interferences by the executive with the individual's right to liberty is . . . one of the fundamental principles of a democratic society.") (internal quotation marks omitted).

9. The official English translation of the Israeli Supreme Court's decision in *Marab* has been attached as Appendix I.

twenty-four hours of arrest.[10] Criminal Procedure (Enforcement Powers – Detention) Law, 5756–1996, (Isr.) § 29(a) [hereinafter "CPL"];[11] Eliahu Harnon & Alex Stein, *Israel*, *in* Criminal Procedure: A Worldwide Study 217, 221-22, 226 (Craig M. Bradley ed. 1999). The initial period of detention cannot exceed fifteen days,[12] and extensions are permissible only under limited circumstances. CPL § 17(a). An individual cannot be detained prior to indictment for more than seventy-five days except by order of a Justice of the Israeli Supreme Court. *Id.* §§ 17(a), 59, 62.

Administrative detainees in the State of Israel. Israeli law also permits administrative detention within Israel. Under the state of emergency in effect since 1948, Israel enacted the Emergency Powers (Detention) Law 1979, S.H. 76 [hereinafter "EPDL"]. The EPDL authorizes the Minister of Defense to issue an order of detention for reasons of State security. EPDL § 2(a); *see also* Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 Ariz. J. Int'l & Comp. L. 721, 725-26 (Fall 2001) [hereinafter Gross, *Bargaining Chips*]. As in a criminal case, the detainee can be held only for forty-eight hours before the detention order must be submitted for judicial review. EPDL § 2(c).

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10. The period can be extended to forty-eight hours under certain conditions, CPL § 30, and for security offenses the law has recently been amended to permit a total delay of up to ninety-six hours. Criminal Procedure (Detainees Suspected of Committing Security Offences) (Provisional Decree) Law, 5766-2006, 2056 LSI 364 (Isr.) § 3(2) (Heb.).

11. Citations to Israeli statutes are to the Laws of the State of Israel ("LSI"), the authorized English translation of Israeli legislative enactments; if the LSI provides only a partial translation, citations are to Sefer HaChukkim ("S.H."), the legislative enactment of the Knesset (the Israeli legislature).

12. For security offenses, this period has recently been extended to twenty days. Criminal Procedure (Detainees Suspected of Committing Security Offences) (Provisional Decree) Law, *supra* note 10, § 4(1).

Criminal suspects and administrative detainees in the occupied territories. In the occupied territories, criminal prosecution and administrative detention are governed by military orders and are supervised by military courts. Under both frameworks, the initial appearance in court and judicial review can be deferred for up to eight days. *Marab*, 57(2) ¶¶ 5, 29, 36.

Both in Israel and in the occupied territories, detention orders upheld at the first judicial hearing are subject to appeal to a court of appeals,[13] and the detainee may petition for further review in the Israeli Supreme Court. Ministry of Justice, The Legal Framework, *supra*, at 4. At both appellate levels, review is *de novo*: the appellate judges examine the strength of the evidence and determine whether the need for continued detention on balance outweighs the liberty interest of the detainee. *Id.* at 4-5; *see also infra* Sections C.3. & C.4.

Unlawful combatants in the State of Israel or the occupied territories. Since 2002, unlawful combatants can be held under a more flexible regime, a regime that traces its history back to a 2000 Israeli Supreme Court decision spawned by the shooting down of an Israeli aviator over Lebanon in 1986, his seizure by a terrorist group, and the subsequent Israeli government attempt to gain his release in exchange for Lebanese detainees held in administrative detention.

The Lebanese citizens, who had been captured in southern Lebanon, were being held under EPDL administrative detention orders that were about to expire, and to make the offer to exchange these prisoners possible, the Israeli government first had to confirm its right to continue holding them. The government attempted to do so by arguing that "reasons of State security" (EPDL § 2(a))—namely, the possible negotiation of an exchange for the Israeli aviator—required that the Lebanese citizens be detained. The Israeli Supreme Court ruled, however,

13. In the occupied territories, the appellate court is a military court of appeals, staffed, as in the case of military trial courts, by judges independent of the executive. *See infra* Section C.2.

that no person (even a former enemy combatant) could be detained under the EPDL unless that person himself posed a security threat, even if his detention was otherwise useful to State security as a means of facilitating a prisoner exchange. CrimA 7048/97 *Anonymous v. Minister of Defense* [2000] IsrSC 54(1) 721, 743 (Heb.), *discussed in* Gross, *Bargaining Chips*, at 727 & n.25. Pursuant to the court's order, the government was required to release the Lebanese prisoners. *Id.*; Emanuel Gross, The Struggle of Democracy Against Terrorism 121 (2006) [hereinafter Gross, The Struggle of Democracy]; Gross, *Bargaining Chips*, *supra*, at 721-36 (summarizing, in English, the decision in *Anonymous v. Minister of Defense*).

In the wake of this decision, the Knesset (the Israeli Parliament) enacted the Incarceration of Unlawful Combatants Law, 5762-2002, (Isr.) [hereinafter "UCL"],[14] to provide a basis for detaining enemy combatants where the EPDL might not apply. Under the UCL, the Chief of General Staff of the Israel Defense Forces may designate as an unlawful combatant "a person [not entitled to prisoner-of-war status] who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel." UCL § 2. When the Chief of General Staff finds that such a person will harm State security, he is authorized to issue a detention order. *Id.* § 3(a). The detainee must be brought before a district court (civilian) judge no later than fourteen days after the order is issued, and the judge must order the person's release unless he finds "reasonable cause to believe that [the detainee] is an unlawful combatant and that his release will harm State security." *Id.* §§ 3(a), 5(a). Each order of detention can be appealed within thirty days to a Justice of the Israeli Supreme Court. *Id.* § 5(d).

As a result of the UCL, unlawful combatants can be denied judicial review for longer periods than other detainees, who are

14. Available at http://www.justice.gov.il/MOJHeb/HeskeminVeKishreiHutz/KishreiChutz/HukimEnglish (select document icon next to "Incarceration of Unlawful Combatants Law, 5762-2002") (last visited Aug. 22, 2007).

entitled to judicial review within two days (in Israel) or eight days (on the West Bank). The fourteen days of detention prior to judicial review permitted in the case of unlawful combatants is long by Israeli standards and has been controversial.[15] By comparison, the Petitioners (and others) have been held at Guantánamo for several years without a judicial hearing on the factual claims underlying their detention. *See Rasul*, 542 U.S. at 488 (Kennedy, J., concurring) ("Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus.").

2. Unlike the United States, Israel provides suspected unlawful combatants the right to judicial review in a tribunal independent from the executive.

It is not sufficient simply for the detainee to be brought before a judicial officer; rather, the rule of law demands that a judicial officer be independent from the executive and imbued with the power to order release. "Th[e] public officer must be independent of the investigators and prosecutors. He must be free of any bias. He must be authorized to order the release of the detainee." *Marab*, 57(2) ¶ 35. Again, Israel scrupulously respects this right.

Criminal suspects, administrative detainees, and unlawful combatants within the State of Israel. Within Israel proper, all detentions—whether they involve criminal defendants,

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15. Indeed, Israel's fourteen-day limit on the denial of judicial review, not yet tested in Israeli litigation, is lengthier than what is permitted by the European Court of Human Rights. That court has held that detentions of seven days under a state of emergency are only justifiable when other safeguards are in place, including the remedy of habeas corpus and the right to consult with an attorney after forty-eight hours. *Aksoy*, 23 Eur. Ct. H.R. 553, ¶¶ 82-83; *Brannigan & McBride v. United Kingdom*, App. Nos. 14553/89, 14554/89, 17 Eur. Ct. H.R. 539, ¶¶ 62-66 (1993).

administrative detainees, or alleged unlawful combatants—are reviewed in the ordinary civilian courts. *See, e.g.*, UCL § 5(a); EPDL § 4(c); *see generally* Zamir, *supra*, at 398 (discussing requirement that detention orders be reviewed in civilian courts).

Criminal suspects, administrative detainees, and unlawful combatants in the occupied territories. In the occupied territories, detentions are nominally different, as the territories are under military administration and the relevant courts, even for ordinary criminal cases, are military courts. *See generally* Lisa Hajjar, Courting Conflict: The Israeli Military Court System in the West Bank and Gaza (2005). Nonetheless, Israeli military judges are fully independent. Israeli military judges are appointed and promoted by a selection committee headed by the Military Advocate General ("MAG")—a senior officer roughly comparable in status to the Judge Advocate General of the United States Army—or by the Deputy MAG. *See* Hajjar, *supra*, at 254. The selection committee is composed primarily of senior military appeals judges, and it also includes a civilian elected by the Israel Bar Association. Only two of the seven members of the selection committee are Israel Defense Forces staff officers outside the ranks of the civilian or military bar. *See, e.g.*, Detention in Time of Warfare (Temporary Order) (Amend. No. 87) (Judea and Samaria) (Number 1500)-2003, art. 78E1 (Heb.). Reinforcing the independence of the trial and appellate judges in the occupied territories, many of them are reservists satisfying their active duty obligations before returning to private life as civilian lawyers or law professors; at any given time, roughly 80% of the sitting military judges are reservists. Hajjar, *supra*, at 254. As the Israeli Supreme Court has noted, military courts sitting in the occupied territories unquestionably qualify as judicial officers "independent of the investigators and prosecutors." *Marab*, 57(2) ¶ 35.[16]

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16. Again, Israel's insistence on guaranteeing the independence of military judges comports with rule-of-law imperatives recognized throughout the democratic world. The European Court of Human Rights, (Cont'd)

Unlike Israeli military judges, members of the Combatant Status Review Tribunals ("CSRT") at Guantánamo appear to lack such independence. While the CSRT Order states that such members must be "neutral," *i.e.*, not involved in the investigation of the detainee in question, the Order does not provide that they must be *independent*, and it does not appear to provide the structural guarantees of independence applicable to courts martial under the Uniform Code of Military Justice. *Compare* Memo. from Dep. Sec'y of Def. Paul Wolfowitz regarding Order Establishing Combatant Status Review Tribunal (July 7, 2004), ¶ (e) [hereinafter CSRT Order], *with* 10 U.S.C. § 826(c) (2007). To the contrary, members of the CSRT are selected by a designee of the Secretary of the Navy, and two of the three tribunal members can be line officers rather than judge-advocate lawyers. CSRT Order, ¶¶ (e), (f); *cf. Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2804 (2006) (Kennedy, J., concurring in part) (noting, in reference to military commission members, that "an acceptable degree of independence from the Executive is necessary to render a commission 'regularly constituted' by the standards of our Nation's system of justice," and further concluding that "any suggestion of Executive power to interfere with an ongoing judicial process raises concerns about the proceedings' fairness").

(Cont'd)

for example, has held that the kind of tribunal required for review of detention must be "independent . . . of the executive" and must afford "the guarantees of judicial procedure." *De Wilde, Ooms & Versyp v. Belgium*, App Nos. 2832/66, 2835/66, 2899/66, 1 Eur. Ct. H.R. 373, ¶¶ 76, 77 (1971). That court has applied this requirement to military as well as civilian courts and has invalidated countries' courts-martial procedures where they permit trial of soldiers by judges serving within the military chain of command. *De Jong, Baljet & van den Brink v. The Netherlands*, App. Nos.8805/79, 8806/79, 9242/81, 8 Eur. Ct. H.R. 20, ¶ 47 (1984).

3. Unlike the United States, Israel limits detention to only those circumstances in which the suspected unlawful combatant poses a threat to State security and when no other means are available to neutralize the threat.

Each of the Israeli detention regimes requires a judicial determination that the detainee poses a threat to State security and that no other means are available to neutralize the threat. Within the State of Israel, the governing standard is the EPDL criterion that "reasons of State security or public security require that a particular person be detained." EPDL § 2(a). In the occupied territories, the applicable military order requires a "suspicion that [the detainee] endangers or may be a danger to the security of the area, the IDF, or the public." Detention in Time of Warfare (Temporary Order) (Judea and Samaria) (Number 1500)-2002, § 2(a) (Heb.), *quoted in Marab*, 57(2) ¶ 3 (English translation). For unlawful combatants, the UCL requires the judge to find "reasonable cause to believe that [the detainee's] . . . release will harm State security." UCL §§ 3(a), 5(a).[17]

Israeli courts have interpreted these standards to require that the detainee would "almost certainly" pose a danger and that the situation is "so grave as to leave no choice." *See* Gross, *Bargaining Chips*, *supra*, at 763 (emphasis omitted) (citing ADA 1-2/88 *Agbariyya v. State of Israel* [1988] IsrSC 42(1) 840, 844-45 (Heb.) and Eyal Nun, *Administrative Detention in Israel*, 3 Plilim (Israel Journal of Criminal Justice) 168, 178-79 (1992)

17. Similarly, the European Court of Human Rights also requires that a judge find reasonable suspicion. *Fox, Campbell, & Hartley v. United Kingdom*, App. Nos. 12244/86, 12245/86, 12383/86, 13 Eur. Ct. H.R. 157, ¶ 32 (1990) ("The 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 § 1(c) (art. 5-1-c) [of the Convention]. . . . [T]he exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the essence of the safeguard secured by Article 5 § 1(c) (art. 5-1-c) is impaired . . . .").

(Heb.), respectively). Applying these criteria in the context of a military detention, a military judge explained that he would have to be satisfied that there existed "evidence, which shows as a near certainty, that failure to detain[] would lead to substantial harm to the security of the area or its inhabitants." *See* Ministry of Justice, The Legal Framework, *supra*, at 3 (quoting ADA 48/97).

The need to show strict necessity for detention also requires that there be no other way to meet the security threat. Thus, if criminal proceedings could be filed, administrative detention is no longer appropriate. *See* Ministry of Justice, The Legal Framework, *supra*, at 2-3; HCJ 7015/02 *Ajuri v. Commander of Israel Defense Force (IDF) in West Bank* [2002] IsrSC 56(6) 352, ¶¶ 26, 32 ; HCJ 5784/03, 6024/03, 6025/03 *Salama v. IDF Commander in Judea and Samaria* [2003] IsrSC ¶ 6, *available at* http://elyon1.court.gov.il/eng/verdict/search_eng/verdict_by_misc.html (last visited Aug. 22, 2007) ("Administrative detention is not meant to be a tool used to punish previous acts, or to be used in place of criminal proceedings."). In the same vein, the Court has stressed "[t]he necessity of finding the right balance between the security of the state and the protection of the detainee's human rights." *Salama*, *supra*, ¶ 8. Thus:

> [T]he decision on the detention [must] reflect[] in each concrete case the appropriate balance between a security necessity for which no other reasonable solution can be found, and the fundamental principle according to which a person's liberty must be respected.

Ministry of Justice, The Legal Framework, *supra*, at 5 (English translation) (quoting HCJ 253/88 *Sajadia v. Minister of Defense* [1988] IsrSC 42(3) 801 (Heb.)).

It was this requirement—that detention be justified by a threat from the detainee himself and not by other national security objectives—which led to the Israeli Supreme Court's decision mandating the release of the Lebanese detainees when the Israeli government sought to use them as bargaining chips.

See supra Section C.1. (discussing *Anonymous v. Minister of Defense*).

4. Unlike the United States, Israel subjects the evidence and judgments supporting the detention of suspected unlawful combatants to searching judicial review.

Judicial review of detention in Israel is not perfunctory. Rather, the Israeli Supreme Court has determined that the rule of law requires an independent judge to perform a sweeping review of the record to "balance security needs, on the one hand, and individual liberty, on the other." *Marab*, 57(2) ¶ 33.[18]

In Israel, each of the elements necessary to support detention must be the subject of a *judicial* finding. Security officials make the initial assessment, but when the case reaches a court for review, the crucial judgments—the weight of the evidence, the seriousness of the security threat, and the appropriate balance between security needs and liberty interests—are all matters for the judge to determine.

Accordingly, Israeli judges are required to undertake a searching examination of the record. The judge must "ensure that every piece of evidence connected to the matter at hand be submitted to him. Judges should never allow quantity to affect either quality or the extent of the judicial examination." *Sajadia*, 42(3) at 820 (Heb.), *quoted in Marab*, 57(2) ¶ 33 (English translation). The evidence and information presented by the security forces must be "carefully and meticulously" examined. ADA 4/94 *Ben Horin v. State of Israel* [1994] IsrSC 48(5) 329, 335 (Heb.), *quoted in Salama, supra*, ¶ 7; *accord Salama, supra*, ¶ 7 ("The Military Court and the Military Appeals Court can question the reliability of the evidence, and not merely decide

18. In this respect again, the Israeli Supreme Court endorses the view, shared across all Western democracies, that where judicial review is required by the rule of law, that review must be sufficiently wide in scope to permit the judge to make an independent judgment on the weight of the evidence. *See, e.g., Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. Ct. H.R. 25, ¶ 200 (1978).

what a reasonable authority might be expected to decide, on the basis of the evidence presented.").

The searching review of the record demanded by Israeli law is a byproduct of the belief that administrative detention is an exception to the customary procedures for deprivation of liberty:

> The judge does not ask himself whether a reasonable police officer would have been permitted to carry out the detention. The judge asks himself whether, in his opinion, there are sufficient investigative materials to support the continuation of the detention. . . . Judicial detention is the norm, while detention by one who is not a judge is the exception.

Marab, 57(2) ¶ 32. Even a detainee seized on a battlefield—whose detention, at the outset, is a military rather than a judicial act—must be brought within the judicial system's framework for evaluating the basis for detention as soon as possible. Referring to the detention of unlawful combatants seized during military operations on the West Bank, the Israeli Supreme Court has insisted that even when "the initial detention is done without a judicial order . . . . everything possible should be done to rapidly pass the investigation over to the regular track, placing the detention in the hands of a judge and not an investigator." *Marab*, 57(2) ¶ 32.

In practice, judicial oversight of administrative detentions in Israel has been neither disruptive nor toothless. The Ministry of Justice reports that "on many occasions the courts have either reduced the period of detention or cancelled the order where there was a question about the necessity for such a measure." Ministry of Justice, The Legal Framework, *supra*, at 5; *see also* Gross, *Bargaining Chips*, *supra*, at 758-61 (describing trends in judicial review of administrative detention in Israel). HaMoked, an advocacy organization representing administrative detainees, reported that in 2004 it appeared in 142 military court hearings and secured release for 11 detainees. HaMoked, Activity Report 2004, at 40, *available at* http://www.hamoked.org.il/items/12902_eng.pdf (last visited Aug. 22, 2007). In the

great majority of cases, courts have upheld the detention orders under review, to the disappointment of Israeli civil rights groups. *See, e.g.*, HaMoked, *supra*, at 39-40. For present purposes, however, the decisive point is that Israeli courts monitor the exercise of administrative detention powers by conducting a searching, independent judicial check on the factual justification for holding each and every detainee.

5. Unlike the United States, Israel prohibits all inhumane methods of interrogation and limits the use of coerced testimony against suspected unlawful combatants when assessing the basis for their detention.

Although at one time the Israeli security services argued that harsh techniques of interrogation should be permitted when necessary to elicit information to thwart a terrorist attack, the Israeli Supreme Court squarely rejected this position. HCJ 5100/94 *Pub. Comm. Against Torture in Israel v. State of Israel* [1999] IsrSC 53(4) 817, ¶ 36. The Court held that Israel's Basic Law[19] prohibits not only outright torture but also other forms of inhumane treatment, and "any degrading conduct whatsoever," specifically including such techniques as sleep deprivation, stress positions, and "shaking." *Pub. Comm. Against Torture*, 53(4) ¶ 23. Moreover, evidence obtained by techniques that violate such fundamental rights is subject to exclusion in both criminal trials and administrative proceedings. Evidence Ordinance (New Version) 1971, 5731-1971, 2 LSI 198 (1968-72) (Isr.), § 12; CrimA 5121/98 *Isacharov v. State of Israel* (unpublished) (Heb.). As the Israeli Supreme Court has declared:

> This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies

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19. Basic Law: Human Dignity and Freedom, 1992, S.H. 1391, art. 8, *in* Israel's Written Constitution (3d ed. 1999). Although Israel has yet to adopt a complete formal constitution, on many matters of "constitutional significance" the Knesset has enacted "Basic Laws," which stand above regular parliamentary statutes. *See* Ariel L. Bendor, *Is It a Duck? On the Israeli Written Constitution*, 6 Yale Isr. J. 53, 53-59 (Spring 2005); Aryeh Greenfield, *Introduction*, *in* Israel's Written Constitution, *supra*, at 4.

> are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.

Pub. Comm. Against Torture, 53(4) ¶ 39.

6. Unlike the United States, Israel requires judicial approval before limiting a suspected unlawful combatant's access to classified information offered in support of detention.

At several stages of a detention proceeding, Israel's need to protect classified information can conflict with the detainee's need to confront such information in order to challenge the State's evidence effectively. Classified information is protected whenever its disclosure could harm State security; but the decision to limit a detainee's access to such information must be made by the judge. UCL § 5(e); Zamir, *supra*, at 398. Thus, detainees have the right to know the reason for their detention unless a judge finds that the information would jeopardize security. Gross, *Bargaining Chips*, *supra*, at 757. Detainees have the right to be present in court for all legal proceedings unless a judge finds that State security requires otherwise. *Id.* Where security concerns warrant, judges can withhold evidence from a detainee and elect to review it *in camera* and *ex parte* instead. Zamir, *supra*, at 399 (describing the development of the practice permitting *ex parte* review).

In determining whether classified information should be withheld from a detainee, the Israeli Supreme Court has articulated the following test: "Does the material need to remain confidential because revealing it would harm state security? If not, then it should be revealed wholly or partially to the petitioner." Ministry of Justice, The Legal Framework, *supra*, at 5 (quoting HCJ 3514/97 *Anonymous v. State of Israel*).

When a court limits a detainee's opportunity to review certain evidence, it must assume a concomitant obligation to conduct an especially comprehensive and thorough examination of the record. *See generally, e.g.*, ADA 8788/03 *Federman v. Minister of Defense* [2003] IsrSC 58(1) 176 (Heb.); ADA 8607/04 *Fahima v. State of Israel* [2004] IsrSC 59(3) 258 (Heb.). On the other hand, if the court concludes that evidence was improperly classified, or that portions of it need not be withheld, the court will order the State to reveal such evidence. Evidence Ordinance (New Version) 1971, § 44; UCL § 5(a); *see also* Ministry of Justice, The Legal Framework, *supra*, at 5 (quoting *Anonymous v. State of Israel*). In such a case, the State still can refuse to disclose the evidence, but only if it is willing instead to free the detainee.

7. Unlike the United States, Israel provides access to counsel within no more than 34 days.

Honoring the rule of law, the Israeli Supreme Court recognizes that, as a general principle, detainees should be permitted to meet with an attorney within days of being detained. "This stems from every person's right to personal liberty." *Marab*, 57(2) ¶ 43.[20]

Criminal suspects and administrative detainees in the State of Israel. In criminal proceedings within Israel proper, a detainee ordinarily is entitled to meet with an attorney immediately. CPL § 34. For detainees suspected of security offenses, however, access to an attorney can be delayed, but only under specified circumstances and subject to a right of appeal to a Justice of the Supreme Court. CPL §§ 35(a), (d). And in any event, for criminal proceedings within Israel proper, the period of delay in affording access to counsel may not exceed a total of twenty-one days. CPL §§ 35(c), (d). The same time limits apply in the case of terrorism suspects facing administrative detention: an order denying access to counsel is subject to judicial review, and in any event access to counsel of the detainee's choice cannot be

20. Courts in other democracies throughout the world likewise recognize that prompt access to counsel is a vital safeguard for assuring the rule of law. *See, e.g., Aksoy*, 23 Eur. Ct. H.R. 553, ¶¶ 81, 83.

delayed for more than twenty-one days. *See* Harnon & Stein, *supra*, at 234.

Criminal suspects and administrative detainees in the occupied territories. For criminal defendants in the occupied territories, access to counsel is ordinarily unimpeded. But for administrative detainees in the occupied territories (and criminal defendants suspected of violating security laws), certain military orders permit access to counsel of the detainee's choice to be denied for periods totaling thirty to thirty-four days, depending on the circumstances.[21] *See Marab*, 57(2) ¶¶ 37-39; Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 Mich. L. Rev. 1906, 1930 (2004).

Unlawful combatants. Unlawful combatants held under the UCL are guaranteed more rapid access to counsel than those held in the West Bank pursuant to military orders, presumably because they will have been seized in Israel proper or are being held there after serving a criminal sentence. Under the UCL, an alleged unlawful combatant must be permitted to meet with a lawyer "no later than seven days prior to his being brought before a judge," in other words, given the fourteen-day limit on detention prior to judicial review, *see supra* Section C.1., no later than seven days after the beginning of detention. UCL § 6(a).

Thus, with respect to the right to counsel, the most restrictive regime applies to detainees in the occupied territories. Reflecting the importance of affording the security services an adequate opportunity for interrogation, *see Marab*, 57(2) ¶ 39, those detainees can be denied access to counsel for up to thirty-

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21. Because of the potential for a delay of up to thirty-four days in affording access to counsel, a fully adversarial hearing may not occur at the first judicial hearing, which must be conducted within fourteen days of the detainee's seizure. *See supra* Section C.1. The first judicial hearing nonetheless affords an occasion for independent review, and a hearing with the assistance of counsel will occur, at the latest, at the first renewal hearing, which must occur within no more than three months for detentions within Israel and within no more than six months for detentions in the occupied territories. *See infra* Section C.8.

four days. By comparison, the United States Government argues that many years of complete isolation are a necessary tool for effectively combating modern terrorism. In Israel, thirty-four days is the maximum period permitted for detention without access to counsel, and even that period of delayed access is considered long by Israeli and international-law standards.[22]

8. Unlike the United States, Israel provides for periodic review of detention at least once every 6 months, permitting the continuation of detention only upon a fresh judicial finding of dangerousness following a fully adversarial hearing.

In the State of Israel, orders of detention must be reviewed after no more than three months (for administrative detentions, *see* Gross, The Struggle of Democracy, *supra*, at 124) or six months (for detentions of alleged unlawful combatants, UCL § 5(c)), and the detainee must be released if the Court "finds that his release will not harm State security." UCL § 5(c); *see also* Gross, The Struggle of Democracy, *supra*, at 123-24 (providing the comparable standard under the EPDL).

In the occupied territories, detention orders must be reviewed every six months and can be renewed only if the court finds continued detention necessary to protect the security of the area. *See* Ministry of Justice, The Legal Framework, *supra*, at 4; Administrative Detentions Order (Temporary Order) (Judea and Samaria) (Number 1226)-1988, *cited in Marab*, 57(2) ¶¶ 5, 21, 22, 29.

Under all of these regimes, the renewal hearing is held in the same independent courts where initial detention hearings occur and is a fully adversarial proceeding. The detainee has a right to representation by counsel of his choosing, can offer any evidence in his favor, and can confront all evidence against him, subject to any restrictions on access to classified information

22. *Compare Aksoy*, 23 Eur. Ct. H.R. 553, ¶¶ 81, 83, 84 (counter-terrorism measures that blocked access to courts or counsel for periods exceeding 14 days held impermissible even in responding to terrorist threats that constitute a "public emergency threatening the life of the nation").

that are approved by the judge. *See supra* Section C.6. Any order renewing the detention is subject to appeal in the same way as an initial order of detention: to military courts of appeal in the case of detention in the occupied territories and to ordinary civil courts in all other cases. *See supra* Section C.2. And all detainees—regardless of whether they are held in Israel proper, in the occupied territories, or on foreign soil, and regardless of whether they are the subjects of general administrative detention or are held as alleged unlawful combatants—can seek review of the renewal of their detention before the Israeli Supreme Court. Ministry of Justice, The Legal Framework, *supra*, at 4.[23]

In short, suspected unlawful combatants detained by Israeli authorities are entitled to judicial review of the basis for their detention within fourteen days (and thereafter periodically, at least every six months) by an independent judicial officer empowered to order their release, who must conduct a careful and meticulous review of the government's evidence to

23. Under the Administrative Review Board ("ARB") regulations applicable at Guantánamo, (1) detainees are not entitled to any prompt reconsideration of the initial classification; (2) the reconsideration—which occurs only once a year—is carried out by a board of officers who are appointed by the Deputy Secretary of Defense and who are not guaranteed independence; (3) the ARB cannot order the detainee to be released; (4) the ARB's review results only in a recommendation as to whether the detainee should continue to be detained, leaving the final decision regarding detention to the executive branch; (5) the ARB may base continued detention either on a finding that the detainee is still a threat or on other reasons; (6) the review proceeding is non-adversarial, with the detainee expressly denied the right to be represented by counsel; and (7) the ARB's decision is not subject to judicial review. The ARB's lack of independence and limited role as an advisory body within the executive branch mean that after the initial CSRT determination and limited review by the United States Court of Appeals for the District of Columbia Circuit, a detainee can be held indefinitely with no further right of access to counsel or to the courts. Memo. from Hon. Gordon R. England, Sec'y of the Navy, regarding Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba (September 14, 2004), Encl. (3).

determine whether they pose a threat to State security and whether other means are available to neutralize the threat. Throughout these adversarial judicial proceedings, the government can withhold from detainees classified information proffered in support of their detention only with the court's approval, and they are provided access to counsel within no more than thirty-four days of their seizure. Guantánamo detainees are denied each of these safeguards.

D. As Israel's experience during Operation Defensive Wall illustrates, providing prompt access to independent judicial review is practical even under the most demanding circumstances.

The regime of prompt independent judicial review has proved workable even in Israel's distinctively difficult and dangerous situation. As a result, judicial oversight is endorsed not only by Israel's courts, but also by its executive authorities as well. The Israeli Ministry of Justice emphatically supports the principle that "special standards of judicial supervision must apply to ensure that the power to use this measure [of administrative detention] is not abused." Ministry of Justice, The Legal Framework, *supra*, at 2.

The viability of Israel's regime was demonstrated most strikingly during recent large-scale military operations on the West Bank. In an effort (known as "Operation Defensive Wall") to sweep up suspected terrorists hiding amidst the civilian population, the IDF moved heavy armor and thousands of troops into the area beginning in March 2002. Within a few months, the IDF had detained nearly 7000 people. After initial screening, many were released, while others were moved to detention facilities for further investigation. By May 15, 2002, more than 5000 detainees had been released and 1600 remained in detention. *See generally Marab*, 57(2) ¶ 1.

As the IDF was finding it difficult to process all detainees within the then-applicable eight-day limit on detention prior to judicial review, a new regulation, Order 1500, was promulgated to regularize the situation. But the new regulation did not go so

far as suspending entirely the right to independent judicial review. Rather, the extraordinary influx of detainees prompted IDF commanders to extend the permissible period of extra-judicial detention only from eight days to eighteen. Detention in Time of Warfare (Temporary Order) (Judea and Samaria) (Number 1500)-2002, § 2(a) (Heb.), *quoted in Marab*, 57(2) ¶ 3 (English translation). Moreover, two months later, a new IDF Order reduced the maximum delay prior to a judicial hearing from eighteen days to twelve. Detention in Time of Warfare (Temporary Order) (Amend. No. 2) (Judea and Samaria) (Number 1505)-2002 (Heb.), *cited in Marab*, 57(2) ¶ 6.

Although these delays in affording access to courts—from eight days to eighteen and later back down to twelve—are insignificant by Guantánamo standards, they were intensely controversial in Israel. Ultimately, the Israeli Supreme Court held the added delays to be violations of the rule of law, unacceptable even under the unusual combat conditions confronting the IDF in 2002. *Marab*, 57(2) ¶ 36. The Court's central premise was that "judicial review of detention proceedings [is] essential for the protection of individual liberty." *Marab*, 57(2) ¶ 32. The Court found in international law a clear governing principle: "[d]elays must not exceed a few days," as even an alleged unlawful combatant "is to be brought promptly before a judge." *Marab*, 57(2) ¶ 27 (citation omitted).

The Israeli Supreme Court did not ignore the practical constraints of warfare. Noting that "police detention is not the same as detention carried out during warfare in the area," and that it cannot be "demanded that a judge accompany the fighting forces," the Court held that judicial intervention could be postponed, but only "until after detainees are taken out of the battlefield to a place where the initial investigation and judicial intervention can be carried out properly." *Marab*, 57(2) ¶ 30 (internal quotations omitted).

Nor did the Court overlook the obstacles of resources and manpower. The Court acknowledged that factual investigation cannot be performed during military operations, that some time

may be required to organize investigations of large numbers of detainees, and that qualified investigators may be in short supply. *Marab*, 57(2) ¶ 33. Nonetheless, the Court held that the military bears an obligation to take the steps necessary to permit investigations to begin promptly:

> Security needs, on the one hand, and the liberty of the individual on the other, all lead to the need to increase the number of investigators. . . . [a]nd even more so when it was expected that the number of detainees would rise due to Operation Defensive Wall. . . . "A society is measured, among other things, by the relative weight it attributes to personal liberty. This weight must express itself not only in pleasant remarks and legal literature, but also in the budget . . . . Society must be ready to pay a price to protect human rights."

Marab, 57(2) ¶ 48 (quoting HCJ 6055/95 *Tzemach v. Minister of Defense* [1999] IsrSC 53(5) 241, 261). In similar fashion, the Court rejected the suggestion that difficulty in arranging more judges could justify a delay in judicial review:

> The current emergency conditions undoubtedly demanded large-scale deployment of forces . . . . However, by the same standards, effort and resources must be invested into the protection of the detainees' rights, and the scope of judicial review should be broadened.

Marab, 57(2) ¶ 35 (quoting HCJ 253/88 *Sajadia v. Minister of Defense* [1988] IsrSC 42(3) 801, 821).

Without setting a specific deadline for judicial review, the Court in *Marab* suspended its ruling for six months to permit the military to implement a more expeditious system. *Marab*, 57(2) ¶ 36. In subsequent regulations, the IDF provided for a judicial hearing within eight days of detention, in effect reinstituting the eight-day period that had been in force before. Detention in Time of Warfare (Temporary Order) (Amend. No. 87) (Judea and Samaria) (Number 1500)-2003, art. 78E1 (Heb.).

Since then, the IDF has managed its detention and judicial review processes within this eight-day limit, without reported difficulty.

The 1600 detainees who required further processing during Operation Defensive Wall represent, for a nation of Israel's size, the equivalent of over 73,000 detainees held for processing by the United States. By comparison, the total number of detainees who have passed through Guantánamo over the past five years reportedly does not exceed several hundred. Against the background of Israel's experience during Operation Defensive Wall, compliance with universal understandings of the rule of law—by providing equivalent rights to several hundred Guantánamo detainees, long after their seizure, and at a location far removed from any area of active combat—can scarcely be deemed "impracticable and anomalous."

CONCLUSION

The judgments of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX I
MARAB v. IDF COMMANDER IN THE WEST BANK
OFFICAL ENGLISH TRANSLATION

Marab v. **IDF Commander in the West Bank**
Israel High Court of Justice
Decided 5.2.2003

HCJ # 3239/02
[official English translation 30.10.2003]

1. **Iad Ashak Mahmud Marab**
2. **Ahsan Abed Al Ftah Id Dahdul**
3. **Weesam Abed Al Ftah Id Dahdul**
4. **Center for the Defense of the Individual founded by Dr. Lota Salzberger**
5. **B'tselem—The Israeli Information Center of Human Rights in the Occupied Territories**
6. **The Association for Civil Rights in Israel**
7. **Physicians for Human Rights**
8. **Adalah—The Legal Center for Arab Minority Rights in Israel**
9. **Kanon—The Palestinian Organization for the Protection of Human and Environmental Rights**
10. **Public Committee Against Torture**

v.

1. **IDF Commander in the West Bank**
2. **Judea and Samaria Brigade Headquarters**

Appendix I

The Supreme Court Sitting as the High Court of Justice
[April 18 2002, July 28 2002]
Before President A. Barak, Justice D. Dorner
and Justice I. Englard

For the petitioners —Lila Margalit
For the respondents —Aner Helman

Judgment

President A. Barak

The Facts

1. Since September 2002, Palestinians have carried out many terrorist attacks against Israelis, both in Judea and Samaria as well as in Israel. The defense forces have been fighting this terrorism. To destroy the terrorist infrastructure, the Israeli government decided to carry out an extensive operation, Operation Defensive Wall. As part of this operation, which was initiated at the end of March 2002, the IDF forces entered various areas of Judea and Samaria. Their intention was to detain wanted persons as well as members of several terrorist organizations. As of May 5, 2002, about 7000 persons had been detained in the context of this operation. Among those detained were persons who were not associated with terrorism; some of these persons were released after a short period of time. Initial screening was done in temporary facilities which were set up at brigade headquarters. Those who were not released after this screening were moved to the detention facility in Ofer Camp. The investigation continued and many more were released.

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A number of the detainees were then moved to the detention facility in Kziot. As of May 15, 2002, of the 7000 persons who had been detained since the start of Operation Defensive Wall, about 1600 remained in detention.

2. The detentions were initially carried out under the regular criminal detention laws of the area, under the Defense Regulations Order (Judea and Samaria) (Number 378)-1970 [hereinafter Order 378]. It soon became clear that Order 378 did not provide a suitable framework for screening thousands of persons detained within a number of days. Thus, on May 5, 2002, respondent no. 1 promulgated a special order: Detention in Time of Warfare (Temporary Order) (Judean and Samaria) (Number 1500)-2002 [hereinafter Order 1500].

3. Order 1500 established a special framework regarding detention during warfare. The order applied to a "detainee," which was defined as follows:

> Detainee —one who has been detained, since March 29, 2002, in the context of military operations in the area and the circumstances of his detention raise the suspicion that he endangers or may be a danger to the security of the area, the IDF, or the public.

The principal innovation of Order 1500 may be found in section 2(a):

> Notwithstanding sections 78(a)-78(d) of the Defense Regulations Order (Judea and Samaria) (Number 378)-1970 [hereinafter the Defense

> Regulations Order], an officer will have the authority to order, in writing, that a detainee be held in detention, for up to 18 days [hereinafter the detention period].

Under this section, officers are authorized to order the detention of a detainee for a period of 18 days, and a judicial detention order is not required. In order to continue holding a detainee beyond 18 days, however, a judge must be approached. Section 2(d) of Order 1500 relates explicitly to this matter:

> Continuing to hold a detainee in detention for investigative purposes, beyond the detention period, will be done under the authority of a detention order issued by a judge, in accordance with section 78(f) of the Defense Regulations Order.

During the first 18 day period of detention, detainees have no option to be heard by a judge. This is due to the fact that under section 78(i) of Order 378, a judge's authority to order the release of detainees is limited to those detained who have been detainees in accordance with those specific sections. However, the detainees in question were not detained under these regulations, but rather under the terms of Order 1500, which explicitly grants authority to detain "[n]otwithstanding sections 78(a)-78(d)" of Order 378. In this specific regard, Order 1500 differs from Order 378 in two ways. First, an officer has the authority to order the detention of a detainee for a period of 18 days himself, and need not obtain a judicial order. Second, during that detention

period, there is no judicial review of the detention order. Of course, an officer has the authority to release the detainee before the detention period has passed. *See* Order 1500, § 2(c).

Order 1500 also differs from Order 378 is a second manner. Under Order 1500, "a detainee shall not meet a lawyer during the detention period." *See* Order 1500, § 3(a). However, "meeting between a detainee and his lawyer after the detention period may only be prevented by the authorities in accordance with section 78C(c)(2) of the Defense Regulations Order." *See* Order 1500, § 3(b). Thus, after the 18 day detention period has passed, meetings with lawyers shall be allowed, unless disallowed by the standard procedures of Order 378. Under this law, the relevant authority may, in a written decision, prevent a meeting between a detainee and his lawyer for an additional period of 15 days, if it has been convinced that such is necessary for the security of the area or for the benefit of the investigation.

Finally, Order 1500 adds that "a detainee shall be given the opportunity to raise claims opposing his detention within eight days." *See* Order 1500, § 2(b). As such, during the first eight days of his detention, a detainee may be held without being given the opportunity to be heard. Order 1500, which was issued on April 5, 2002, was to be valid for two months.

4. As we have seen, Order 1500 states that in order to hold a detainee for a period which exceeds the 18 day detention period, a judge must be approached. This judge proceeds under the provisions of the standard detention law.

See Order 1500, § 2(3) of Order 1500. It became clear, however, that there are many detainees who have been screened, yet have not been brought before a judge, despite the fact that their 18-day detention period has passed. To rectify this situation, an additional order was issued on May 1, 2002: Detention in Time of Warfare (Temporary Order) (Amendment) (Judea and Samaria) (Number 1502)-2002 (hereinafter Order 1502). This order provided that section 2(d) of Order 1500 shall be marked subsection (1), after which shall be inserted subsection (2), which would provide that:

> (2) Any person who has been detained under subsection (1) for a period which exceeds the detention period, whose detention is necessary for further investigation, and who has not been brought before a judge in accordance with subsection (d)(2), shall be brought before one as soon as possible, and, in any event, no later than May 10, 2002.
>
> A detainee who has not been brought before a judge within this period of time shall be released, unless there stands a cause for his detention under any other law.

Order 1502 also provided that its provisions would remain in effect until May 10, 2002.

5. Aside from Order 378, which is concerned with criminal detention, and Order 1500 (as amendment by Order 1502), which is concerned with detention during times of

warfare, and which was specially issued within the context of Operation Defensive Wall, there also exists defense regulations which apply to the area and deal with administrative detention. The main order in this regard is the Administrative Detentions Order (Temporary Order) (Judea and Samaria) (Number 1226)-1988 [hereinafter Order 1226]. This order has undergone numerous amendments. After the issue and amendment of Order 1500, Order 1226 was amended accordingly. Issues concerning these orders do not stand before us.

6. To conclude this review of the relevant defense regulations, it should be noted that Order 1500 was to remain in effect for a period of two months. *See* Order 1500, § 5. As this expiration date approached, the order was extended by Order: Detention in Time of Warfare (Temporary Order) (Amendment Number 2) (Judean and Samaria) (Number 1505)-2002 [hereinafter Order 1505]. This subsequent order made a number of significant changes in Order 1500. First, the definition of "detainee" was modified. The new definition was set in section 2:

> Detainee—one who has been detained in the context of the war against terrorism in the area, while the circumstances of his detention raise the suspicion that he endangers or may endanger the security of the area, IDF security, or the public security.

Second, the period of detention without judicial review was shortened. The 18-day period set by Order 1500 was replaced with a 12-day detention period. Third, a detainee

could only be prevented from meeting with his lawyer for a period of "four days from his detention." *See* Order 1500 4(a). Furthermore, it provided that if the investigators wished to prevent such a meeting after the four-day detention period, they must act in accordance with section 78C(c) of Order 378. Thus, the "head of the investigation" may first be appealed to. The head of the investigation, if he is of the opinion that such is necessary for the security of the area or for the benefit of the investigation, he may, in a written decision, order that the detainee be prevented from meeting with his lawyer for a period of up to 15 days from the day of his detention. After these periods have elapsed, such a meeting may be prevented for an additional 15 days.

7. Order 1505 was to expire on April 9, 2002. Its validity was extended until January 4, 2003 in Order: Detention in Time of Warfare (Temporary Order) (Amendment Number 3) (Judea and Samaria) (Number 1512)-2002 [hereinafter Order 1512].

Petitioners' Arguments

8. Petitioners argued in their original petition that Order 1500 is illegal. It allows for mass detentions without the individual examination of each case, without clear grounds for detention, and without judicial review. It unlawfully prevents meetings between a detainee and a lawyer for a period of 18 days, without allowing for judicial review of this decision. It unlawfully permits detention for a period of 8 days without allowing the detainee's claims to be heard. Petitioners claim that arrangement is in conflict with the Basic Law: Human Dignity and Liberty. The petitioners apply these general claims to the specific cases of petitioners 1-3.

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9. We received additional briefs from the petitioners after the issue of Order 1502. In these briefs, petitioners argued that Order 1500 and Order 1502 are unlawful, as they are in conflict with international humanitarian law and human rights law. In this regard, the petitioners rely upon the Covenant on Civil and Political Rights-1966 and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War-1949. The petitioners claim that international law recognizes only two types of detentions: regular "criminal" detention and preventive detention (internment). According to the petitioners, Order 1500 creates a third type of detention: prolonged mass detention for the purpose of screening the detainees. This third type is not recognized by international law and is unlawful. Lawful detention, whether "regular," "preventive," or "administrative," must be based on individual reasons related to a specific person. Order 1500 and Order 1502, petitioners argue, allow for collective detention. In summarizing their arguments, the petitioners note that "Order 1500 severely violates fundamental basic human rights. It allows for arbitrary detention, precludes judicial review over decisions regarding detention and isolates those detained under the order from the outside world for a prolonged period of time."

10. In additional oral arguments which were heard after the issue of Order 1505 on May 5, 2002, petitioners asserted that their claims apply to Order 1505 as well. They claim that the three orders unlawfully violate freedom, due process and the principle of proportionality.

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The State's Response

11. In the state's original response to the petition, on May 5, 2002, it noted that the Palestinian terrorists had based themselves in population centers. In carrying out their activities, they did not hesitate to use women and children, sometimes dressed in civilian garb, and often carried concealed explosives on their bodies. Under these circumstances, it was often impossible to distinguish, in real-time and during combat situations, between members of terrorist organizations and innocent civilians. As such, persons who were found at sites of terrorist activity or combat, under circumstances which raised the suspicion of their involvement in these activities, were detained. About 7000 persons were so detained between the initiation of the operation and this suit. As a result, it was decided that the standard detention laws—which are concerned with policing activities, and not with combat situations—did not provide a suitable framework for the need to detain a large number of persons whose identities were often unknown. Respondents added that many of the detainees were released, and, as of May 5, 2002—the date the response was submitted—about 1,600 persons remained in detention.

12. Regarding Order 1500, the state asserted in its response that due to the large number of detainees and limited resources, the initial process of investigation and screening under Order 1500 could last up to 18 days. Occasionally, the process could last for over 18 days. Order 1502 was issued to provide a legal framework for this situation. Respondents further claimed that Order 1500, as well as Order 1502, accord with the international laws of warfare and detention,

specifically article 43 of the Hague Convention Regarding the Laws and Customs of War on Land-1907 and the Geneva Convention relative to the Protection of Civilian Persons in Time of War-1949.

In addition, the state claimed that the temporary prevention of meetings with a lawyer is lawful. The state argues that while military activities continue—especially while IDF forces find themselves in hostile territory, in an attempt to uproot the terrorist infrastructure—it is unthinkable that their lives should be endangered due to the possibility that messages may be passed from the detention facilities to the outside world. This is especially true when the screening processes are unfinished and it is unclear which of the detainees will remain in detention, whether criminal or administrative, when the screening is concluded. Finally, the respondents assert that regardless of whether the Basic Law: Human Dignity and Liberty applies to the orders in question, Order 150, as well as Order 1502, are in accordance with the limitations clause of the Basic Law. *See* Basic Law: Human Dignity and Liberty, § 8.

13. On June 11, 2002, in additional briefs, the respondents drew attention to Order 1505, which was issued on April 6, 2002. This order limited the detention period from 18 to 12 days. The period during which meetings with a lawyer could be prevented was shortened from 18 days to 4 days. The respondents assert that these changes became possible due to the easing of military activities in the area. Nevertheless, the respondents are of the opinion that due to the current state of affairs in the area, such as the war against terrorism—which places an unprecedented and prolonged

burden on the security and investigatory authorities—and the large number of detainees being held, which is substantially higher than the amount of persons detained before Operation Defensive Wall, it is practically impossible to be satisfied with the standard detention framework of Order 378.

With regard to the prevention of meetings with a lawyer, the respondents assert that under the current circumstances and considering the amount of persons currently being detained, it is possible to restrict the prevention period to four days. Further, respondents claim that the amendment of Order 1500 does not change the fact that the original text of Order 1500 was also reasonable and proportionate under the circumstances. The amendment promulgated under Order 1505 only entered the realm of possibility as a result of the decreased number of detainees and changes in the nature of the military activities. Respondents add that Order 1500 does not to allow for mass detentions in the absence of any individual basis for detention. They assert that Order 1500 also requires individualized grounds, based on individual circumstances and suspicion. As such, Order 1500 should not be characterized as a third type of detention, aside from and in addition to criminal and administrative detention. Moreover, according to the respondents, Order 1500 is not administrative detention. It is a type of detention intended to allow for initial clarification and criminal investigation. The respondents analyze the laws of warfare and conclude that Orders 1500, 1502 and 1505 are legal under those laws.

14. In the additional oral pleadings which were conducted on July 28, 2002—during which Order 1505 was already effective—the respondents reiterated their claim that

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Order 1500, as well as Order 1505, do not create a third type of detention. According to respondents, they provide for a regular form of criminal detention, in accordance with the special circumstances of warfare.

15. In approaching the task of writing our judgment, it became clear that no *order nisi* had been issued under this petition. We asked the parties whether they would be willing to continue as if such an order had been issued. Petitioners, of course, agreed; respondents objected. Under these circumstances, we issued an *order nisi* on December 15, 2002, ordering the respondents to submit their final response within 10 days. The petitioners were given ten additional days to respond to the respondents' response. We added that the judicial panel would decide whether additional oral pleadings would be necessary.

16. After a number of continuances, we received an affidavit in response from respondent no. 1 on January 13, 2002. In this affidavit, the respondent explained the reason behind the issuance of Order 1512, *see supra* par. 7. He informed us that terrorist activities persist and the IDF is responding with military operations. For example, between September and the end of December 2002, approximately 1,600 terrorist attacks were carried out. During this period, 84 citizens and residents were killed. Over 400 citizens and residents were wounded. About 2,050 persons suspected of terrorist activity were detained in Judea and Samaria. Consequently, respondent 1 decided to extend Order 1500—as it had been extended in Order 1505—for an additional period of time in Order: Detention in Time of Warfare (Temporary Order) (Amendment Number 4) (Judea and

Samaria) (Number 1518)-2003 [hereinafter Order 1518], after concluding that security reasons demanded such an extension. The extension is valid until April 5, 2003.

17. Aside from extending the validity of the amended Order 1500, Order 1518 also makes two significant modifications. First, it specifies that meetings between a detainee and his lawyer will be prevented for a period of "two days from the day of his detention." *See* Order 1518, § 3. As was mentioned, previously, such meetings could be prevented for a maximum of four days. Second, the detainee was given the opportunity to voice his claims "no later than within four days of his detention." *See* Order 1518, § 2. As noted, under Order 1500—and similarly under Orders 1505 and 1512—a detainee could be held for a period of eight days without being given the opportunity to voice his claims before the detaining authority. Respondent 1 asserted that these amendments had been made after consultation "and not without hesitation." It was reemphasized that the General Security Service, which is responsible for investigating detainees suspected of terrorist activities, could not have prepared for the dramatic increase in the number of detainees since operation Defensive Wall in March 2002. Respondent asserted that, even today, the logistical constraints of investigations demand that a detainee not be permitted to meet with his lawyer for a period of forty-eight hours and that there be guidelines regarding the length of the "screening process." He emphasized that these guidelines are reasonable and proportionate. Respondent noted that the war against terrorism demands professional and specialized skills, and is not akin to regular police investigation. The process of training General Security Service investigators is

exceptionally lengthy. Consequently, it was practically impossible to prepare for the increase in terror which began in March 2002, and which continues today. Respondent repeated that merely investing financial resources would not solve this problem. In conclusion, respondent requested that, if the information offered does not suffice to reject this petition, we hear, *ex parte*, from the General Security Service itself, a detailed description of the objective constraints which required the issuance of Order 1500. These restraints also required that the amended order be extended for an additional period. The respondents assert that Order 1500 cannot be deemed illegal before we hear this classified data.

The Issues Raised

18. An examination of this petition indicates that petitioners have raised four issues. First, petitioners contest the authority to detain. The petitioners claim that Orders 1500, 1502, 1505, 1512, and 1518 unlawfully create a new type of detention—the orders allow mass detention and free the authorities examining each case individually. Second, petitioners contest the lack of any possibility of judicial intervention. The petitioners claim that the detention period without possibility of judicial intervention—18 days under Order 1500, and 12 days under Orders 1505, 1512, and 1518—lacks proportion and, as such, is illegal. Third, petitioners contest the prevention of meetings with lawyers—such meetings can be for a period of 18 days under Order 1500, 4 days under Order 1505, and two days under Order 1518. Petitioners claim that such prevention lacks proportion and, as such, is illegal. Fourth, petitioners contest the fact that detainees cannot voice their claims before the detaining

authority. Petitioners cannot voice their claims for a period of eight days under Order 1500, 1505, and 1512, and for a period of four days under Order 1518. Petitioners claim that this order is illegal. We shall deal with each of these claims, beginning with the first.

The Authority to Detain for the Purpose of Investigation

19. Detention for the purpose of investigation infringes the liberty of the detainee. Occasionally, in order to prevent the disruption of investigatory proceedings or to ensure public peace and safety, such detention is unavoidable. A delicate balance must be struck between the liberty of the individual, who enjoys the presumption of innocence, and between public peace and safety. Such is the case with regard to the internal balance within the state—between the citizen and his state—and such is the case with regard to the external balance outside the state—between a state that is engaged in war, and between persons detained during that war. Such is the case with regard to this balance in time of peace, and such is the case with regard to this balance in time of war. Thus, the general provision of Article 9.1 of the International Covenant on Civil and Political Rights (1966), which provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention

The prohibition is not against detention, but rather against arbitrary detention. The various laws which apply to this matter, whether they concern times of peace or times of war, are intended to establish the proper balance by which the detention will no longer be arbitrary.

20. This approach accords with Israeli Law. Man's inherent liberty is at the foundation of the Jewish and democratic values of the State of Israel. "Personal liberty is a primary constitutional right, and from a practical point of view, is a condition for the realization of other fundamental rights." HCJ 6055/95 *Tzemach v. Minister of Defense*, at 261 (Zamir, J.) Nevertheless, this is not an absolute right. It may be restricted. A person may be detained for investigative purposes—in order to prevent the disruption of an investigation or to prevent a danger to the public presented by the detainee—where the proper balance between the liberty of the individual and public interest justifies the denial of that right. The balance demands that the detaining authority possess an evidentiary basis sufficient to establish suspicion against the individual detainee. Such is the case with regard to "regular" criminal detention, whether for investigative purposes or until the end of the proceedings. *See* sections 13, 21 and 23 of the Criminal Procedure (Enforcement Authorities- Detentions) Law-1996. Such is the case with regard to administrative detention. *See* section 2 of the Emergency Powers (Detentions) Law-1979, and HCJ *Citrin v. IDF Commander in Judea and Samaria* (unreported case); HCJ 1361/91 *Masalem v. IDF Commander in Gaza Strip*, at 444, 456; HCJ 554/81 *Branasa v. GOC Central Command*, at 247, 250; HCJ 814/88 *Nassrallah v. IDF Commander in the West Bank*, at 265, 271; HCJ 7015/0 *Ajuri v. IDF Commander in the West Bank*, at 352, 371.

Moreover, it must always be kept in mind that detention without the establishment of criminal responsibility should only occur in unique and exceptional cases. The general rule is one of liberty Detention is the exception. The general

rule is one of freedom. Confinement is an exception. *See* Crim.App. 2316/95 *Ganimat v. State of Israel*, at 649. There is no authority to detain arbitrarily. There is no need, in the context of this petition, to decide to what extent these principles apply to internal Israeli law regarding detention in the area. It suffices to state that we are convinced that internal Israeli law corresponds to international law in this matter. Furthermore, the fundamental principles of Israeli administrative law apply to the commander in the area. *See* HCJ *Jamit Askhan Al-Maalmon v. IDF Commander in Judea and Samaria*. The fundamental principles which are most important to the matter at hand are those regarding the duty of each public authority to act reasonably and proportionately, while properly balancing between individual liberty and public necessity.

21. International law adopts a similar approach concerning occupation in times of war. On the one hand, the liberty of each resident of occupied territory is, of course, recognized. On the other hand, international law also recognizes the duty and power of the occupying state, acting through the military commander, to preserve public peace and safety; *see* Article 43 of the Annex to the Hague Convention Regulations Respecting The Laws and Customs of War on Land-1907 [hereinafter Hague Regulations]. In this framework, the military commander has the authority to promulgate security legislation intended to allow the occupying state to fulfill its function of preserving the peace, protecting the security of the occupying state, and the security of its soldiers. *See* Article 64 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War-1949 [hereinafter the Fourth Geneva Convention].

Consequently, the military commander has the authority to detain any person suspect of committing criminal offences, and any person he considers harmful to the security of the area. He may also set regulations concerning detention for investigative purposes—as in the matter at hand—or administrative detention—which is not our interest in this petition. Vice-President M. Shamgar, in HCJ 102/82 *Tzemel v. Minister of Defense*, at 369, stated in this regard:

> Among the authority of a warring party is the power to detain hostile agents who endanger its security due to the nature of their activities . . . Whoever endangers the security of the forces of the warring party may be imprisoned.

True, the Fourth Geneva Convention contains no specific article regarding the authority of the commander to order detentions for investigative purposes. However, this authority can be derived from the law in the area and is included in the general authority of the commander of the area to preserve peace and security. This law may be changed by security legislation under certain circumstances. Such legislation must reflect the necessary balance between security needs and the liberty of the individual in the territory. An expression of this delicate balance may be found in Article 27 of the Fourth Geneva Convention:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely

> treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity . . . However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

Moreover, Article 78 of the Fourth Geneva Convention provides that residents of the area may, at most, be subjected to interment or assigned residence. This appears to allow for the possibility of detention for the purpose of investigating an offence against security legislation. We would reach this same conclusion if we were to examine this from the perspective of international human rights law. International law, of course, recognizes the authority to detain for investigative purposes, and demands that this authority be balanced properly against the liberty of the individual. Thus, regular criminal detention is acceptable, while arbitrary detention is unacceptable. Orders such as Orders 378 and 1226 were issued with this in mind.

22. The petitioners argued that Order 1500, as well as Orders 1502, 1505, 1512, and 1518, establish a new type of detention, aside from standard criminal detention and administrative detention. Petitioners assert that his new type of detention allows for detention without cause, and should thus be nullified. Indeed, we accept that the law which applies to the area recognizes only two types of detention: detention for the purpose of criminal investigation, as in Order 378, and administrative detention, as in Order 1226. There exists no authority to carry out detentions without "cause for detention." In *Tzemel*, Vice-President Shamgar expressed as

much after quoting the provisions of Article 78 of the Fourth Geneva Convention:

> The discussed Article allows for the imprisonment of persons, who, due to their behavior or personal data, must be detained for definitive defense reasons. As is our custom, we hold that every case of detention must be the result of a decision which weighs the interests and data regarding the person who is being considered for detention.

Tzemel at 375. Detentions which are not based upon the suspicion that the detainee endangers, or may be a danger to public peace and security, are arbitrary. The military commander does not have the authority to order such detentions. *See Prosecutor v. Delalic*, Tribunal for the Former Yugoslavia, IT-96-21. *Compare also* section 7(1) of the Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism: "A person suspected of terrorist activities may only be arrested if there are suspicions." With this in mind, we turn to Order 1500.

23. Under Order 1500, an order may be given to hold a detainee in detention. Order 1500 defines a "detainee" as follows:

> Detainee—one who has been detained, since March 29, 2002, during warfare in the area and the circumstances of his detention raise the suspicion that he endangers or may be a danger to the security of the area, the IDF or the public.

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A similar provision exists in Order 1505:

> Detainee—one who has been detained in the area during anti-terrorism activities, while the circumstances of his detention raise the suspicion that he endangers or may be a danger to the security of the area, IDF security or the public.

From these provisions, we find that under Order 1500 as well as Order 1505—and similarly under Orders 1512 and 1518—detention may only be carried out where there is a "cause for detention." The cause required is that the circumstances of the detention raise the suspicion that the detainee endangers or may be a danger to security. Thus, a person should not be detained merely because he has been detained during warfare; a person should not be detained merely because he is located in a house or village wherein other detainees are located. The circumstances of his detention must be such that they raise the suspicion that he—he individually and no one else—presents a danger to security. Such a suspicion may be raised because he was detained in an area of warfare while he was actively fighting or carrying out terrorist activities, or because he is suspect of being involved in warfare or terrorism.

Of course, the evidentiary basis for the establishment of this suspicion varies from one matter to another. When shots are fired at the defense forces from a house, any person located in the house with the ability to shoot may be suspect of endangering security. This basis may be established against a single person or a group of persons. However, this does not mean that Orders 1500, 1505, 1512 or 1518 allow for

"mass detentions," just as detaining a group of demonstrators for the purpose of investigation, when one of the demonstrators has shot at police officers, does not constitute mass detention. The only detention authority set in these orders is the authority to detain where there exists an individual cause for detention against a specific detainee. It is insignificant whether that cause applies to an isolated individual or if it exists with regard to that individual as part of a large group. The size of the group has no bearing. Rather, what matters is the existence of circumstances which raise the suspicion that the individual detainee presents a danger to security. Thus, for example, petitioner 1 was detained, as there is information that he is active in the Popular Front for the Liberation of Palestine, a terrorist organization. He recruited people for the terrorist organization. Petitioner 2 was detained because he is active in the *Tanzim*. Petitioner 3 was detained because he is a member of the *Tanzim* military. Thus, an individual cause for detention existed with regard to each of the individual petitioners.

24. Thus, the amended Order 1500 is included in the category of detention for investigative purposes. It is intended to prevent the disruption of investigative proceedings due to the flight of a detainee whose circumstances of detention raise the suspicion that he is a danger to security. The difference between this detention and regular criminal detention lies only in the circumstances under which they are carried out. Detention on the authority of the amended Order 1500 is carried out under circumstances of warfare, whereas regular criminal detention is carried out in cases controlled by the police. In both cases, we are dealing with individual detention based on an evidentiary basis that raises individual suspicion against the detainee. For these reasons, we reject the petitioners' first claim.

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Detention Without Judicial Intervention

25. Petitioners' second claim relates to the detention period. The claim does not concentrate on the length of the period *per se*, since the length of the period is determined by the needs of the investigation. The claim focuses on the period between the detention and the first instance of judicial intervention. Under Order 1500, this period lasts 18 days; the petitioners claim that this period is excessive. Moreover, they claim that there are a number of detainees who have yet to be brought before a judge despite the fact that the 18-day period has passed. In order to rectify this situation Order 1502 was issued, under which such detainee are to be brought before a judge as soon as possible and no later than 10.5.2002, *see supra*, para. 12. The petitioners claim that, under the authority of this latter order, some detainees were held for a period of 42 days without judicial intervention. The petitioners also assert that Order 1505, under which the detention order may prevent judicial intervention for a period of 12 days, is also illegal, as the period specified there is also excessive. This period remains valid under Order 1512 and Order 1518.

26. Judicial intervention with regard to detention orders is essential. As Justice I. Zamir correctly noted:

> Judicial review is the line of defense for liberty, and it must be preserved beyond all else.

HCJ 2320/98 *El-Amla v. IDF Commander in Judea and Samaria*, at 350.

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Judicial intervention stands before arbitrariness; it is essential to the principle of rule of law. *See Brogan v. United Kingdom* (1988) EHRR 117, 134. It guarantees the preservation of the delicate balance between individual liberty and public safety, a balance which lies at the base of the laws of detention. *See* AMA 10/94 *Anon. v. Minister of Defense*, at 105. Internal Israeli law has established clear laws in this regard. In "regular" criminal detention, the detainee is to be brought before a judge within 24 hours. *See* section 29(a) of the Criminal Procedure (Enforcement Powers-Detentions) Law-1996. In this case, the order is issued by the judge himself. In "administrative" detention, the detention order is to be brought before the president of the district court within 48 hours. *See* section 4 (a) of the Emergency Powers (Detentions) Law-1979. The decision of district court president is an integral part of the development of the administrative detention order. *See* AMA 2/86 *Anon. v. Minister of Defense*, at 515.

Similarly, in detaining an "unlawful combatant," the detainee is to be brought before a justice of the district court within 14 days of the issuance of the imprisonment order by the Chief of Staff. *See* section 5 of the Imprisonment of Unlawful Combatants Law-2002. With regard to the detention of military soldiers, section 237A of the Military Justice Law-1955 provided that the detainee is to be brought before a military justice within 96 hours. We reviewed this provision, and concluded that it was unconstitutional, as it unlawfully infringed upon personal liberty, and was not proportionate. *See Tzemach*. Subsequent to our judgment, the law was amended, and it now provides that in detaining a military soldier under the Military Justice Law, the detainee

is to be brought before a judge within 48 hours. What is the law with regard to detentions carried out in the area?

27. International law does not specify the number of days during which a detainee may be held without judicial intervention. Instead, it provides a general principle, which is to be applied to the circumstances of each and every case. This general principle, which pervades international law, is that the question of detention is to be brought promptly before a judge or other official with judiciary authority. *See* F. Jacobs and R. White, *The European Convention on Human Rights* 89 (2nd ed., 1996). Thus, for example, Article 9.3 of the Covenant on Civil and Political Rights-1966 provides:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by the law to exercise judicial power.

This provision is perceived as part of customary international law. *See* N. Rodley, *The Treatment of Prisoners Under International Law* 340 (2nd ed., 1999). A similar provision may be found in the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, which was ratified by the UN General Assembly in 1988 (hereinafter the Principles of Protection from Detention or Imprisonment). Principle 1.11 provides:

> A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.

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According to the interpretation of the UN Human Rights Committee "[D]elays must not exceed a few days." *See* Report of the Human Rights Committee, GAOR, 37th Session, Supplement No. 40 (1982), quoted by Rodley, *Id.*, at 335. On a similar note, Article 5(3) of the European Convention for the Protection of human Rights and Fundamental Freedoms-1950 provides:

> Everyone arrested or detained in accordance with the provisions of paragraph 1(C) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.

In one of the cases in which the European Court of Human Rights interpreted this provision, *Brogan v. United Kingdom*, EHRR 117, 134 (1988), it stated:

> The degree of flexibility attaching to the notion "promptness" is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. Whereas promptness is to be assessed in each case according to its special features, the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5(3), that is the point of effectively negating the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority.

In that case, the British authorities had been holding a number of detainees, who had been detained with regard to terrorist activities in Northern Ireland. They were released after four days and six hours, without having been brought before a judge. The European court determined that in so doing, England had violated its duty to bring the detainees before a judge promptly. A number of additional cases were similarly decided. *See McGoff v. Sweden*, 8 EHRR 246 (1984); *De Jong v. Netherlands*, 8 EHRR 20 (1984); *Duinhoff v. Netherlands*, 13 EHRR 478 (1984); *Koster v. Netherlands*, 14 EHRR 196 (1991); *Aksoy v. Turkey*, 23 EHRR 553 (1986) *See also Human Rights Law and Practice* 121-22 (Lester and Pannik eds.,1999).

28. Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter the Fourth Geneva Convention] includes a general provision under which:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

The Fourth Geneva Convention does not include provisions which specify set detention periods or occasions for judicial intervention with regard to detention. It only includes provisions concerning administrative detention

(internment). The first provision, Article 43, which applies to detentions carried out by the occupying state, provides:

> Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.

The second provision, Article 78, which applies to detentions carried out in the occupied territory, provides:

> Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay.

There are no additional provisions which relate to this matter, or to the issue of judicial intervention into detention which is not administrative.

29. Finally, there is security legislation relating to "regular" criminal detention and administrative detention, in the area. With regard to "regular" criminal detention, Order 378 provides that a police officer, who has reasonable reason to believe that a crime has been committed, has the authority to issues a detention order for a period of up to 18 days, *see*

section 78(3). Following the recommendations of the *Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity* (*Landau Commission*), Order 378 was amended, and the detention period without judicial intervention was reduced to 8 days. In a petition submitted in this matter, the Court held that "at this time, there is no room for this Court to intervene to reduce the maximum period of detention permitted before bringing persons detained in the territories before a military judge." HCJ 2307/00 *Natsha v. IDF Commander in the West Bank* (unreported case case).

With regard to administrative detention in the area, such detentions were initially carried out under the Emergency Defense Regulations, which apply to the area. Later on, provisions regarding administrative detention were included in the Defense Regulations Order (Judea and Samaria) (Number 378)-1970. Under these provisions, if a person was detained on the authority of an administrative order, he was to be brought before a judge within 96 hours, *see* section 87B(a). These provisions were suspended by Order 1226. This Order provided that any person who had been administratively detained would be brought before a judge within 8 days. With the issuance of Order 1500, this was changed, and this provision was substituted by one which provided that an administrative detainee should be brought before a judge within 18 days. With the issuance of Order 1505, Order 1226 was once again amended, and it provided that if an administrative detention order was issued against a person who had been formerly being detained under Order 1500, his case was to be brought for judicial review within 10 days of his detention.

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30. Against this normative background, which demands prompt judicial review of detention orders, the question again arises whether the arrangement established in Order 1500—under which a person may be detained for a period of 18 days without having been brought before a judge—is legal. Similarly, is the arrangement established in Order 1505 legal? This arrangement—which was unaffected by Order 1512 or Order 1518—provided that a person may be detained for a period of 12 days without having being brought before a judge. In answering these questions, the special circumstances of the detention must be taken into account. "Regular" police detention is not the same as detention carried out "during warfare in the area," Order 1500, or "during anti-terrorism operations" Order 1505. It should not be demanded that the initial investigation be performed under conditions of warfare, nor should it be demanded that a judge accompany the fighting forces. We accept that there is room to postpone the beginning of the investigation, and naturally also the judicial intervention. These may be postponed until after detainees are taken out of the battlefield to a place where the initial investigation and judicial intervention can be carried out properly. Thus, the issue at hand rests upon the question: where a detainee is in a detention facility which allows for carrying out the initial investigation, what is the timeframe available to investigators for carrying out the initial investigation without judicial intervention?

31. In this regard, the respondents claim before us that it was necessary to allow the investigating officials 18 days—and after Order 1505, 12 days—to carry out "initial screening activities, before the detainee's case is brought before the examination of a judge." This was due to the large number

of persons being investigated, and constraints on the number of professional investigators. In their response, the respondents emphasized that "during the warfare operations, thousands of people were apprehended by the IDF forces, under circumstances which raised the suspicion that they were involved in terrorist activities and warfare. The object of Order 1500 was to allow the "screening" and identification of unlawful combatants who were involved in terrorist activities. This activity was necessary due to the fact that the terrorists had been carrying out their activities in Palestinian populations centers, without bearing any symbols that would identify them as members of combating forces and distinguish them from the civilian population, in utter violation of the laws of warfare." *See* para. 51 of the response brief from May 15, 2002. The respondents added that it is pointless to bring detainees before a judge, when they have not yet been identified, and the investigative material against them has not yet undergone the necessary processing. This initial investigation, performed prior to bringing the detainee before the judge, is difficult and often demands considerable time. This is due, among other reasons, to "the lack of cooperation on the part of those being investigated and their attempts to hide their identities, their hostility towards the investigating authorities due to nationalistic and ideological views, the inability to predetermine the time and place of the detentions, the fact that most of the investigations are based on confidential intelligence information which cannot be revealed to the person being investigated, and the difficulty of reaching potential witnesses." *See* para. 62 of the response brief from June 11, 2002.

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32. The respondents thus claim that the investigating authorities must be allowed the time necessary for the completion of the initial investigation. This will, of course, not exceed a period of 18 days, under Order 1500, or 12 days, under Order 1505, as it was amended in Orders 1512 and 1518. In this timeframe, all those detainees against whom there is insufficient evidence will be released. Only those detainees, whose initial investigation has been completed, such that the investigation is ready for judicial examination, will remain in detention.

In our opinion, this approach is in conflict with the fundamentals of both international and Israeli law. This approach is not based on the presumption that investigating authorities should be provided with the minimal time necessary for the completion of the investigation, and that only when such time has passed is there room for judicial review. The accepted approach is that judicial review is an integral part of the detention process. Judicial review is not "external" to the detention. It is an inseparable part of the development of the detention itself. At the basis of this approach lies a constitutional perspective which considers judicial review of detention proceedings essential for the protection of individual liberty. Thus, the detainee need not "appeal" his detention before a judge. Appearing before a judge is an "internal" part of the dentition process. The judge does not ask himself whether a reasonable police officer would have been permitted to carry out the detention. The judge asks himself whether, in his opinion, there are sufficient investigative materials to support the continuation of the detention.

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Indeed, the laws regarding detention for investigative purposes focus mainly on judicial decisions. In a "natural" state of affairs, the initial detention is performed on the authority of a judicial order. *See* H. Zandberg, *Interpretation of the Detentions Law* 148 (2001). Of course, this state of affairs does not apply to the circumstances at hand. It is natural that the initial detention not be carried out on the authority of a judicial order. It is natural that the beginning of the initial investigation in the facility be performed within the context of the amended Order 1500. Judicial review will naturally come later. Even so, everything possible should be done to ensure prompt judicial review. Indeed, the laws of detention for investigative purposes are primarily laws which guide the judge as to under what circumstances he should allow the detention of a person and under what circumstances he should order the detainee's release. Judicial detention is the norm, while detention by one who is not a judge is the exception. This exception applies to the matter at hand, since naturally, the initial detention is done without a judicial order. Nevertheless, everything possible should be done to rapidly pass the investigation over to the regular track, placing the detention in the hands of a judge and not an investigator. Indeed, the authority to detain as set by Order 1500, as well as the detention authority under Orders 1505, 1512, and 1518, is not unique. This detention authority is part of the regular policing authority, *see* para. 24. Otherwise it could not be conferred upon an authorized officer. This nature of the detention authority affects its implementation. Like every detention authority, it must be passed over to the regular track of judicial intervention as quickly as possible.

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33. Of course, such judicial intervention takes the circumstances of the case into account. In evaluating the detention for investigative purposes, the judge does not ask himself whether there exists *prima facie* evidence of the detainee's guilt. That is not the standard which needs to be tested. At this primary stage, there must be reasonable suspicion that the detainee committed a security crime and reasonable reason to presume that his release will disturb security or the investigation. Regarding this reasonable suspicion, Justice M. Cheshin stated:

> "Reasonable suspicion" will exist even if it is not supported by "prima facie evidence for proving guilt," where there is evidence which connects the suspect to the crime at hand to a reasonable extent that justifies, in the balancing of the interests on each side, allowing the police the opportunity to continue and complete the investigation.

VCA 6350/97 *Rosenstien v. State of Israel* (unreported case); VCA 157/02 *Tzinman v. State of Israel* (unreported case).

Indeed, the judge may often learn of the existence of reasonable suspicion from the circumstances of the detention themselves, which raise the suspicion that the individual detainee presents a danger to the security of the area, *see* the definition of detainee in Orders 1500 and 1505. The judge will review the circumstances and examine whether they raise reasonable suspicion that the crime has been committed. He will, of course, consider additional materials submitted to him. He will inquire into the intended course of investigation and the difficulties of the investigation—whether they be the

lack of manpower or difficulties in the investigation itself—in order to be convinced that the investigators are truly in need of additional time for their investigation. All these will ensure that the decision regarding the continuation of the detention, even if it is only based upon initial investigative materials, will not be made by the investigating authority, but rather by a judicial official. This is the object which lays at the base of both the international and Israeli regulation of detention for investigative purposes.

It is possible, that in the end, the judge will decide to allow the continuation of the detention, as would an authorized officer. This is irrelevant, since the judge's intervention is intended to guarantee that only the proper considerations be taken into account, and that the entire matter be examined from a judicial perspective. This is the minimum required by both the international and Israeli legal frameworks. President Shamgar, in HCJ 253/88 *Sajadia v. Minister of Defense*, at 819-820, expressed the same in reference to judicial review over administrative detention, which also applies to the matter at hand:

> It would be proper for the authorities to act effectively to reduce the period of time between the detention and the submission of the appeal, and the judicial review.

Of course, this does not mean that the judicial review should be superficial. On the contrary, "it is highly significant that a judge thoroughly examine the material, and ensure that every piece of evidence connected to the matter at hand be submitted to him. Judges should never allow quantity to affect

either quality or the extent of the judicial examination." President Shamgar in *Sajadia*, at 820. In exercising his discretion, in each and every case, the judge will balance security needs, on the one hand, and individual liberty, on the other. He will keep in mind President Shamgar's words in *Sajadia*, at 821, which were said with reference to administrative detention, but apply to our case as well:

> Depriving one of his liberty, without the decision of a judicial authority, is a severe step, which the law only allows for in circumstances which demand that such be done for overwhelming reasons of security. Proper discretion, which must be exercised in issuing the order, must relate to the question of whether each concrete decision regarding detention reflects the proper balance between security needs—which have no other reasonable solution—and the fundamental tendency to respect man's liberty.

34. With this in mind, we are of the opinion that detention periods of 18 days, under Order 1500, and 12 days, under Orders 1505, 1512 and 1518, exceed appropriate limits. This detention period was intended to allow for initial investigation. However, that is not its proper function. According to the normative framework, soon after the authorized officer carries out the initial detention, the case should be transferred to the track of judicial intervention. The case should not wait for the completion of the initial or other investigation before it is brought before a judge. The need to complete the initial investigation will be presented before the judge himself, and he will decide whether there

exists reasonable suspicion of the detainee's involvement to justify the continuation of his detention. Thus, Order 1500, as well as Orders 1505, 1512, and 1518, unlawfully infringes upon the judge's authority, thus infringing upon the detainee's liberty, which the international and Israeli legal frameworks are intended to protect.

35. How can this problem be resolved? We doubt that it would be suitable to substitute the periods of detention without judicial intervention set in Order 1500 and the amended Order 1505 with a shorter predetermined detention period. As we have seen, everything rests upon the changing circumstances, which are not always foreseeable. It seems, that due to the unique circumstances before us, the approach adopted by international law, which avoids prescribing set periods and instead requires that a judge be approached promptly, is justified. In any case, this is a matter for the respondents and not for us. Of course, presumably, this means that it will be necessary to substantially enlarge the staff of judges who will deal with detention. It was not argued before us that there is a lack of such judges. In any case, even if the claim had been raised before us, we would have rejected it and quoted President Shamgar's words in *Sajadia*, at 821:

> What are the practical implications of what has been said? If there are a large number of detainees, it will be necessary to increase the number of judges. Difficulty in organizing such an arrangement, which will increase the number of judges who are called to service in order that a detainee's appeal be heard promptly and effectively, cannot justify the length of the period

during which the detainee is held before his case has been judicially reviewed. The current emergency conditions undoubtedly demanded large-scale deployment of forces to deal with the riots occurring in Judea, Samaria and the Gaza Strip, and the matter at hand—the establishment of a special facility in Kziot—is an example of this deployment of forces. However, by the same standards, effort and resources must be invested into the protection of the detainees' rights, and the scope of judicial review should be broadened. If the large number of appeals so demands, ten or more judges may be called upon to simultaneously review the cases, and not only the smaller number of judges who are currently treating these matters. Such is the case—aside from the differences which stem from the nature of the matter—with regard to prosecutors as well. The number of prosecutors may also be increased, due to the need to hasten the appeal proceedings and the preparations thus involved.

Notably, under international law, judicial intervention may be carried out by a judge or by any other public officer authorized by law to exercise judicial power. This public officer must be independent of the investigators and prosecutors. He must be free of any bias. He must be authorized to order the release of the detainee. *See Ireland v. United Kingdom*, 2 EHRR 25 (1978); *Schiesser v.* Switzerland, 2 EHRR 417 (1979).

36. Thus, we hold the 18-day detention period without judicial oversight under Order 1500, and the 12-day detention period without judicial oversight under Orders 1505, 1512, and 1518, to be null and void. They will be substituted by a different period, to be set by the respondents. To this end, the respondents should be allowed to consider the matter. Therefore, we hold that this declaration of nullification will be effective six months from the date at which this judgment is given. *Compare Tzemach*, at 284. We have considered respondents' request to present us with classified information. We are of the opinion that such is neither appropriate nor desirable. We hope that the half-year suspension will allow for the reorganization required by both international and internal law.

Preventing Meetings with a Lawyer

37. Order 378 distinguishes between a "regular" criminal detainee and a detainee suspect of committing a crime set out in security legislation, with regard to the issue of meeting with a lawyer. In the case of the former, the detainee is allowed to meet and consult with his lawyer, *see* section 78B(a). The meeting may only be prevented if the detainee is currently under investigation or subject to other activities connected to the investigation, and even then the delay is only for "a number of hours." *See* section 78B(d). The prevention may be extended for reasons security for up to 96 hours from the time of detention. This is not so in the latter case, of one suspected of a security crime. In this case, the head of the investigation may order that the detainee be prohibited from meeting with a lawyer for a period of 15 days from the day of his detention, if the head of the

investigation is of the opinion that such is necessary for the security of the area or for the benefit of the investigation. *See* section 78C(c). An approving authority may order that the detainee not be allowed to meet with a lawyer for an additional 15 days, if it is convinced that such is necessary for the security of the area or the benefit of the investigation.

38. Order 1500 altered the arrangement set out in Order 378. Section 3 of Order 1500 provides:

> (a) Despite that which is stated in sections 78(b) and 78(c) of the Defense Regulations Order, a detainee shall not meet with a lawyer during the detention period.
>
> (b) At the end of the detention period, a meeting between a detainee and a lawyer shall only be prevented on the order of an approving authority, in accordance with section 78C(c)(2) of the Defense Regulations Order.

Thus, Order 1500 substituted the 15-day detention period set by Order 378, during which a detainee was prevented from meeting with a lawyer, with an 18-day prevention period. After these 18 days, we return to Order 378, and an approving authority may order that the detainee not be allowed to meet with a lawyer for a period of up to 15 days.

39. Order 1505 modified this arrangement. It included two new provisions. First, the original period of preventing the meeting with a lawyer was shortened to four days, *see* section 4 (a). Second, at the end of those four days, the

head of the investigation may order that the detainee not be allowed to meet with his lawyer for an additional period of up to 15 days, if the head of the investigation is of the opinion that such is necessary for the security of the area or the benefit of the investigation. Afterwards, returning to the regular track, an approving authority may order that the detainee not be allowed to meet with a lawyer for an additional period of up to 15 days. Thus, the arrangement set in Order 1500, which allowed for the prevention of a meeting between a detainee and a lawyer for a period of 33 days inclusive—18 days on the authority of the Order itself and an additional 15 days on the authority of the decision of an approving authority—was substituted by a new arrangement which allowed for the prevention of a meeting between a detainee and a lawyer for a period of 34 days inclusive—4 days on the authority of the Order itself, 15 days on the authority of the decision of the head of the investigation and an additional 15 days on the authority of the decision of an approving authority.

40. Another change occurred in this regard with the issue of Order 1518, which further reduced the initial period, during which a meeting with a lawyer could be prevented, to two days, *see* section 3. Thus, the period for preventing a meeting, which had formerly been 34 days under Order 1505—4 days on the authority of the Order itself, 15 days on the authority of the decision of the head of the investigation and an additional 15 days on the authority of the decision of an approving authority, was now 32 days.

41. Are the arrangements set out in Orders 1500, 1505 or 1518 in accord with international law? Upon inspecting international law, one finds that the International Covenant

on Civil and Political Rights-1966 does not include an explicit provision referring to this matter. The provision which most closely relates to this matter may be found in Article 14.3 of the Covenant, which applies to any person who has been criminally charged. It provides, in this regard, that the accused must be guaranteed a facility in which he can prepare his defense with an attorney, *see* sub-section (b), and that in court, he will be defended by an attorney, sub-section (d). A more explicit provision may be found in the Principles of Protection from Detention or Imprisonment. Principle 18.1 provides that:

> A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

This principle has an exception which is significant to the matter at hand. Under Principle 18.3:

> The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

42. The Fourth Geneva Convention does not include any explicit provision regarding meetings with a lawyer. There is, of course, the general provision in Article 27 of the

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Convention, quoted above in para. 28, which protects the dignity and liberty of the residents of the territory, but which, at the same time, provides that the hostile state may take necessary security measures. Aside from this general provision, the provision most closely related to this matter may be found in Article 113 of the Convention:

> The Detaining Powers shall provide all reasonable facilities for the transmission, through the Protecting Power or the Central Agency provided in Article 140, or as otherwise required, of wills, powers of attorney, letters of authority, or any other documents intended for internees or dispatched by them.
>
> In all cases the Detaining Powers shall facilitate the execution and authentication in due legal form of such documents on behalf of internees, in particular by allowing them to consult a lawyer.

This right is subject to security arrangements. Pictet expressed this in noting:

> It was important, however, that these facilities for the transmission of documents should not serve as a pretext for the giving of information for subversive purposes; hence the wording "all reasonable facilities," which enables suspicious correspondence to be eliminated.

See J. S. Pictet, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War

471-472. In summarizing this issue, Vice-President Shamgar, in *Tzemel*, at 377, noted:

> That which is stated in Article 113 and in the interpretation of the Red Cross International Committee, which was subsequently published, indicates that the defense considerations of the detaining power are legitimate considerations.

Another provision of the Fourth Geneva Convention, Article 72, which relates to a detainee who has been criminally charged, provides:

> Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.

43. Thus, under both Israeli and international law, the principle that meetings between detainees and attorneys should generally be permitted constitutes the normative framework in which the legality of the arrangement should be examined. This stems from every person's right to personal liberty. *See* HCJ 3412/91 *Sophian v. Commander of the IDF Forces in the Gaza* Strip, at 847; HCJ 6302/92 *Rumhiah v. Israeli Police Department*, at 212. Nevertheless, such rights are not absolute. In *Sophian*, at 848, Vice-President M. Elon correctly noted:

> The right to meet with a lawyer, like other fundamental rights, is not an absolute right, but rather

> a relative right, and it should be balanced against other rights and interests.

Thus, a meeting between a detainee and a lawyer may be prevented if significant security considerations justify the prevention of the meeting. I expressed this in *Rumhiah*, at 213:

> Preventing a meeting between a detainee and his lawyer is a serious injury to the detainee's right. Such an injury is tolerable only when it is demanded by security and essential for the benefit of the investigation. Regarding the benefit of the investigation—which is the respondents' claim in the matter before us—it is essential to find that allowing the meeting between the detainee and the lawyer will frustrate the investigation. It was correctly noted stated that "it is insufficient that it would be more comfortable, beneficial or desirable"; HCJ 128/84, at 27. It must be shown that such is necessary and essential to the investigation.

International law does not prescribe set maximum periods during which meetings may be prevented. These should be inferred from the specific circumstances, according to tests of reasonability and proportionality. A similar approach has been adopted in the Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism. These Guidelines provide:

> The imperative of fight against terrorism may nevertheless justify certain restrictions to the right of defence, in particular with regard to the arrangements for access to and contact with counsel.

44. It may be inferred from this that the detainee should not be allowed to meet with his lawyer so long as the warfare continues. This Court recently stated as much:

> It is inconceivable that the respondent should allow meetings with persons during warfare or close to it, when there exists a suspicion that they endanger or may be a danger to the security of the area, the security of the IDF forces, or the security of the lawyers. This remains the case until conditions develop as to allow for the consideration of the individual circumstances of each and every detainee.

HCJ 2901/02 *The Center for the Defense of the Individual founded by Dr. Lota Salzbereger v. IDF Commander in the West Bank* (unreported case).

What is the law where the detainee is already in an organized detention facility, and conditions which allow for the consideration of the individual circumstances of each and every detainee have developed?

45. Our answer is that the standard rule in this situation should be that the fundamental right of meeting with a lawyer should be realized. However, significant security considerations may prevent this. Thus, for example, the respondent noted in his response that a meeting with a lawyer may be prevented where there is suspicion that "the lives of the combat forces will be endangered due to opportunities to pass messages out of the facility." *See* para. 54 of the response brief from 5.5.2002. We are in agreement with this. There is also room to prevent a meeting when it may damage or disrupt the investigation. It should be emphasized, however, that advancing the investigation

is not a sufficient reason to prevent the meeting. "The focus is on the damage that may be caused to national security if the meeting with the lawyer is not prevented." HCJ 4965/94 *Kahalani v. Minister of Police* (unreported case) (Goldberg, J.). Thus, "it is insufficient that it is comfortable, beneficial or desirable to prevent a meeting with a layer. The expression 'is required' indicates that there must be an element of necessity which connects the decision to the reasons it is based upon." HCJ 128/84 *Hazan v. Meir*, at 27 (Shamgar, P.) With this in mind, we are of the opinion that there are no flaws in the arrangements set in Orders 1500, 1505, and Order 1518 regarding the prevention of meetings with lawyers.

46. Before concluding this matter, we wish to relate to one of the petitioners' claims. The claim is that, by preventing meetings with lawyers on the authority of Order 1500, 1505, or 1518, the detainees remain incommunicado for a period of 18 days, under Order 1500, 4 days, under Order 1505, or two days, under Order 1518. We reject this claim. Even if meetings with lawyers are prevented, this does not justify the claim that the detainee is isolated from the outside world. It is sufficient to note that when the detainees are moved to the detention facility, which occurs within 48 hours of their detention during warfare, they have the right to be visited by the Red Cross, and their families are informed of their whereabouts. At any time, they may appeal to the High Court of Justice in a petition against their detention. *See* section 15(d)(1) of the Basic Law: The Judiciary. Not only may the detainee himself appeal to the Court, but his family may also do so. Furthermore, under our approach to the issue of standing, any person or organization interested in the fate of the detainee may also do so. Indeed, the petition before was submitted by, among others, seven associations or

organizations that deal with human rights. Their claims were heard and the issue of standing was not even raised in these proceedings. Under these circumstances, it cannot be said that those detained on the authority of Order 1500, *a fortiori* those detained on the authority of Order 1505, and certainly not those who were detained on the authority of Order 1518, are in a state of isolation from the outside world.

Detention Without Investigation

47. Section 2(b) of Order 1500 provides:

> The detainee shall be given the opportunity to voice his claims within eight days of his detention.

This provision remains valid under Order 1505. Section 2 of Order 1518 shortens this period of detention without investigation to four days. The petitioners claim that the provision itself is illegal. They assert that it constitutes an excessive violation of the detainee's liberty. It undermines the right to liberty and denies due process. It may lead to mistaken or arbitrary detrainments. Conversely, the respondents claim that the significance of the provision is that it compels the investigators to question the detainee within eight days, in order to make an initial investigation of his identity and hear his account of his detention. This period cannot be shortened due to the large number of detainees, on the one hand, and the constraints limiting the number of professional investigators, on the other. It was noted before us that the investigating officials have limited capabilities, and they are not equipped to deal with such a large number of detainees in a more compact schedule.

Appendix 1

48. We accept that investigations should not be performed during warfare or during military operations, nor can the detainee's account be heard during this time. The investigation can only begin when the detainee, against whom there stands an individual cause for detention, is brought to a detention facility which allows for investigation. Moreover, we also accept that at a location which holds large number of detainees, some time may pass before it is possible to organize for initial investigations. This, of course, must be done promptly. It is especially important to begin the investigation rapidly at this initial stage, since simple facts such as age, circumstances of detention and identity, which may determine whether the detention should be continued, may become clear at this stage. Of course, often this initial investigation is insufficient, and the investigation must continue. All of this must be done promptly.

Respondents are of course aware of this. Their argument is simple: there is a lack of professional investigators. Unfortunately, this explanation is unsatisfactory. Security needs, on the one hand, and the liberty of the individual on the other, all lead to the need to increase the number of investigators. This is especially true during these difficult times in which we are plagued by terrorism, and even more so when it was expected that the number of detainees would rise due to Operation Defensive Wall. Regarding the considerations of individual liberty that justify such an increase, Justice Dorner has stated:

> Fundamental rights essentially have a social price. The preservation of man's fundamental rights is not only the concern of the individual, but of all of society, and it shapes society's image.

Ganimat, at 645. In a similar spirit, Justice Zamir, in *Tzemach*, at 281, has noted:

Appendix I

> A society is measured, among other things, by the relative weight it attributes to personal liberty. This weight must express itself not only in pleasant remarks and legal literature, but also in the budget. The protection of human rights often has its price. Society must be ready to pay a price to protect human rights.

Such is the case in the matter at hand. A society which desires both security and individual liberty must pay the price. The mere lack of investigators cannot justify neglecting to investigate. Everything possible should be done to increase the number of investigators. This will guarantee both security and individual liberty. Furthermore, the beginning of the investigation is also affected by our holding that the arrangements according to which a detainee may be held for 18 days without being brought before a judge, under Order 1500, and for 12 days, under Order 1505, 1512, and 1518, to be illegal. Now, the detainee's own appeal to a judge will require that the investigation be carried out sooner.

49. We conclude, from this, that the provisions of section 2(b) of Order 1500 and section 2 of Order 1518 are invalid. The respondents must decide on a substitute arrangement. For this reason, we suspend our declaration that section 2(b) of Order 1500 and section 2 of Order 1518 are void. It will become valid only after six months pass from the date of this judgment. *Compare Tzemach*, at 284. Here too, we considered the respondents' request to present us with confidential information, *see supra* para. 36, and here too we are of the opinion that such is neither appropriate nor desirable. This suspension period should be utilized for reorganization, which should be in accord with international and Israeli law.

Appendix 1

The petition is denied in part, with regard to the authority to detain provided in Orders 1500, 1505, 1512 and 1518, and with regard to the prevention of meetings between detainees and lawyers. The petition is granted in part in the sense that we declare the provision of section 2(a) of Order 1500, as later amended by Order 1505 and extended by Orders 1512 and 1518, the provision of section 2(b) of Order 1500 and the provision of section 2 of Order 1518 to be null and void. This declaration of nullification will become effective six months after the day on which this judgment is given.

Justice D. Dorner
I agree.

Justice I. Englard
I agree.

Decided as stated in the opinion of President A. Barak.
5.2.2003

APPENDIX II

COMPARISON *ISRAEL AND UNITED STATES*	
Population	
Israel 6,500,000	*United States* 300,000,000
Deaths from Terrorism (since January 1, 2001)	
Israel 1067 deaths	*United States* 3000 deaths
Rate of Deaths from Terrorism per 100,000 population (since January 1, 2001)	
Israel 16.4 deaths per 100,000	*United States* 1 death per 100,000
Number of Deaths from Terrorism, Adjusted for Population Size	
Israel 1067 deaths	*United States* (at Israeli rate) 49,150 deaths

DETENTION OF UNLAWFUL COMBATANTS	
Time for Initial Review of Basis for Detention	
Israel	*United States (Guantánamo)*
Judicial review is required within no more than 14 days. Incarceration of Unlawful Combatants Law ["UCL"], 5762-2002, (Isr.) §§ 3(a), 5(a).	*Boumediene* and *al Odah* petitioners were held for years prior to any hearing. The CSRTs were created in July 2004 and proceedings began thereafter. The CSRT procedures set no timetable for hearings regarding new detentions. Memo. from Hon. Gordon R. England, Sec'y of the Navy, regarding Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantánamo Bay Naval Base, Cuba (July 29, 2004) ["CSRT Procedures"], Encls. (1)-(9); Memo. from Hon. Gordon R. England, Sec'y of the Navy, regarding Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba (Sept. 14, 2004) ["ARB Procedures"], Encls. (1)-(12).

Appeal of Detention Decisions	
Israel Detainee has the right of appeal to a court of independent civil or military judges, followed by the right to petition for review by the Israeli Supreme Court; appellate review is a *de novo* determination based on the whole record. State of Israel, Ministry of Justice, Foreign Relations & Int'l Org. Dep't, The Legal Framework for the Use of Administrative Detention as a Means of Combating Terrorism 4 (March 2003) ["Ministry of Justice, The Legal Framework"].	*United States (Guantánamo)* Detainee has a limited right of appeal to the United States Court of Appeals for the District of Columbia Circuit, which can review only a claim brought by an alien detained by the Department of Defense in Guantánamo and for which a CSRT hearing has been conducted. The scope of review is limited to whether the status determination was consistent with the CSRT procedures. These procedures impose a preponderance of the evidence standard and provide for a rebuttable presumption in favor of the government's evidence. To the extent the Constitution and federal laws are applicable, the scope of review also includes whether the status determination process was consistent with the Constitution and federal law. Detainee Treatment Act of 2005, Pub. L. No. 109-163, § 1405(e)(2), 119 Stat. 3476 (2006).

Independence of Tribunal Conducting the Review	
Israel Review tribunal is composed of civilian or military judges, all of whom are independent of the executive and military detaining authorities. UCL § 5(a); Emergency Powers (Detention) Law 1979 ["EPDL"], S.H. 76, § 4(c); Lisa Hajjar, Courting Conflict: The Israeli Military Court System in the West Bank and Gaza 254 (2005).	*United States (Guantánamo)* The CSRT is composed of officers assigned by a political appointee in the Department of Defense. Only one of the officers is a judge-advocate. CSRT officers lack the guarantees of independence afforded to U.S. military judges under the Uniform Code of Military Justice, 10 U.S.C. § 826(c). CSRT Procedures, Encl. (1), § C(1).
Standard Required to Support Detention	
Israel Detention requires a determination that the detainee poses a threat to State security and that no other means are available to neutralize the threat. UCL §§ 3(a), 5(a); EPDL § 2(a); Detention in Time of Warfare (Temporary Order) (Judea and Samaria) (number 1500)-2002, § 2(a) (Heb.); HCJ 253/88 *Sajadia v. Minister of Defense* [1988] IsrSC 42(3) 801.	*United States (Guantánamo)* The CSRT is to determine if the detainee meets the criteria to be designated an enemy combatant. Enemy combatant is defined as an individual that was part of or supporting the Taliban or al Qaida forces engaged in hostilities against the United State or its coalition partners. Threat to security is not an issue for consideration. Memo. from Deputy Sec'y of Def. Paul Wolfowitz regarding Order Establishing Combatant Status Review Tribunal (July 7, 2004), ¶ (a).

Scope of Review of Detention Decision	
Israel Judges must undertake a searching *de novo* examination of the record; absent sufficient evidentiary support, judges will order immediate release of the detainee. HCJ 253/88 *Sajadia v. Minister of Defense* [1988] IsrSC 42(3) 801; HCJ 3239/02 *Marab v. IDF Commander in the West Bank* [2003] IsrSC 57(2) 349.	*United States (Guantánamo)* The CSRT decides whether a preponderance of the evidence supports the conclusion that the detainee is an enemy combatant; CSRT conclusions are advisory only; and the CSRT has no power to order release. CSRT Procedures, Encl. (1), § G(11).
Coerced Testimony	
Israel Coercive and inhumane methods of interrogation are prohibited; testimony obtained by such methods is subject to exclusion. Basic Law: Human Dignity and Freedom, 1992, S.H. 1391, art. 8; HCJ 5100/94 *Pub. Comm. Against Torture in Israel v. State of Israel* [1999] IsrSC 53(4) 817; Evidence Ordinance (New Version) 5731-1971, 2 LSI 198 (1968-72) (Isr.), § 12; CrimA 5121/98 *Isacharov v. State of Israel* (unpublished) IsrSC.	*United States (Guantánamo)* CSRTs and Administrative Review Boards ("ARBs") are permitted to consider "the probative value (if any)" of any statement "derived from or obtained by coercion.' Detainee Treatment Act of 2005, Pub. L. No. 109-163, § 1405(b)(1), 119 Stat. 3476 (2006).

Classified Material	
Israel Independent civilian or military judge is empowered to determine whether classified material may be withheld from detainee and may order the government to produce such material to the detainee. The government may refuse, but then it must release the detainee. UCL § 5(e); Itzhak Zamir, *Human Rights and National Security*, 23 Isr. L. Rev. 375, 398-99 (1989).	*United States (Guantánamo)* CSRTs and ARBs have no authority to declassify classified material. CSRTs and ARBs cannot order disclosure of classified materials to detainees. CSRT Procedures, Encl. (1), § D(3); ARB Procedures, Encl. (3), § 4(d).
Right to Counsel for Detainees	
Israel Detainees have access to counsel within no more than 34 days. HCJ 3239/02 *Marab v. IDF Commander of the West Bank* [2003] IsrSC 57(2) 349.	*United States (Guantánamo)* Detainees are not permitted to have access to counsel. CSRT Procedures, Encl. (1), § F(5); ARB Procedures, Encls. (3), (4), (9), (10).

Frequency and Character of Periodic Review	
Israel	*United States (Guantánamo)*
Detention orders must be reviewed at least once every six months in the same independent judicial forum in which the orders were first issued. The renewal hearing is fully adversarial, with the detainee represented by counsel of his choice. If the judge finds that the detainee no longer poses a threat, the detainee must be released, and if the detention order is renewed, the renewal is subject to review at two levels by independent appellate courts. UCL § 5(c); Ministry of Justice, The Legal Framework, at 4.	Periodic review occurs only once a year, by ARB members who are appointed by Deputy Secretary of Defense and are not guaranteed independence. The review proceeding is non-adversarial, and the detainee is not permitted to be represented by counsel. The ARB may base continued detention either on a finding that detainee is still a threat or on other reasons, and the ARB's opinion is advisory only, with the decision to detain indefinitely remaining entirely within the executive branch. After the detainee's initial determination by the CSRT and limited review by the United States Court of Appeals for the District of Columbia Circuit, there is no further right of access to counsel or to the courts. ARB Procedures, Encls. (3), (4), (9), (10); 28 U.S.C. § 2241(e).

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(14) (24)

Nos. 06-1195 and 06-1196

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

KHALED A. F. AL ODAH, *et al.*,
Petitioners,

v.

UNITED STATES, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF UNITED STATES SENATOR ARLEN SPECTER IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, Senator Alen Specter, is the Ranking Member of the Senate Committee on the Judiciary. During the 109th Congress, when the Military Commissions Act of 2006 and the Detainee Treatment Act of 2005 moved through the Senate, *amicus* was Chairman of that Committee and held several hearings to consider whether it is constitutionally permissible for Congress to deny the right of habeas corpus to detainees held at the United States Naval Station at Guantanamo Bay without providing an adequate and effective alternative to challenge the legality of their detention. *Amicus*, being intimately familiar with the statutory provisions implicated in these cases, urges this Court to recognize the constitutional infirmity inherent in Congress' effort to foreclose the Great Writ.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States began sending alien detainees to Guantanamo over five years ago, after capturing them in the field and declaring them "enemy combatants." Approximately 415 detainees have been released to other countries while additional prisoners have since been interned at the installation.[2] In total, the base remains home to roughly 360 detainees, of whom eighty have been designated for release.[3] By all accounts, certain dangerous individuals reside within the walls of Guantanamo. Toward the end of 2006, for example,

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[1] This brief is filed with the written consent of the parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* and his counsel, make a monetary contribution to the preparation or submission of this brief.

[2] Dep't of Defense, News Release, *Detainee Transfer Announced* (July 16, 2007), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=11130 (last visited Aug. 22, 2007).

[3] *Id.*

the government transferred fourteen "high value" detainees to the base, including the alleged (and now, reportedly, confessed) 9/11 mastermind, Khalid Sheikh Muhammad.[4] Moreover, reports indicate that as many as thirty former detainees released from Guantanamo have returned to the battlefield to face U.S. forces.[5]

The question presented here is not whether some of the individuals should continue to be detained. They should. The question is whether the U.S. Constitution ensures that the writ of habeas corpus is available for detainees to contest the legality of their detention by the executive.

The writ of habeas corpus is an age-old legal means for challenging unlawful detention at the hands of an executive authority. The Founders imported this common law right from England; afforded it constitutional protection in the Suspension Clause, U.S. CONST. art. I, § 9, cl. 2; and authorized the federal courts to issue the writ, *see* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

Three years ago, in *Rasul v. Bush*, 542 U.S. 466 (2004), this Court explained that the common law writ extends both to citizens and to aliens within United States territory. *See id.* at 481. In turn, the Court reasoned that, because the United States exercises exclusive jurisdiction and control over Guantanamo, "[a]pplication of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus." *Id.*; *see* 28 U.S.C. § 2241 (2000). Shortly thereafter, the Department of Defense (DoD) insti-

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[4] *See* Dep't of Defense, *Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10024* (Mar. 10, 2007), *available at* http://www.defenselink.mil/news/transcript_ISN10024.pdf (last visited Aug. 22, 2007).

[5] *See, e.g.*, Griff Witte, *Taliban Leader Once Held by U.S. Dies in Pakistan Raid*, WASH. POST, July 25, 2007, at A1.

tuted Combatant Status Review Tribunals (CSRTs) to ascertain whether each detainee should still be considered an enemy combatant and remain detained at the Guantanamo facility. *See* Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004) ("CSRT Order"); Memorandum from Gordon England, Deputy Sec'y of Def., to the Sec'ys of the Military Dep'ts et al., Implementation of Combatant Status Review Tribunal Procedures (July 14, 2006) (previously issued July 29, 2004) ("CSRT Procedures").

The following year, with the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (DTA), Congress purported to preclude habeas petitions from aliens detained at Guantanamo, *id.* § 1005(e)(1), while at the same time providing for a limited review of CSRT determinations in the D.C. Circuit, *id.* § 1005(e)(2). In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), this Court held that this so-called jurisdiction-stripping provision did not apply to pending cases and therefore found it unnecessary to address its constitutional implications. In response, Congress passed the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (MCA), to preclude habeas petitions from Guantanamo detainees in all cases—pending and future, *id.* § 7 (superseding DTA § 1005(e)(1)).

In the present cases, the court of appeals relied on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to hold that the Guantanamo detainees have no constitutional right to seek habeas relief because Guantanamo is not within the sovereign territory of the United States. *Boumediene v. Bush*, 476 F.3d 981, 990-92 (D.C. Cir. 2007), *cert. denied*, 127 S. Ct. 1478 (Apr. 2, 2007), *reh'g and cert. granted*, 127 S. Ct. 3078 (June 29, 2007). This decision flies directly in the teeth of this Court's reasoned conclusion in *Rasul* as to Guantanamo's unique territorial status, which places it within the "historical reach

of the writ" as it existed at common law prior to and during the founding era. At a minimum, that writ enables the Guantanamo detainees to challenge, in federal court, the legality of their detention.

Although this Court has permitted legal means to challenge detention other than through a habeas petition, such means must be an "adequate and effective" substitute for habeas. The procedures for reviewing enemy combatant status provided pursuant to the DTA depart dramatically from the core features of habeas relief, however, and are therefore a wholly inadequate substitute. In particular, they fail to provide an independent forum for the challenge to be heard, a fair opportunity to contest enemy combatant status, and an imperative remedy to end unlawful detention.

Accordingly, this Court should hold that the MCA's attempt to curtail the Guantanamo detainees' access to habeas corpus is constitutionally infirm. Habeas must be restored to ensure that the rule of law prevails at Guantanamo.

ARGUMENT

I. The MCA Precludes Habeas Relief In Pending Cases

As a preliminary matter, this Court should decline Petitioners' invitation to exempt pending detainee cases from the ambit of the MCA. *See* Pet. 12-14, No. 06-1195; Pet. 25-26, No. 06-1196. The Petitioners' argument is aimed at avoiding this Court's review of the pressing constitutional issues. The language of the statute, however, is straightforward: it precludes pending and future actions, both habeas and non-habeas (except for limited CSRT appeals in the D.C. Circuit), that relate to "any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of alien detainees alleged to be enemy combatants. *See* MCA § 7 (codified at 28 U.S.C § 2241(e)).

Section 7(a) of the MCA removes the federal courts' jurisdiction to hear or consider (1) "an application for a writ of habeas corpus" and (2) "any *other* action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement." (Emphasis added.) In turn, section 7(b) states that "subsection (a) . . . shall apply to *all cases, without exception,* pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention." (Emphasis added.) Although this list mirrors the language that section 7(a) uses to address non-habeas cases (in the second clause), it does not mean that section 7(b) exempts habeas cases (which are referenced in section 7(a)'s first clause). To the contrary, section 7(b) explicitly references the entirety of 7(a) and conspicuously omits the word "other"—a qualifier used in section 7(a) to address non-habeas actions. In short, there is no significance to section 7(b)'s use of one clause to refer to what section 7(a) refers to in two clauses. *Cf.* MCA § 3(a) (adding 10 U.S.C. § 950j).

Moreover, as Congress debated and passed the MCA, both the Members who opposed and the Members who supported these provisions recognized the effect on pending habeas cases. *See, e.g.*, 152 CONG. REC. S10357 (daily ed. Sept. 28, 2006) (statement of Sen. Leahy, who voted against the MCA) ("This new bill strips habeas jurisdiction retroactively, even for pending cases."); *id.* at S10404 (statement of Sen. Sessions, who voted in favor of the MCA) ("I don't see how there could be any confusion as to the effect of this act on the pending Guantanamo litigation. The MCA's jurisdictional bar applies to that litigation 'without exception.'").[6] Sim-

[6] *See also* 152 CONG. REC. S11197 (daily ed. Dec. 5, 2006) (Sen. Specter); *id.* at S10364-65 (daily ed. Sept. 28, 2006) (Sens. Smith and Levin); *id.* at S10269-70 (daily ed. Sept. 27, 2006) (Sen. Kyl); *id.* at H7938 (daily ed. Sept. 29, 2006) (Rep. Hunter); *id.* at H7942 (Rep. Jackson-Lee); *id.* at H7544 (daily ed. Sept. 27, 2006) (Rep. Sensenbrenner).

ilarly, the lone dissenter below agreed with the majority that the statute impacts pending habeas cases. *Boumediene*, 476 F.3d at 986-88 & n.2; *id.* at 999 (Rogers, J., dissenting).

Any attempt to avoid this interpretation runs headlong into the plain statutory text as well as the clear understanding of the legislators. *See Swain v. Pressley*, 430 U.S. 372, 378 n.11 (1977). As a consequence, this Court should move past the statutory argument and determine whether the MCA's jurisdiction-stripping provisions are constitutional.

II. The Great Writ Extends To Guantanamo Detainees

The Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. At a minimum, this constitutional protection extends to the writ as it existed at common law in 1789. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). Although it has expanded since that time to include post-conviction collateral review of detentions, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *Id.*

In *Rasul*, this Court held that the federal habeas statute was available to aliens being detained at Guantanamo. *See* 542 U.S. at 485; 28 U.S.C. § 2241 (2000). In reaching this conclusion, this Court reasoned that extending habeas to such individuals was "consistent with the historical reach of the writ of habeas corpus," given that Guantanamo was "territory over which the United States exercises exclusive jurisdiction and control." *Rasul*, 542 U.S. at 476, 481-82. At common law, this Court declared, "even if a territory was 'no part of the realm,' there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the

subjection of the Crown.'" *Id.* at 482 (quoting *King v. Cowle*, 97 Eng. Rep. 587, 598-99 (K.B. 1759)).

Although the court of appeals held that "[t]he text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba—not the United States—has sovereignty over Guantanamo Bay," *Boumediene*, 476 F.3d at 992, this conclusion is of no moment given that under *Rasul*, the "historical reach of the writ" turns not on *de jure* sovereignty, but rather on *de facto* exclusive jurisdiction and control. This Court conclusively determined that the United States enjoys complete *de facto* control of Guantanamo.

It bears emphasizing that Guantanamo, for the reasons articulated in *Rasul*, is uniquely situated. 542 U.S. at 471, 480-81. Under the 1903 lease agreement, although Cuba retains "ultimate sovereignty," the United States "shall exercise complete jurisdiction and control over and within said areas."[7] Also, pursuant to a subsequent treaty, the arrangement is to last indefinitely and it cannot unilaterally be terminated by Cuba.[8] As Justice Kennedy explained, "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . . From a practical perspective, the indefinite lease . . . has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." *Rasul*, 542 U.S. at 487 (concurring opinion) (quoting *Eisentrager*, 339 U.S. at 777-78).

Additional facts illustrate this exclusive control. First, under the lease agreement, "[t]he United States exercises ex-

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[7] Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418 ("*Lease*").

[8] *See* Treaty Between the United States and Cuba Defining Their Relations, May 29, 1934, U.S.-Cuba, art. III, T.S. No. 866.

clusive criminal jurisdiction over all persons, citizens and aliens alike, who commit criminal offenses at the Base[.]" *Gherebi v. Bush*, 352 F.3d 1278, 1289 (9th Cir. 2003), *vacated on other grounds*, 542 U.S. 952 (2004).[9] Second, the United States has the power of eminent domain at Guantanamo. *See Lease* art. III. Third, when Fidel Castro severed water and supplies to the base in 1964, the base promptly "became and remains entirely self-sufficient, with its own water plant, schools, transportation, entertainment facilities, and fast-food establishments." *Gherebi*, 352 F.3d at 1295. Fourth, although Cuba has declared its belief that the United States has not adhered to restrictions in the original agreement, Cuba nonetheless has recognized that it is powerless to do anything about it.[10] Fifth, the base remains in place despite the lack of formal relations between the United States and Cuba.

The contrast between Guantanamo and other American military bases, past and present, further highlights the exclusivity of American control of the base. For example, Diego Garcia, located in the Indian Ocean, is operated under an agreement with Great Britain that, unlike the Guantanamo

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[9] *See* Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, art. IV, T.S. No. 426; *United States v. Lee*, 906 F.2d 117, 117 & n.1 (4th Cir. 1990) (Jamaican national charged with sexual abuse occurring at Guantanamo); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975) (U.S. civilian employee at Guantanamo Bay under contract with the Navy was prosecuted for drug offenses and tried in Virginia).

[10] *Compare Lease* art. II (permitting the United States "generally to do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose"), *with* Statement by the Government of Cuba to the National and International Public Opinion (Jan. 11, 2002) ("Cuba could do absolutely nothing to prevent [other activities]."), *available at* http://ciponline.org/cuba/cubaproject/cubanstatement.htm (last visited July 31, 2007).

lease, is terminable by either party.[11] Similarly, the United States has operated various military facilities under agreements that run only for a specific period of time,[12] articulate very narrow purposes,[13] or provide for joint control.[14] Indeed, Landsberg, the post-WWII prison in Germany that housed the petitioners in *Eisentrager*, was operated under three flags (those of the United States, Great Britian, and France). *Gherebi*, 352 F.3d at 1287 n.10. In still other instances of American control abroad, the host country has pressured the United States to leave or make changes.[15] Such is not the case at Guantanamo, where the United States "is accountable to no one." Gerald L. Neuman, *Anomalous*

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[11] *See* Availability of Certain Indian Ocean Islands for Defense Purposes, Dec. 30, 1966, U.S.-U.K., para. 11, 18 U.S.T. 28 (terminating two years after "either Government shall have given notice of termination to the other"); *see also, e.g.*, Establishment of Long Range Aid to Navigation Station in the Bahama Islands, June 24, 1960, U.S.-U.K., art. XXVI, 11 U.S.T. 1587; Mutual Defense Treaty, Oct. 1, 1953, U.S.-S. Korea, art. VI, 5 U.S.T. 2368.

[12] *See, e.g.*, Treaty Regarding United States Defence Areas and Facilities in Antigua, Jan. 1, 1978, U.S.-Ant. & Barb., art. XXIV, 29 U.S.T. 4183 ("This Agreement shall come into force on January 1, 1978, and shall remain in force through December 31, 1988.").

[13] *See, e.g.*, Connie Veillette, CRS Report RL32337, *Andean Counterdrug Initiative (ACI) and Related Funding Programs: FY2005 Assistance* 18 (May 10, 2005) (describing agreement for use of location "solely for the detection of drug trafficking flights in the region").

[14] *See, e.g.*, Defense of Greenland, June 8, 1951, U.S.-Den., art. II, 2 U.S.T. 1485.

[15] *See, e.g.*, Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1 (reporting that, in 2003, the Thai government insisted CIA shut down "black" site where it was holding and interrogating suspected terrorists); Matthew L. Wald, *U.S. Curbs Low-Flight Training in Italy Near '98 Ski-Lift Deaths*, N.Y. TIMES, Mar. 11, 1999, at A7 (describing Italian response to accident involving U.S. pilots based out of Aviano).

Zones, 48 STAN. L. REV. 1197, 1230 (1996); *see also Gherebi*, 352 F.3d at 1300 ("[T]he United States' territorial relationship with the Base is without parallel today . . . .").

Consequently, the lower court's reliance on *Eisentrager* is misplaced. *See Boumediene*, 476 F.3d at 990-92. In *Eisentrager*, this Court turned back the habeas claims of enemy aliens who were captured, tried, convicted, and detained on non-U.S. territory. Once Guantanamo is understood to be under the exclusive authority of the United States, as *Rasul* holds it must, then *Eisentrager* no longer controls. Nor can the court below draw support from the DTA provision stating that "'United States,' when used in a geographic sense . . . does not include the United States Naval Station, Guantanamo Bay, Cuba." DTA § 1005(g). Whether or not "the determination of sovereignty over an area is for the legislative and executive departments," *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948), *see Boumediene*, 476 F.3d at 992, the inquiry, per *Rasul*, into the common law scope of the writ turns not on formal sovereignty, but rather on the functional level of control. Here, it is plain that the United States exercises such control over Guantanamo.

In short, contrary to the court of appeals decision, *Rasul*'s analytical path leads inexorably to the conclusion that the Constitution prevents Congress from eliminating the writ for the Guantanamo detainees—absent the prerequisites for suspension (rebellion or invasion), which no one asserts here. With Guantanamo under the plenary control of the United States and isolated from the heat of battle, the "ordinary constitutional processes" can, and must, move forward. *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting); *see also Rasul*, 542 U.S. at 487 (Kennedy, J., concurring) (observing that Guantanamo is "far removed from any hostilities").

III. The Framework Established for Challenging Detention Is an Insufficient Substitute For The Great Writ

Although the MCA deprives the Guantanamo detainees of the legal right to petition for a writ of habeas corpus, the Suspension Clause will not be offended if there remains a substitute remedy that is "neither inadequate nor ineffective to test the legality of a person's detention." *Swain*, 430 U.S. at 381; *see also St. Cyr*, 533 U.S. at 314 n.38; *Sanders v. United States*, 373 U.S. 1, 14 (1963). However, no adequate substitute appears here.

This Court has upheld statutory alternatives that shifted the challenge to a different court, while not otherwise materially altering the nature of the habeas remedy. For example, this Court has approved a provision shifting habeas challenges to local D.C. courts, notwithstanding their lack of tenure and salary protections, *Swain*, 430 U.S. at 383-84, and a provision requiring actions to be brought by federal convicts in the sentencing district rather than the district of detention, *United States v. Hayman*, 342 U.S. 205 (1952) (upholding 28 U.S.C. § 2255). These substitutes avoided constitutional difficulties largely by virtue of an escape clause allowing habeas relief in an Article III court any time the alternative proves "inadequate or ineffective." *Swain*, 430 U.S. at 381; *Hayman*, 342 U.S. at 223.[16] No such escape clause exists here, as the

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[16] Restrictions on filing successive petitions have also been approved because such constraints fall "well within the compass of [the] evolutionary process" of the writ. *Felker v. Turpin*, 518 U.S. 651, 664 (1996). Lower courts have upheld other modest limitations, such as a one-year statute of limitation—albeit often acknowledging equitable tolling as a means to avoid constitutional impropriety. *See, e.g., Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005); *Delaney v. Matesanz*, 264 F.3d 7, 12 (1st Cir. 2001); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998).

procedures established under the DTA are the sole mechanism by which detention may be challenged.

Far from a mere change in venue or an inconvenient hurdle, the procedures available to the Guantanamo detainees for contesting detention represent a dramatic departure from the essence of habeas relief and, accordingly, are ill-suited as an alternative. The limited status review mechanisms include CSRTs (to assess the detainees' status upon arrival) and Administrative Review Boards (ARBs) (to reassess the status annually). The DoD is given wide discretion in designing these tribunals, *see* DTA § 1005(a)-(b), and it can alter them at will, *see id.* § 1005(c)

Moreover, the DTA only makes available a limited appeal of CSRT decisions in the D.C. Circuit to determine whether the CSRT complied with the DoD's "standards and procedures" (including the requirement that a CSRT base its conclusions on a preponderance of the evidence, allowing a rebuttable presumption in favor of the government's evidence), and whether those "standards and procedures" are "consistent with the Constitution and laws of the United States." *Id.* § 1005(e)(2)(C). The courts are otherwise barred from hearing actions (including habeas petitions) relating to the "detention, transfer, treatment, trial, or conditions of confinement" of alien detainees alleged to be enemy combatants. MCA § 7.

The inquiry into the necessary scope of an adequate habeas substitute, while potentially murky at the margins, is informed by the Due Process Clause. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion) (explaining that Due Process Clause "informs the procedural contours" of the writ of habeas corpus); David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 75 n.67 (2006) ("[T]he habeas remedy (or an adequate alternative) and the right of a detainee not to be deprived of liberty without due process are intertwined.").

Here, in light of the *Rasul* Court's characterization of Guantanamo as being under plenary U.S. control—which perhaps makes it akin to the "unincorporated territories" in the so-called "Insular Cases"—the detainees are entitled to at least a bare minimum of due process in contesting enemy combatant status.[17]

Whatever the precise metes and bounds of the inviolable core of habeas, the exclusive framework established by the DTA and MCA provides an insufficient substitute for habeas because it lacks three fundamental features of due process: a hearing before an impartial adjudicator, a fair opportunity to rebut the government's allegations, and an imperative remedy.

A. The Framework Lacks an Independent Tribunal

The DTA fails to provide an independent forum in which to contest executive detention in the first instance, contrary to the requirements of habeas corpus and fundamental due process. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993) ("[D]ue process requires a neutral and detached judge *in the*

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[17] *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298, 311-13 (1922) (Constitution affords "certain fundamental personal rights" to inhabitants of territories not yet "incorporated" by Congress); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1342-43 (2d Cir. 1992) ("fundamental constitutional rights" are guaranteed to Guantanamo inhabitants), *vacated as moot*, 509 U.S. 918 (1993); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2094 (2007) ("Guantanamo Bay is sufficiently similar, functionally, to American territory that at least fundamental constitutional rights extend to all who are held there."); *but see Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995); *Vermilya-Brown*, 335 U.S. at 405 (Jackson, J., dissenting) (arguing Guantanamo is not a "possession").

first instance . . . ." (emphasis added; internal quotation marks and citation omitted)); *Zadvydas v. Davis*, 533 U.S. 678, 723 (2001) (Kennedy, J., dissenting) (highlighting the importance of a "neutral administrative official" in cases involving prolonged alien detention); *Hamdi*, 542 U.S. at 533 (plurality opinion) (finding citizen entitled to "neutral decisionmaker" in challenging enemy combatant status in habeas action). Instead, detainees must initially face a non-neutral tribunal—a CSRT staffed with executive branch officials. *See* CSRT Procedures, encl.1 § C; *Boumediene*, 476 F.3d at 1005 (Rogers, J., dissenting) ("[T]hese proceedings occur before a board of military judges subject to command influence."). Labeling the CSRT panel members as "*neutral* commissioned officers," CSRT Procedures, encl.1 § C(1) (emphasis added), is of little comfort to the detainee, whose plea for release depends on the very executive branch that is detaining him. Indeed, that turns traditional habeas corpus on its head, putting the king in the role of both jailer and judge. *See Lonchar v. Thomas*, 517 U.S. 314, 322 (1996) (describing the writ's "most basic purpose" as "avoiding serious abuses of power by a government, say a king's imprisonment of an individual without referring the matter to a court").

Although this Court has understood that non-Article III courts may entertain petitions challenging the legality of executive detention, *see Swain*, 430 U.S. at 383-84, never has it allowed the executive branch the authority to assess the lawfulness of its own detentions. It is clear why the Court has never done so. Consolidating the decision to detain with the review of that decision is anathema to fundamental liberty interests.

In fact, the CSRT procedures have allowed the government, upon receiving an unfavorable CSRT decision, to convene multiple tribunals until the detainee is found to be an enemy combatant. *See Boumediene*, 476 F.3d at 1006-07 (Rogers, J., dissenting); Decl. of Stephen Abraham, Lt. Col.,

U.S. Army Reserve ¶ 23 (June 15, 2007) ("Abraham Decl."), *appended to* Reply to Br. in Opp. to Reh'g, No. 06-1196; *see also Upholding the Principles of Habeas Corpus for Detainees, 2007: Hearing before the House Armed Servs. Comm.*, 110th Cong. (Jul. 26, 2007) (testimony of Stephen Abraham) (noting that CSRTs have been empanelled "precisely for the purpose of overturning prior findings that were favorable to the detainees"). Plainly, the CSRTs (and, similarly, the ARBs) are in no sense independent and, accordingly, are not a passable substitute to the Great Writ.

Moreover, such a fundamental structural flaw cannot be remedied on review, especially given the limited scope of authority afforded the D.C. Circuit. *See Hamdan*, 126 S. Ct. at 2807 (Kennedy, J., concurring) (expressing concern for DTA's limited review of military commissions and noting that "provisions for review of legal issues after trial cannot correct for structural defects . . . that can cast doubt on the factfinding process and the presiding judge's exercise of discretion during trial"); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61-62 (1972) (holding that due process requires "a neutral and detached judge in the first instance" and that a biased initial adjudication cannot be cured simply by offering an impartial tribunal on appeal).

Recently, in *Bismullah v. Gates*, the D.C. Circuit highlighted its constrained authority in CSRT review cases, acknowledging that its "jurisdiction under the [DTA] is expressly 'limited to the consideration of' whether a detainee's status determination was 'consistent with the standards and procedures specified by the Secretary of Defense for [a CSRT].'" --- F.3d ----, ----, 2007 WL 2067938, at *7 (D.C. Cir. July 20, 2007) (quoting DTA § 1005(e)(2)(C)(i)). The court further fleshed out its deferential posture in explaining that the DTA "does not authorize [the] court to determine whether a status determination is arbitrary and capricious because . . . it is inconsistent with the status

determination of another detainee who was detained under similar circumstances." *Id. Cf. Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting) ("As persons within our jurisdiction, the aliens are entitled to the protection of the Due Process Clause[,] . . . includ[ing] protection against . . . arbitrary personal restraint or detention."). This suggests that, faced with similar evidence in two cases, the court will not make its own determination but will instead defer to a non-neutral panel.[18]

In sum, by permitting the executive branch to determine the legality of its own detention decisions and then by constraining the D.C. Circuit's review of this inherently biased tribunal, the DTA fails to provide an adequate substitute to habeas corpus. This deficiency alone is fatal to the MCA's habeas-stripping provision.

B. The Framework Lacks a Fair Opportunity to Rebut the Accusations

The limited nature of the D.C. Circuit's review is even more problematic when considered in light of the CSRTs' other deficiencies that deny detainees due process and make it impossible meaningfully to contest enemy combatant status.

Aside from the lack of a truly neutral and independent adjudicator, the additional shortcomings of the CSRTs have been well-documented. *See Boumediene*, 476 F.3d at 1005-06 (Rogers, J., dissenting); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2100 & n.286 (2007); Abraham Decl. ¶¶ 5-23. Those deficiencies include the lack of counsel; the lack of standards and safeguards in

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[18] *Cf. Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (court will not "displace [an agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*").

sifting through evidence; the potential use of information obtained under abusive interrogation techniques; the limitation on discovery of classified information; the tribunal's discretion to screen out evidence and witnesses found to be not "reasonably available"; the inability to ascertain the factual basis underlying the government's case; the government's low burden of proof; the admission of hearsay evidence; and the rebuttable presumption in favor of the government's evidence. *See* DTA § 1005(b)(1), (e)(2)(C)(i); CSRT Procedures, encl.1 §§ B, E(2)-(3), F(5)-(6), F(8), G(2), G(7), G(9)-(11), H(7); *id.*, encl.3 §§ A(1), C(1), D; *id.*, encl.10 § B. While some of these elements might individually be justifiable under certain limited circumstances, *see Hamdi*, 542 U.S. at 533-34 (plurality opinion) (giving qualified approval of hearsay evidence and rebuttable presumptions), in the aggregate, this framework denies a detainee a "fair opportunity to rebut the Government's factual assertions" and "present his own factual case to rebut the Government's return," *id.* at 533, 538.

The CSRTs' shortcomings are hardly surprising given the haste with which they were issued in the wake of *Rasul*—and given that the DoD *itself* contemplated the continuing availability of habeas corpus as a failsafe. *See* CSRT Order at 1 ("[A]ll detainees shall be notified . . . of the right to seek a writ of habeas corpus in the courts of the United States."). Apparently, even on its own terms, the DoD did not intend CSRTs to act a substitute for habeas.

One particular anecdote, recounted in an opinion rendered by the United States District Court for the District of Columbia below, brings the matter into focus. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). An individual was being detained on allegations that he was "associated with a known Al Qaida operative." *Id.* at 469. However, he was not told his purported associate's name (the tribunal did not even know it) and was unable to

view the evidence against him (if any even existed). Unable to defend himself, and lacking independent defense counsel, he simply denied the charges and stated: "I was hoping you had evidence that you can give me. . . . [I]f a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about that." *Id.* The resulting laughter by those in the tribunal room demonstrates the absurdity of the situation. As the district court judge noted, it would have been humorous, had it not been so serious and "had the detainee's criticism of the process not been so piercingly accurate." *Id.* at 470.

A process such as this, which lacks even the fundamental indicia of a fair judicial proceeding, demands robust habeas review. That is, given that the procedural protections afforded by the CSRTs are "rudimentary at best," Fallon & Meltzer, *supra*, at 2100 & n.286, a habeas court's duty must be correspondingly heightened. *See Hamdi*, 542 U.S. at 538-39 (plurality opinion) (calibrating scope of the habeas review based on deficiencies in prior executive proceedings and expecting the habeas court to "permit[] the alleged combatant to present his own factual case to rebut the Government's return" and to "engag[e] in a factfinding process"); Fallon & Meltzer, *supra*, at 2098 ("[T]he appropriate scope of review often depends on the nature of the prior executive proceeding[.]").[19]

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[19] *See also Swain*, 430 U.S. at 383 ("Normally a state judge's resolution of a factual issue will be presumed to be correct [by a federal habeas court] *unless the factfinding procedure employed by the state court was not adequate*." (emphasis added)); *Burns v. Wilson*, 346 U.S. 137, 141 (1953) (plurality opinion) (approving of limitations on habeas review of court-martial determinations where "[r]igorous provisions guarantee a trial as free as possible from command influence, the right to prompt arraignment, the right to counsel of the accused's own choosing, and the right to secure witnesses and prepare an adequate defense").

The DTA is not up to the task, notwithstanding the government's assurances to the contrary. The government contends that the various CSRT deficiencies can be addressed by the D.C. Circuit as it ascertains whether a CSRT "misapplied" the DoD's specified standards and procedures. Br. in Opp. to Cert. 17; *see* DTA § 1005(e)(2)(C)(i). While this argument is not without force as to certain issues, *see Bismullah*, --- F. 3d at ----, 2007 WL 2067938, at *6 & n.* (noting that court will review pre-hearing actions taken by CSRT staff for compliance with DoD procedures), there are at least three concerns that resist such an easy response: the lack of counsel, the lack of reliable process to uncover exculpatory information, and the lack of prohibitions on evidence adduced by coercion.

1. First, the CSRT is a "non-adversarial proceeding" at which the detainee "shall not be represented by legal counsel," and will only have access to a "Personal Representative"—a commissioned officer who is not necessarily trained in the law, who is appointed by the Director, who is forbidden from acting as a detainee's advocate, and with whom "no confidential relationship exists." CSRT Procedures, encl.1 §§ B, F(5); *id.*, encl.3 §§ A(1), C(1), D. Although access to legal counsel is well-established as an essential aspect of challenging one's detention, *see Hamdi*, 542 U.S. at 539, the CSRTs fail to provide this fundamental protection. As this Court has noted in other contexts, the right to counsel is "necessary to insure fundamental human rights of life and liberty," given that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Gideon v. Wainwright*, 372 U.S. 335, 343, 344-45 (1963) (internal quotation marks and citations omitted).

This lack of counsel cannot be cured on review in the D.C. Circuit. During the CSRT's crucial factfinding stage, the detainee will be unaided by an advocate in preparing his case,

discerning what evidence and witnesses to seek, and attempting to digest the non-confidential evidence against him. And it is at that stage that a detainee most needs the "guiding hand of counsel," *id.* at 345 (internal quotation marks and citation omitted), given that the choices made will chart and constrain the appellate court's course on review. Rather than being in a position to correct the absence of counsel below, the appellate court's ability to review the case will be hampered by the absence of counsel below.

The D.C. Circuit's decision in *Bismullah*, --- F.3d ----, 2007 WL 2067938, issued in July 2007, does not mitigate the problem. There, the court determined that detainees challenging a CSRT decision would have access to counsel, that the record on review would include "all the information a [CSRT] is authorized to obtain and consider" (not just the subset actually presented to the CSRT), and that the court can review whether the CSRT properly determined witnesses and evidence not to be "reasonably available." *Id.* at *1, *7. Such apparent concessions, however, are of little practical solace for the detainee who, unaided by counsel in the CSRT, was not savvy enough to request certain witnesses or evidence in the first instance. Similarly, as a detainee is unable to draw upon classified information in the CSRT, it is little help that, on review, counsel is given access to such information and is presumed to have a "need to know," *id.* at *1, *8—after the factfinding damage is already done.

Indeed, the court seems disinclined to allow such factual development as might be necessary to offset the prior lack of counsel. *See id.* at *7 (finding further discovery not necessary "in order to challenge a CSRT's ruling that a requested witness or item of evidence was not 'reasonably available'" because "that ruling must be made on the record, which should be sufficient to determine whether the [CSRT] acted in accordance with the specified procedures"). In like fashion, the government has made clear its view that a detainee

cannot adduce new evidence in his DTA court challenge. *See* Br. in Opp. to Reh'g 7 n.3 (DTA procedures "permit detainees to present new evidence *to the Defense Department*" (emphasis added)). Thus, the lack of counsel as the CSRT purports to sort out the facts injects a persistent taint that undermines the adequacy of the D.C. Circuit's review.

2. Second, the CSRT procedures lack standards and safeguards for culling exculpatory information from the various federal agencies. *See* Abraham Decl. ¶¶ 10-18 (explaining the inability to discern whether agencies produce all exculpatory evidence and noting the absence of a requirement that staff members have legal or intelligence training). This represents a serious deficit of due process, doing little to "minimize the risk of erroneous decisions." *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979).[20]

In particular, the procedures allow government agencies (such as intelligence organizations) to decline CSRT requests for information, merely by providing instead a "certification to the Tribunal that none of the withheld information would support a determination that the detainee is not an enemy combatant." CSRT Procedures, encl.1 § E(3)(a). However, there are no specified standards by which the sundry agencies are to exercise discretion in assessing what constitutes exculpatory information. *See* Abraham Decl. ¶ 16 ("The content of intelligence products, including databases, made

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[20] *Cf. Youngblood v. West Virginia*, 126 S. Ct. 2188, 2190 (2006) ("A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused[—]even evidence that is known only to police investigators and not to the prosecutor." (internal quotation marks and citation omitted)); *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

available to case writers, Recorders, or liaison officers, was often left entirely to the discretion of the organizations providing the information."); *id.* ¶¶ 10-16 (detailing irregularities in certification process and in collection of exculpatory information). Similarly, individual military commanders are tasked with deciding if their subordinates are "reasonably available," and civilian witnesses can simply "decline properly made requests to appear at a hearing." CSRT Procedures, encl.1 § G(9)(a), (b).

This standardless discretion cannot be cured on review, as the D.C. Circuit's limited inquiry only addresses final decisions *of the CSRT*. *See* DTA § 1005(e)(2)(A). In other words, a hodgepodge of other federal agencies, military commanders, and civilian witnesses—not a court, and not even the CSRT—are making potentially unreviewable decisions about the universe of evidence that is available to the CSRT. As such, notwithstanding a CSRT's full compliance with the governing procedures, any resulting CSRT fact-finding on a "preponderance of the evidence," DTA § 1005(e)(2)(C)(i), is inherently unreliable and unworthy of deference.[21] A review premised on such an *ad hoc* set of standards (or lack thereof) does not ensure the due process necessary for a detainee to meaningfully contest his detention, as is required by an adequate habeas substitute.

Nor is it sufficient to ensure that, on review, the D.C. Circuit will have access to all of the government's evidence (including exculpatory evidence) that the CSRT is "authorized to obtain and consider." *See Bismullah*, --- F.3d at ----, 2007 WL 2067938, at *1. In order to have a meaningful opportunity to contest the basis of detention, the detainee must have access to the exculpatory evidence during the

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[21] *Cf.* Fallon & Meltzer, *supra*, at 2069 ("Modern notions of deference to administrative decisionmakers, developed primarily in other contexts, are in considerable tension with the historic office of the Great Writ.").

initial CSRT proceedings as he formulates a strategy and attempts to persuade the factfinder.

3. Third, a CSRT faces no solid barriers whatsoever to using evidence obtained under abusive conditions. The procedures simply require the CSRT to "assess, to the extent practicable, whether any statement derived from or relating to such detainee was obtained as a result of coercion and the probative value, if any, of such statement." CSRT Procedures, encl.10 § B. There is no requirement that such statements be excluded—a shortcoming not remedied on appeal given that the statute itself contemplates such evidence. *See* DTA § 1005(b)(1). While no one suggests that statements taken in the context of military action be subjected to the same level of scrutiny as if taken in the course of routine police actions, it is incumbent that there be *some* articulated standards for assessing probity, allowing for appropriate consideration of weighty national security concerns. As currently designed, however, the CSRTs are given no such guidance.

In short, there are several impediments to a fair and meaningful opportunity to contest detention that are not cured by the D.C. Circuit's relatively constrained review. An adequate habeas remedy cannot consist of making sure an executive tribunal followed its own patently inadequate rules.[22] Even if, by promulgation of certain regulations, the executive branch remedied several of these procedural

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[22] Nor is it dispositive, as the government suggests, that the DTA permits the D.C. Circuit to determine whether the CSRTs' standards and procedures are consistent with the Constitution and laws of the United States. *See* Br. in Opp. to Cert. 17; DTA § 1005(e)(2)(C)(ii). Where, as here, the mechanism for reviewing detention as *currently* enacted by Congress and implemented by the DoD is, on its face, an insufficient substitute for habeas corpus, such a mechanism does not suddenly become adequate simply by providing an additional forum where its flaws can be identified.

deficiencies, the detainee still would be dependent on the discretion of the executive. Congress has not spelled out the precise framework for the CSRTs (and ARBs)—except that they must "provide for periodic review of any new evidence" and must, "to the extent practicable, assess" the probative value of any statements resulting from coercion, DTA § 1005(a)(3), (b)(1)—and has, instead, entrusted the DoD to fill in the gaps, *see id.* § 1005(a)(1)(A). And the DoD is free to alter the procedures at will. *See id.* § 1005(c); CSRT Procedures § 3. Such a flimsy and ephemeral set of procedural safeguards is an inadequate substitute for habeas.

C. The Framework Lacks an Imperative Remedy

Finally, the DTA does not provide either the CSRTs or the D.C. Circuit with the power to order the release of individuals whose indefinite detentions are unlawful. At its core, the writ's function is "to afford a *swift and imperative* remedy in all cases of illegal restraint upon personal liberty." *Price v. Johnston*, 334 U.S. 266, 283 (1948) (emphasis added). As imported from England, "the use of habeas corpus to *secure release* from unlawful physical confinement . . . was thus an integral part of our common-law heritage." *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973). This is reflected, for example, in the federal statute providing post-conviction relief for federal convicts (as a substitute to habeas under § 2241): if the sentence is illegal, the court is authorized to "discharge the prisoner" after "vacat[ing] and set[ting] the judgment aside." 28 U.S.C. § 2255. While, over time, the writ may have expanded, a claim for "'immediate release' . . . lies at 'the core of habeas corpus.'" *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005) (quoting *Preiser*, 411 U.S. at 482, 487).

1. A CSRT has no power to order a detainee released, even if it determines that the detainee is not an enemy combatant. As implemented, if the CSRT "determines that the detainee shall no longer be classified as an enemy

combatant," its decision (once approved by the Director) is forwarded "in order to *permit* the Secretary of State to coordinate the transfer of the detainee with representatives of the detainee's country of nationality for release *or other disposition* consistent with applicable laws," CSRT Procedures, encl.1 § I(9) (emphases added), and "consistent with domestic and international obligations and the foreign policy of the United States," CSRT Order § i. Also, the "implementing directive is subject to revision at any time." CSRT Procedures § 3. The lack of an imperative remedy is apparent from this permissive language.[23]

Accordingly, in the absence of statutory constraints, there is ample wiggle room for continued detention at the discretion of executive officials—who are under no obligation to reach an agreement with the host countries at all, let alone in an expeditious fashion. By claiming it has not received adequate assurances from the home countries to address security risks posed by the individuals to be released, the executive branch can refrain indefinitely from actually releasing the detainees.[24] Moreover, as noted above, a finding of non-enemy combatant status might result in nothing more than a new CSRT. *Boumediene*, 476 F.3d at 1006-07 (Rogers, J., dissenting).

2. Nor is the D.C. Circuit given authority to order release. Even if that court, in exercising its limited review,

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[23] In similar fashion, ARBs offer little remedial hope. *See* Memorandum from Gordon England, Deputy Sec'y of Def., to the Sec'ys of the Military Dep'ts et al., Revised Implementation of Administrative Review Procedures, encl.3 § 1(b) (July 14, 2006); *id.*, encl.4 § 5(c)-(d). *Cf.* 18 U.S.C. § 4203 (explicitly authorizing U.S. Parole Commission to "grant . . . an application [for] parole" with respect to certain offenders).

[24] *See* Dep't of Defense, News Release, *Detainee Transfer Announced* (July 16, 2007) (discussing 80 detainees still in custody despite being "designated for release or transfer").

concludes that the CSRT's procedures were improper—that is, the court determines either that the CSRT did not comply with the Defense Secretary's "standards and procedures" or that the "standards and procedures" are inconsistent with the Constitution and laws of the United States—the court is only given authority "to determine the validity of any final decision of a [CSRT]." DTA § 1005(e)(2)(A), (C).

In other statutory schemes, Congress has explicitly empowered courts to order release, *e.g.* 28 U.S.C. § 2255 (authorizing court to discharge federal convict), or, more generally, to compel agency action, *e.g.*, 5 U.S.C. § 706(1) (authorizing court to "compel agency action unlawfully withheld or unreasonably delayed"). Tellingly, it has not done so here. In fact, the government has acknowledged implicitly that, under the DTA, the D.C. Circuit can only remand to the CSRT, not order release. Br. in Opp. to Reh'g 7. Voiding the CSRT's decision would thus apparently leave the detainee in his *ex ante* position—*i.e.*, detained.[25]

In sum, lacking an imperative remedy to cure unlawful detention, these procedures are not an adequate substitute for the Great Writ. As has been the case over the last five years, the resulting "indefinite detention of an alien" represents a "serious constitutional problem," *Zadvydas*, 533 U.S. at 690, impacting "friends and foes alike," *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring).

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[25] Moreover, the DTA's statutory review provisions do not allow the D.C. Circuit to step in when the government refuses to release a detainee that has received a *favorable* CRST decision. *See* DTA § 1005(e)(2)(A) (authorizing court to "determine the validity of any *final decision* of a [CSRT] that an alien is *properly detained as an enemy combatant*" (emphasis added)). That is, a detainee cannot challenge whether the government's asserted reasons for continued detention (e.g., inability to secure agreement from a destination country) are instead mere pretense or the result of a lack of diligence.

At the end of the day, Congress is, of course, capable of amending the statute to prescribe a framework commensurate with traditional habeas review. Indeed, efforts statutorily to specify CRST procedures are underway. *See, e.g.*, S. Amdt. 2011, 110th Cong. § 1023(a) (proposed July 9, 2007) (substitute amendment to H.R. 1585).[26] However, this Court should provide guidance to legislators and clarify that although the detainees' legal authority to petition for habeas may be statutorily removed, Congress must—at a minimum—establish a constitutionally adequate procedure to enable the Guantanamo prisoners to challenge the legality their detentions. While Congress will undoubtedly continue to work its will, it is incumbent upon this Court to provide appropriate constitutional guidance and to restore habeas to its rightful place. By making clear that certain constitutional minimums apply, this Court will preserve Congress' role in mapping out the path forward while simultaneously allowing the detainees the opportunity to be heard and to advance the merits of their individual cases without further delay.

After all, these detainees are not "some undefined, limitless class of noncitizens who are beyond our territory." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (Kennedy, J., concurring). They are 360 individuals who "face continued detention, perhaps for life," and, even though aliens are "subject to limitations and conditions not applicable to citizens," they are nonetheless entitled to a "fair hearing under lawful and proper procedures." *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting); *see also Hamdi*, 542 U.S. at

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[26] Among other things, the proposed legislation specifies that a detainee appearing before a CSRT is entitled to legal counsel; may "compel witnesses to appear and testify and to compel the production of other evidence"; and may cross-examine witnesses against him. S. Amdt. 2011, § 1023(a) (amending DTA § 1005(b)). Furthermore, it requires a CSRT President to be a military judge and prohibits a CSRT from considering a statement resulting from torture. *Id.*

530 (plurality opinion) ("[A]n unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present [an immediate] threat [to the national security of the United States during ongoing international conflict]."). We do not shield our eyes from the danger those interned at Guantanamo may present. But neither can we blind ourselves to the shunting aside of our constitutional values. Our nation is strong, our Constitution revered, precisely because our laws apply equally to all persons—regardless of how heinous their actions may have been.

In an address at Buffalo Law School in 1951, Justice Jackson warned that "suspension of privilege of the writ of habeas corpus is in effect a suspension of every other liberty." Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 109 (1951). In the most recent iteration of that same lecture series, another federal judge appropriately echoed these sentiments: "[T]he Great Writ and the liberty interests that it represents are supported by balanced power in government and challenged when power is unbalanced and unchecked." James Robertson, *Quo Vadis, Habeas Corpus?*, 55 BUFF. L. REV. (forthcoming 2008). To avoid an incongruous legal "black hole" at Guantanamo, this Court should strike down the MCA's illegal suspension of the Great Writ and allow Congress to establish procedures consistent with what national security and the Constitution require.

CONCLUSION

This Court should reverse the judgment of the court of appeals and remand for further proceedings.

Respectfully submitted,

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August 24, 2007

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 06-1196 and 06-1195

IN THE

Supreme Court of the United States

KHALED A.F. AL ODAH, ET AL., *Petitioners,*
v.
UNITED STATES OF AMERICA, ET AL., *Respondents.*

LAKHDAR BOUMEDIENE, ET AL., *Petitioners,*
v.
GEORGE W. BUSH, ET AL., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF 383 UNITED KINGDOM AND EUROPEAN PARLIAMENTARIANS IN SUPPORT OF PETITIONERS

[International Law—Need for Adherence]

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INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of a group of 383 U.K. and European parliamentarians, including 272 current or former Members of the U.K. Parliament and 111 current or former Members of the European Parliament (the "*amici*").[1] The full list of *amici* is attached as an Appendix to this brief.

Amici are drawn from all across Europe, and the group spans the political spectrum, including senior figures from all major political parties in the U.K. The group also includes several former judges of the highest court in the U.K.; senior lawyers; former Cabinet Ministers, including a Secretary of State for Defense; a former Attorney-General; a former European Commissioner and U.K. ambassador to the United Nations; two former Speakers of the House of Commons; 12 Bishops and Archbishops of the Church of England; a former Archbishop of Canterbury; a Vice President of the European Parliament; and a former Vice President of the European Commission.

Amici note that Petitioners have not been charged by the United States with any war crimes or other crimes, acts of terrorism or acts in violation of the laws of war. *Amici* express no view on whether Petitioners or any of them have in fact engaged in any such acts. Nor do *amici* seek to express any view on the legitimacy of the military action in Afghanistan or Iraq or the politics or tactics of the "war on

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored the brief in whole or in part and no person or entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

terror" in general. These are questions on which *amici* hold differing individual views.

Amici have come together to participate in this case because, despite their divergent political views, they share a common view that it is important to the international legal order that, even when faced with the threat of international terrorism, all States, including the United States, comply with the standards set by international humanitarian law and human rights law. *Amici* share a concern that the treatment of Petitioners currently falls short of these standards and urge the Court to ensure that these standards are observed in relation to Petitioners.

The outcome of this case is, for Petitioners, of course, of enormous personal significance: if denied meaningful access to the courts to challenge the legality of their detention or the process to which they have been subjected they face the prospect of remaining indefinitely outside the legal order, unprotected by either the Constitution or Laws of the United States or the rules of international law specifically applicable to individuals like Petitioners, engaged or caught up in armed combat, or apparently even the general rules of international law relating to fundamental human rights.

For the community of liberal democracies committed to the rule of law, which each member of the *amicus* group is or has been privileged to serve, the stakes are equally high. While this case presents a number of contested issues of U.S. law (which *amici* do not address), to the outside world it boils down to the simple, but crucial, question of whether the system of legal norms that purports to restrain the conduct of States vis-à-vis individuals within their power will survive the terrorist threat. This case can thus be seen as one battle in the ongoing war between the evil logic of terrorism and the bedrock principles that individuals are entitled to fair and

humane treatment under the rule of law—principles which American and coalition soldiers today fight to uphold in Afghanistan, Iraq and elsewhere.

If the Court of Appeals' determination that the doors of the courts are effectively closed to Petitioners' *habeas corpus* challenge to their prolonged, indefinite detention stands, *amici* fear that the lesson that will be drawn by the wider world is that the evil of terrorism has proved more than a match for our principles and that accordingly other States will fail to abide by these principles in their own conduct. To avoid thus eroding bedrock principles of human rights and the rule of law, *amici* urge this Court to reaffirm what liberal democracies the world over have long asserted: that even "amid the clash of arms, the laws are not silent." *Liversage v. Andersen*, [1942] A.C. 206 (H.L.).

SUMMARY OF ARGUMENT

This case presents questions of U.S. constitutional and statutory interpretation which are addressed in detail in other submissions. This *amicus* submission aims to provide an international perspective on the wider context within which this Court's decision will be viewed.

Accordingly, *amici* draw attention to the common heritage of respect for human rights and the rule of law of civilized nations. The United States has long been a leading proponent of these principles, which are reflected in specific international legal instruments, including not only the Geneva Conventions of 1949, relating in particular to armed conflict, but also human rights treaties, and norms of customary international law. When the United States acts inconsistently with international law, it undermines fundamental principles of human rights and the rule of law and it damages long-standing efforts by civilized nations to achieve universal recognition of and respect for those

principles. These principles have recently been reaffirmed in two landmark decisions of the U.K. House of Lords ensuring basic human rights for terrorism-related prisoners, *A and others v. Sec'y of State for the Home Dep't; X and another v. Sec'y of State for the Home Dep't* [2004] UKHL 56, and rejecting the use of evidence obtained by torture in judicial proceedings, *A and others v. Sec'y of State for the Home Dep't*, [2005] UKHL 71.

The United States' prosecution of the "war on terror" is subject to human rights treaties and customary norms of human rights and humanitarian law and the fundamental standards they impose. Wherever and whenever relevant conduct takes place, even in time of war or armed conflict, the United States' treatment of prisoners such as Petitioners will be assessed according to these universal standards.

Amici are concerned that the treatment to which Petitioners have been subjected falls short of those fundamental standards and the United States' international legal obligations. In particular, the Combatant Status Review Tribunal (CSRT) process contravenes applicable international legal standards of fairness because it: (a) fails to ensure an impartial determination of the basis for Petitioners' continued detention; (b) reverses the presumption of innocence to which Petitioners are entitled; (c) does not provide Petitioners the right to confront all the evidence against them; and (d) does not afford Petitioners the chance to offer evidence on their own behalf on equal terms. In addition, the CSRT process violates international law by failing to exclude evidence obtained through torture.

Moreover, if, as the Court of Appeals held, the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), strips the courts of jurisdiction to hear Petitioners' *habeas* challenges to their detention and bars

meaningful scrutiny by the courts of the factual and legal basis for Petitioners' claims that their continued detention is unlawful, the United States will have failed in its basic and non-derogable international legal obligation to ensure that anyone deprived of his liberty has the right to meaningful access to a court to challenge the lawfulness of his detention.

The rule of law, humanitarian and human rights principles at stake in this case are the very principles which the coalition of liberal democracies together seek to uphold and defend in the "war on terror." The Court should bear these stakes in mind in considering the questions presented in these petitions.

ARGUMENT

I. The United States And The Nations Of Europe Share A Common Heritage Of Respect For Human Rights And The Rule Of Law.

A. The United States Has Long Been A Standard Bearer For Human Rights And The Rule Of Law.

The United States has long played a "leading role . . . in the international struggle for human rights." *See* S. Exec. Rep. No. 23, 102d Cong., 2d Sess. (1992) (on the occasion of ratification of the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 ("ICCPR")). The human rights and rule of law principles that are the focus of this brief find eloquent expression in the Declaration of Independence and the U.S. Constitution, which themselves both reflect principles in the Magna Carta and have in turn influenced the development of constitutional democracies the world over. Accordingly, the United States has seen itself—and been seen—as a nation "unwilling to witness or permit the slow undoing of those human rights to

which this nation has always been committed." J. Kennedy, Inaugural Address (Jan. 20, 1961), *reprinted in* Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101-10 (1989).

B. Our Common Heritage Is Codified In A Network Of Human Rights Treaties And Other International Legal Obligations.

In the modern era, the United States and the nations of Europe have frequently cooperated in developing the international treaties, principles and institutions that create the public international law framework that nations share today. These instruments reflect our common heritage of respect for human rights and the rule of law. They impose binding obligations on every nation that has signed up to them, including the United States, and customary international law binds States universally. Critically, insofar as these treaties relate to human rights, they extend the basic protections of the law to all human beings, without differentiation based on color, creed, gender or nationality.

The United States has pledged to uphold the rights created by the international human rights treaties to which it is a party. Exec. Order No. 13,107, 61 Fed. Reg. 68,991 (Dec. 10, 1998) ("It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the [ICCPR], the [Torture Convention], and the [Convention on the Elimination of All Forms of Racial Discrimination]. It shall also be the policy and practice of the Government of the United States to promote respect for international human rights . . . .").

1. The United States Is Bound By The ICCPR.

Central to the modern human rights framework is the ICCPR, which is a treaty that embodies the fundamental civil and political rights contained in the Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810 ("Universal Declaration"), agreed at the United Nations General Assembly on December 10, 1948.

Among other protections, the ICCPR guarantees fair-trial rights, including not only the fundamental right "to a fair and public hearing by a competent, independent and impartial tribunal established by law," art. 14(1), but also "the right to be presumed innocent until proved guilty according to law," art. 14(2), the right of a prisoner "to be informed promptly and in detail . . . of the nature and cause of the charge against him," art. 14(3)(a), and the right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him," art. 14(3)(e). The ICCPR also enshrines *habeas corpus* as a fundamental human right: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful," art. 9(4).

With over 150 States Parties, the ICCPR is the most widely accepted human rights treaty in existence. The United States ratified the ICCPR on September 8, 1992, and is therefore bound by its terms.

When ratifying the ICCPR, the United States appended a "declaration" to the effect that the operative provisions of the Covenant are "not self-executing". 138

CONG. REC. S4784 (daily ed. Apr. 2, 1992). The basis for this declaration (the effect of which is that the ICCPR does not, of itself, create private rights directly enforceable in U.S. courts) was that "the fundamental rights and freedoms protected by the Covenant are already *guaranteed as a matter of U.S. law*, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases." Report submitted by the United States of America under Article 40 of the ICCPR, U.N. Doc. CCPR/C/81/Add.4 (1994), at 2 (emphasis added).

This declaration does not relieve the United States of its obligations on the international legal plane. Rather it operates as a representation to the international community that the United States' international legal obligation to confer the fundamental rights and protections enshrined in the ICCPR will be discharged through the medium of U.S. domestic law, including the U.S. Constitution, because individuals whose human rights may be infringed are entitled to effective equivalent remedies under that law. The declaration amounts to an undertaking to the other States Parties to the ICCPR that the United States will secure the protections set forth in the ICCPR through domestic law as applicable to "all individuals within its territory and subject to its jurisdiction", *see* ICCPR, art. 2(1).

This Court has held that the United States exercises "'complete jurisdiction and control' over the Guantanamo Bay Navai Base." *Rasul v. Bush*, 542 U.S. 466, 480 (2004). Accordingly, prisoners at Guantanamo are entitled to the fair trial, *habeas* and other rights guaranteed in the ICCPR.

2. The United States Is Bound By The Torture Convention.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 ("Torture Convention"), was ratified by the United States in October 1994 and entered into force for the United States on November 20, 1994. The Torture Convention prohibits both torture and cruel and inhuman treatment, *see* arts. 2 and 16, and the use or admission in legal proceedings of evidence obtained by torture, *see* art. 15.

As with the ICCPR, the United States has entered a declaration to the effect that the operative provisions of this convention are not self-executing. Such a declaration constitutes a representation to the international community that U.S. domestic law will conform to the Torture Convention. And as with the ICCPR, the Torture Convention remains a valid instrument of international law to which the United States is a party, to which it has pledged to adhere, *see* Exec. Order No. 13,107, *supra*, and by which it is bound.

The Secretary of State has reaffirmed that "the United States' obligations under the [Torture Convention] extend to U.S. personnel wherever they are, whether they are in the United States or outside of the United States." Secretary of State Condoleezza Rice, Statement at Press Event with Ukrainian President Viktor Yushchenko (Dec. 7, 2005), *transcript available at* http://www.state.gov/secretary/rm/2005/57723.htm ("Secretary Rice Statement"). Accordingly, the Torture Convention applies to the conduct of CSRT proceedings by U.S. personnel concerning detainees held at the U.S. Naval installation at Guantanamo Bay.

3. The United States Is Bound Not To Defeat The Object And Purpose Of The ACHR.

The American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 ("ACHR"), is a regional human rights instrument existing under the aegis of the Organization of American States. It contains protections for civil and political rights—including the right to challenge the lawfulness of any deprivation of liberty in court, *see* ACHR, art. 7(6), and the right to a fair trial in terms similar to the ICCPR, *see* ACHR, art. 8—as well as economic, social and cultural rights.

The United States has signed, but not ratified, the ACHR. As a signatory, although it is not strictly bound by the ACHR, the United States has an obligation not to defeat its object and purpose, *see* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 18, and must therefore avoid taking any action that is inconsistent with the rights set out therein. The object and purpose of the ACHR extends to guaranteeing the rights contained therein on an individual basis. *See* ACHR, fourth preambular paragraph. U.S. courts can, and frequently do, refer to the ACHR in determining the scope and existence of obligations under international law. *E.g.*, *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (referring to the ACHR, ICCPR and Geneva Conventions in support of the decision to vacate a sentence of death imposed on a juvenile).

4. Customary International Law Obliges The United States To Respect Fundamental Human Rights.

The United States is also bound by the customary international law of human rights. Customary international law is established by authoritative state practice. The

relevant norms have been codified in a number of documents. These include the American Declaration of the Rights and Duties of Man, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev. 1 (1992) ("American Declaration"), which binds the United States (as a signatory of the Charter of the Organization of American States) as a matter of international law. *Roach and Pinkerton v. United States*, Case No. 9647, Inter-Am. C.H.R., Report No. 3/87, OEA/Ser. L./V/11/71, doc. 9 rev. 1, ¶¶ 44-8 (1987). Among the fundamental human rights enshrined in the American Declaration (and therefore considered provisions of customary international law) are the right to a fair trial and the right to due process of law, including the right to an impartial and public hearing in courts previously established in accordance with pre-existing laws. American Declaration, arts. 18 and 26.

Customary international law on human rights is also codified in the Universal Declaration, *supra*. The Universal Declaration is not a treaty, but a series of statements defining the civil, political, economic, social and cultural rights of all human beings. It is the primary United Nations document establishing human rights standards and norms, and it forms the basis for many of the human rights instruments enacted since its adoption, including those referenced above. Through time, its various provisions have become so accepted by States that it now amounts to customary international law. *See Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 1995). Like the ICCPR and the ACHR, the Universal Declaration is frequently considered in judgments of United States courts. *E.g.*, *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995) (referring to the Universal Declaration definition of arbitrary detention); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 n.19 (9th Cir. 1994) (noting that there is a "clear international

prohibition against arbitrary arrest and detention", and citing the Universal Declaration as an example).

Most pertinent here, the Universal Declaration recognizes the right of every person "to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him," art. 10, and such guarantees of fairness as the presumption of innocence, *see* art. 11(1). The Universal Declaration states a clear proscription against arbitrary detention: "No one shall be subjected to arbitrary arrest, detention or exile," art. 9. And the Declaration guarantees to "[e]veryone . . . the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law," art. 8.

C. It Is Crucial For The International Legal Order That The United States Abide By Its International Legal Commitments.

The obligations and protections established in human rights treaties and customary law are fundamental components of the modern world order under the rule of law that the United States, together with its allies and other like-minded nations, strives to establish and encourage. To a far greater extent than domestic law, international law depends for its vitality and efficacy on the compliance by States with its dictates. It undermines the political and moral authority of the United States and damages the rule of law in a troubled world if the United States, contrary to its long tradition, fails to uphold the international standards that it has been so instrumental in creating and with which it has urged other nations to comply. The damage is all the greater when, as did the Court of Appeals, the United States denies that its conduct may even be scrutinized for compliance with these standards.

II. The War On Terror Is Not Conducted In A Legal "Black Hole": It Is Subject To International Legal Standards Of Human Rights And Respect For The Rule Of Law.

The decision below would insulate from meaningful judicial review Petitioners' claims that their prolonged, indefinite detention by U.S. military authorities is unlawful and unjustified. But closing the doors of the courts to the detainees' petitions for *habeas corpus* means only that the persistent questions about the consistency of the United States' conduct of the "war on terror" with the rule of law and due process values reflected in U.S. law and the international law instruments by which the United States is bound will go unanswered. They will not go away, for it is indisputable that Petitioners are entitled to the protection of international human rights and humanitarian law—whether or not the U.S. courts will vindicate those rights.

A. International Legal Standards Of Human Rights And Respect For The Rule Of Law Apply To The Conduct Of The United States Anywhere In The World.

State responsibility under international human rights treaties turns upon whether the respondent State exercises sufficient authority and control in the situation that the action can be said to have been taken under its jurisdiction. Thus, the International Court of Justice ("ICJ") has recently reaffirmed that the ICCPR "is applicable in respect of acts done by a State in the exercise of jurisdiction outside its own territory." *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 2004 I.C.J. 136, 180 (July 9). In so holding, the ICJ considered the text of the treaty in the light of its object and

purpose,[2] "the constant practice of the Human Rights Committee" established under the auspices of the United Nations to monitor compliance with the ICCPR,[3] and the fact that the *travaux préparatoires* of the ICCPR "show that in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory." 2004 I.C.J. at 179.

Similarly, the fundamental protections recognized in the American Declaration, to which the United States has in past conflicts conceded it was bound, *see Coard v. United States*, Case 10.951, Inter Am. C.H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999), attach not due to the territorial *locus* of state conduct but by virtue of the fact that the state exercises authority and control over individuals claiming the protection. *See* American Declaration, *supra*, arts. 25 and 26.

The Inter-American Commission on Human Rights, authoritatively interpreting the American Declaration, has held that "[g]iven that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its

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[2] *See* Vienna Convention on the Law of Treaties, *supra*, art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

[3] *See López Burgos v. Uruguay*, No. 52/1979, Views of the H.R.C., U.N. Doc. CCPR/C/13/D/52/1979 at ¶ 12.3 (July 29, 1981); *Casariego v. Uruguay*, No. 56/1979, Views of the H.R.C., U.N. Doc. CCPR/C/13/D/56/1979 at ¶¶ 10.1-10.3 (July 29, 1981) (both applying the ICCPR to extraterritorial state actions).

jurisdiction" and has specifically ruled that jurisdiction "may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter's agents abroad." *Coard* at 1283, ¶¶ 37, 39, 41 & 43.

It is therefore well established that the application of international human rights norms "turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control." *Id.* at ¶ 37.

The United States unquestionably exercises authority and control at Guantanamo Bay. *See Rasul*, 542 U.S. at 480. To paraphrase the words of the Human Rights Committee, it would be "unconscionable to so interpret the responsibility" of the United States under international human rights treaties as to allow the U.S. "to perpetrate violations [of human rights norms] on the territory of another State, which violations it could not perpetrate on its own territory." *López Burgos v. Uruguay*, No. 52/1979, Views of the H.R.C., U.N. Doc. CCPR/C/13/D/52/179, at ¶ 12.3 (July 29, 1981). Accordingly, international law governs the treatment of the Guantanamo prisoners, including Petitioners, and obliges the United States to respect their fundamental human rights.

B. International Legal Standards Of Human Rights And Respect For The Rule Of Law Apply In Times Of Armed Conflict And National Emergency.

The United States has not declared war in the aftermath of September 11, although the "war on terror" has resulted at various times and places in a state of armed conflict. Moreover, neither a state of war nor armed conflict

suspends the application of international law. Indeed the norms of international humanitarian law, and especially the Geneva Conventions of 1949, apply in terms to situations of armed conflict; Common Article 3 applies "at any time and in any place whatsoever." *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 2, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, art. 3. Whether or not specific instruments of international humanitarian law apply in a particular case, it has been recognized that, even in situations of armed conflict, "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3, art. 1(2).

There is no tension between the application of international humanitarian law in time of war or armed conflict and the residual application of international human rights law at the same time. As the Inter-American Commission stated when considering the application of international human rights norms in a case arising out of the U.S. military engagement in Grenada:

> There is an integral linkage between the law of human rights and humanitarian law because they share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity," and there may be a substantial overlap in the application of these bodies of law. Certain core guarantees apply in all circumstances, including situations of conflict . . . .

Coard at ¶ 39 (footnotes omitted). Thus the non-derogable rules of international human rights law continue to operate even in times of war and armed conflict.

The ICJ concurs, having repeatedly rejected the assertion that international human rights protections cease to apply at such times. In its opinion on the *Legal Consequences of the Construction of a Wall*, the ICJ reaffirmed the determination in a previous Advisory Opinion that "the protection of the International Covenant of [*sic*] Civil and Political Rights does not cease in time of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency." 2004 I.C.J. at 177-8 (quoting *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 266, 240 (July 8)). Similar provisions for temporary derogations from particular human rights obligations in order to confront war or other public emergency are provided in other human rights treaties. *See* ACHR, *supra*, art. 27. These provisions confirm that, absent such a derogation, international human rights norms are not generally suspended in the face of war. The United States has not entered a derogation from its obligations under the ICCPR in respect of the "war on terror".

Some human rights obligations are in any event non-derogable. As the United Nations Human Rights Committee (H.R.C.) has ruled in respect of the ICCPR, these norms include "humanitarian law" and "peremptory norms of international law" such as those prohibiting hostage-taking, the imposition of collective punishments, "arbitrary deprivations of liberty" and "deviating from fundamental principles of fair trial, including the presumption of innocence." H.R.C. General Comment No. 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶ 11 (2001). Moreover, as will be discussed in more detail

below, the right of an individual to meaningful access to the courts to challenge the legality of his detention is another such non-derogable right. Accordingly, the United States' fundamental obligations under international humanitarian and human rights law persist in a situation of war or armed conflict.

III. The Combatant Status Review Tribunals Do Not Meet International Legal Standards Of Human Rights And Respect For The Rule Of Law.

Petitioners have been detained by the United States Government at Guantanamo Bay, without charge or trial, for more than five years. Their continued detention is premised on the determination by a CSRT that they are "enemy combatants." The CSRT process fails to live up to standards of fairness imposed by international law in a number of respects, and it also contravenes international law by failing to exclude evidence procured by torture.

A. The CSRT Process Violates Petitioners' Right To An Independent And Impartial Tribunal.

The right to be tried by an independent and impartial tribunal is a cardinal component of international human rights law. It is protected by all major human rights treaties. *See, e.g.*, ICCPR, art. 14(1) ("In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."); ACHR, art. 8(1) ("Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or

for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.").

The common source of all these instruments is the entitlement to an independent tribunal, enshrined as one of the "equal and inalienable rights of all members of the human family" in the Universal Declaration, *supra*, preamble & art. 19 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.").

International humanitarian and human rights law complement this fundamental right with a number of specific procedural guarantees, including the right of the accused to confront the evidence offered against him, ICCPR, art. 14(3)(a) and (d); ACHR, art. 8(2)(b) and (f); the right of the accused to offer evidence on his own behalf on equal terms, ICCPR, art. 14(3)(e); ACHR, art. 8(2)(f); and the benefit of a presumption of innocence, ICCPR, art. 14(2); ACHR, art. 8(2). The CSRTs, as established and implemented by the United States with respect to Petitioners and other prisoners at Guantanamo Bay, and subject only to limited review under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2740, 10 U.S.C. § 801, do not sufficiently safeguard these and other fundamental due process rights.

By applying a "rebuttable presumption in favor of the government's evidence," Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, dated July 7, 2004 ("CSRT Order"), at ¶ (g)(12), the CSRT process patently "stacks the deck" against prisoners seeking to resist their continued detention, shifting to those prisoners the burden of proving (while in prolonged detention thousands of miles from home and from any theatre of armed conflict in which they allegedly participated) that

they are *not* enemy combatants. The CSRTs cannot, therefore, be seen as "independent and impartial" tribunals, as required by international law. This presumption also effectively reverses the ordinary presumption of innocence, to which Petitioners are entitled as a matter of human rights law.

The CSRTs infringe Petitioners' human rights in violation of international law in at least two further respects. First, by providing that the detainee's "Personal Representative" may not share classified information with the detainee, CSRT Order ¶ (c), and by excluding the detainee from CSRT proceedings whenever his presence "would compromise national security," *id.* at ¶ (g)(4), the CSRTs deny Petitioners the right to see, and therefore to confront, all of the evidence offered by the Government to support their continued detention. This is inconsistent with the United States' obligations under the ICCPR, the ACHR and other binding international legal instruments.

Second, detainees are only entitled to call witnesses on their behalf if the Tribunal determines that such witnesses are "reasonably available" or, in the case of witnesses who are members of the U.S. Armed Forces, if attending a hearing in Guantanamo Bay would not, in the view of their commanding officer, "affect combat or support operations." CSRT Order ¶ (g)(8). The Government's ability to call witnesses in support of detention is not limited in this way. As such, the CSRT process does not provide detainees with the right guaranteed by the ICCPR "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." *See* ICCPR, art. 14(3)(e).

B. The CSRT Process Further Violates International Law By Failing To Exclude Evidence Obtained Through Torture.

Standard rules on the admission of evidence applied in U.S. courts do not apply to the CSRT process. CSRT Order, ¶ (g)(9) ("The Tribunal is not bound by the rules of evidence such as would apply in a court of law."). Rather, "the Tribunal shall be free to consider *any* information it deems relevant and helpful to a resolution of the issue before it." *Id.* (emphasis added). There is, therefore, no bar to the admission of confessions and other evidence procured through questionable interrogation methods, including torture, in CSRT proceedings.

The acceptance of evidence without regard to the means by which it was procured is contrary to international practice and international law. The House of Lords, sitting as the highest court in the United Kingdom, has had the occasion to consider the use of torture evidence, in particular evidence obtained by torture of third parties, in legal proceedings in *A and others v. Sec'y of State for the Home Dep't*, [2005] UKHL 71. The House of Lords unequivocally rejected any use of torture evidence, concluding that: "the duty not to countenance the use of torture by admission of evidence so obtained in judicial proceedings must be regarded as paramount and that to allow its admission would shock the conscience, abuse or degrade the proceedings and involve the state in moral defilement." *Id.* at ¶ 150 (per Lord Carswell). Accordingly, "The English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention." *Id.* at ¶ 51 (per Lord Bingham).

In addition to contravening the Torture Convention—which at article 15 explicitly prohibits the invocation of any statement obtained by torture as evidence in any proceeding—the use of evidence obtained by torture violates the United States' obligations under the ICCPR and other treaty instruments, which it has publicly pledged to uphold. *See* Secretary Rice Statement, *supra*; Letter from William J. Haynes II, General Counsel of the U.S. Department of Defense, to the Honorable Patrick J. Leahy, dated June 25, 2003, *available at* http://www.hrw.org/press/2003/06/letter-to-leahy.pdf ("it is the policy of the United States to comply with all of its legal obligations in its treatment of detainees, and in particular with legal obligations prohibiting torture. Its obligations include conducting interrogations in a manner that is consistent with the [Torture Convention] . . . as ratified by the United States in 1994.").

The principle that evidence obtained using such practices must be inadmissible is a direct corollary of the prohibition on torture and inhuman treatment of detainees, which is widely recognized and explicitly codified in the Torture Convention. *See also* Universal Declaration, art. 5; ICCPR, arts. 7 & 10. The H.R.C. has explained that the exclusion of such evidence is essential to the struggle against improper interrogation techniques. H.R.C. General Comment No. 20, U.N. Doc. HRI/Gen/1/Rev.7, at ¶ 12. The H.R.C. reiterated this principle in *Paul v. Guyana*: "It is important for the prevention of violations under Article 7 that the law must exclude the admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment." H.R.C. Communication No. 728/1996, U.N. Doc. CCPR/C/73/D/728/1996 (Dec. 21, 2001), at ¶ 9.3. The House of Lords similarly recognized the link between excluding the fruits of torture from legal proceedings and reducing the incidence of torture in fact. *A and Others v. Sec'y of State for the Home Dep't*, [2005]

UKHL 71. The Supreme Court of the United States has also recognized that to admit improperly-acquired evidence will encourage detaining authorities to employ such tactics, undermining the integrity of the judicial system and the United States' ideals of due process. *Haynes v. Washington*, 373 U.S. 503, 515 (1963).[4]

In the case of Guantanamo prisoners, these fundamental rules of international law are far from theoretical. Press reports and eyewitness accounts from such facilities as Abu Ghraib, Guantanamo itself and elsewhere have raised serious doubts about the nature, extent and intensity of interrogation techniques employed in connection with the "war on terror." These reports underline the seriousness of the due process flaws in the CSRT process. By not expressly excluding from that process evidence obtained by torture, these procedures violate the United States' obligations under the ICCPR, the Torture Convention and other international instruments.

IV. International Law Entitles Petitioners To *Habeas* Review Or Meaningful Alternative Access To The Courts To Challenge The Legality Of Their Detention.

The Court of Appeals held that the MCA bars Petitioners' petitions for writs of *habeas corpus*. Petitioners argue that denying them access to *habeas* would contravene U.S. law.

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[4] U.S. jurisprudence goes still further in deterring improper interrogation of detainees, excluding from evidence even subsequent confessions that could be regarded as "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471 (1963).

Whatever the position as a matter of U.S. domestic (statutory and constitutional) law, a subject on which *amici* offer no views, denying Petitioners access to *habeas* review—or to a meaningful equivalent—would undoubtedly contravene the United States' international legal obligations. The human rights treaties by which the United States is bound uniformly oblige signatories to provide adequate access to the courts so that individuals deprived of their liberty may challenge the legality of their detention on any factual or legal basis—statutory, constitutional or international. The ICCPR provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful," art. 9(4). The ACHR provides identical protection. *See* ACHR, art. 7(6). And the Universal Declaration, reflecting customary international human rights law, guarantees "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law," art. 8.

So central is this right, so fundamental to securing all other rights, that as a matter of international law it may not be derogated from even in times of war or public emergency. As the H.R.C. has commented, "In order to protect [other] non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by a State party's decision to derogate from the Covenant." H.R.C. General Comment No. 29, *supra*, at ¶ 16; *accord* H.R.C., Concluding Observations of the Human Rights Committee: Israel, Aug. 18, 1998, U.N. Doc. CCPR/C/79/Add.93, ¶ 21 ("a State party may not depart from the requirement of effective judicial review of detention"); Official Records of the General Assembly, U.N. Doc. A/49/40, vol. I, annex XI,

¶ 2 ("the right to habeas corpus . . . should not be limited in situations of emergency").

The substance of the right of *habeas corpus* at international law is access to the courts for a meaningful review of the factual and legal bases on which liberty is being denied. Depriving Petitioners of access to the courts to challenge the legality of their detention and those aspects of the CSRT process to which they are subject which themselves contravene applicable international and other legal standards in a proceeding commensurate with *habeas corpus* would involve the United States in further violations of bedrock human rights and rule of law principles and obligations. Any interpretation of the MCA that would have this effect should therefore be resisted. *Cf. Murray v. The Charming Betsey*, 6 U.S. (2 Cranch) 64, 118 (1804).

CONCLUSION

In this submission, *amici* have showed a number of fundamental respects in which the CSRT process and insulating Petitioner' continued detention from *habeas* review or its equivalent departs from the fundamental rule of law and human dignity values embodied in treaties to which the United States is a party or a signatory, including the ICCPR, the ACHR and the Torture Convention. *Amici* are fully aware that the threat of terrorism is real. Governments around the world confront the dangers, and the hard choices posed by confronting those dangers, on an ongoing basis. The support for international law, human rights and the rule of law articulated in this brief comes, therefore, not from any underestimation of the terrorist threat, but rather from a keen appreciation of the extent to which those principles and values which most obviously distinguish us from those who target us with terror are endangered.

To meet the danger the world needs not only military might, but renewed and sustained commitment to the rule of law and to fundamental principles of human dignity and respect for human rights. In short, the world needs the United States to resume its role as a standard bearer for the principles of the rule of law and the protection of human rights and fundamental freedoms which are the shared heritage of a civilized world—and which are the heritage that together we seek to defend against the terrorist threat.

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APPENDIX

APPENDIX

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65 CORRECTED COPY 44p (34) (37)

Nos. 06-1195, 06-1196

FILED
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OFFICE OF THE CLERK
SUPREME COURT U.S.

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL.,

Petitioners,

—v.—

GEORGE W. BUSH, ET AL.,

Respondents.

KHALED A. F. AL ODAH, ET AL.,

Petitioners,

—v.—

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae United Nations High Commissioner for Human Rights Louise Arbour is the senior United Nations official responsible for human rights.[1] By General Assembly resolution 48/141, adopted by consensus of all States, she is charged to promote the effective enjoyment by all persons of their civil, cultural, economic, political, and social rights; to prevent human rights violations; and to enhance international cooperation in the promotion and protection of human rights. In fulfilling her mandate, the High Commissioner monitors, investigates, and reports on individual States' compliance with their obligations under international human rights law. The Office of the High Commissioner also serves as the Secretariat for all human rights treaty monitoring bodies within the United Nations. Given those responsibilities, she has gained great expertise in the interpretation and application of international human rights law, in both conventional and customary form, in a wide variety of contexts.

One of the principal instruments of international human rights law is the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [the "ICCPR" or the "Covenant"], to which the United States is party. Among the rights guaranteed by the Covenant are the right to be free from arbitrary arrest and detention and the right to have a court determine whether a detention is lawful and, if it is not, order release. The prohibition of prolonged arbitrary detention also con-

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[1] No counsel for a party authored this brief in whole or in part; no person or entity other than *amicus curiae* and her counsel made a monetary contribution to its preparation or submission; and the parties have consented to its filing by letters on file with the Clerk.

stitutes customary international law. *See, e.g., The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, Annex, Principle 11 (Dec. 9, 1988); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 701–02 (1987) [the "RESTATEMENT"] (United States bound by customary international law of human rights, including protection against prolonged arbitrary detention).

The cases now before this Court squarely implicate these rights. The High Commissioner recognizes that the United States Constitution makes treaties of the United States, along with the Constitution and federal statutes, part of the "supreme law of the land." U.S. CONST. art. VI, cl. 2. The High Commissioner also recognizes that, consistent with the rule of international law that a State may not invoke its own law to excuse a failure to comply with a treaty or other international obligation,[2] this Court has held, from its very beginnings, that the United States's domestic law should be interpreted, if at all possible, to comply with the United States's international obligations. *See, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ."); RESTATEMENT § 114. The United States Constitution and this Court have thereby expressed their profound respect for the rule of *pacta sunt servanda*—a State must comply with its agreements—"perhaps the most important principle of international law." RESTATEMENT § 321 cmt. a.

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[2] *See* Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, arts. 3-4, U.N. Doc. A/Res/56/83 (Dec. 12, 2001).

The High Commissioner therefore files this brief to emphasize to this Court the importance of the questions raised by these cases and to express her views on the United States's international obligations as they apply to those questions. Much of the High Commissioner's work consists of identifying a given State's obligations under international human rights law, publicly and privately urging compliance with those obligations, and marshalling all appropriate actors in support. To be sure, in developed democracies, national standards of protection will often meet, or even surpass, the requirements of international law. That result cannot be assumed, however; whether national standards fully satisfy the requirements of international law must be carefully assessed on a case-by-case basis.

A State's compliance with its obligations under the Covenant and other human rights treaties reflects its basic commitment to the rule of law. The High Commissioner's experience accordingly has been that a State's domestic courts, and in particular its courts of last resort, have a definitive role in vindicating human rights guarantees conferred under applicable international human rights treaties. In exercise of the mandate entrusted to her by the international community, the High Commissioner calls on this Court to give full effect to the United States's international obligations in adjudicating the questions presented.

SUMMARY OF ARGUMENT

The obligations of the Covenant, voluntarily assumed by the United States by its ratification of the treaty in 1992, extend to the Petitioners in these cases, regardless of their detention at Guantánamo Bay, their status as non-citizens, or the concurrent applicability of any pro-

visions of international humanitarian law. Basic principles of treaty interpretation, as well as consistent authoritative interpretation of the Covenant by the International Court of Justice, the United Nations Human Rights Committee, and respected commentators, confirm that the treaty's provisions apply extraterritorially to all persons within the power or effective control of a State Party, such as Petitioners. Moreover, because the rights protected by the Covenant are universal, they do not stand aside in times of armed conflict, and the provisions of the Covenant continue to apply. To the extent that provisions of international humanitarian law also apply, international human rights law informs their interpretation, complements them, and frequently provides clarity and detail as to their requirements, as in the case of judicial review of detention.

Article 9(4) of the Covenant requires that individuals deprived of their liberty have access to a court in order to test the lawfulness of their detention. As a matter of international law, this judicial review must consider whether the detention is reasonable in all the circumstances, encompassing an assessment of the full justification for the detention, and must permit reference to both national and international law. In addition, the reviewing court must have the power to order release if the detention is judged unlawful. Continued detention without justification and review by the State is inherently arbitrary, and therefore a breach of international law as codified in Article 9 of the Covenant.

As construed by the United States Court of Appeals for the District of Columbia in these cases, United States law falls substantially short of the requirements of Article 9 for persons detained at Guantánamo. The procedures and evidentiary rules employed by the Combatant Status Review Tribunals frustrate subsequent effective

judicial review of the lawfulness and reasonableness of a prisoner's detention. These processes, even combined with the scope of review by the Court of Appeals, do not satisfy the obligations of the United States under the Covenant.

As a matter of international law, the United States is obliged to respect and ensure the rights set forth in the Covenant, including the substantive and procedural protections of Article 9, with regard to these Petitioners. The current system fails to do so. This Court should ensure that provisions of domestic law are construed and applied consistent with the United States's international obligations, and thereby confirm the United States's continued commitment to the protection and promotion of human rights.

ARGUMENT

I. To Hold Petitioners, the United States Must Comply with Article 9 of the Covenant.

When it ratified the Covenant, the United States undertook "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized [there], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICCPR art. 2(1). It also agreed that every person "has the right to liberty and security of person," that no person "shall be subjected to arbitrary arrest and detention," and that no person "shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." ICCPR art. 9(1). Finally, it agreed that any person "who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in

order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR art. 9(4).[3]

The High Commissioner respectfully submits that these rights and obligations apply fully to the United States's treatment of Petitioners even if (1) Guantánamo Bay is not a territory of the United States; (2) the detainees are aliens; and (3) any provisions of international humanitarian law might also apply.

A. The United States Must Afford Petitioners the Protections of Article 9 Regardless of Their Detention at Guantánamo Bay.

A State Party to the Covenant undertakes to apply its protections to "all individuals within its territory and subject to its jurisdiction." ICCPR art. 2(1). The United States has expressed the view that "the obligations assumed by the United States under the Covenant apply only within the territory of the United States."[4] The

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[3] Under Article 4 of the Covenant, certain of the Covenant's protections may be suspended in a time of national emergency. Under that provision, any party "availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated." ICCPR art. 4(3). The United States has made no such communication, but instead has expressly recognized that its obligations under the Covenant remain binding. *See, e.g.*, Written Reply of U.S. Government to the List of Issues To Be Taken Up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America to the Human Rights Committee, 14–15 (July 17, 2006), *available at* http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/USA-writtenreplies.pdf ("[C]ounterterrorism measures as a general matter satisfy U.S. obligations under the Covenant.").

[4] *See* U.N. Hum. Rts. C'ttee, *Third Periodic Report of the United States to the Human Rights Committee*, ¶ 130, Annex I, U.N.

United States's attempt to restrict the scope of its commitment is inconsistent with basic principles of treaty interpretation and authoritative interpretations of Article 9.

Under Article 31 of the Vienna Convention, the Covenant must "be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *See Reports of the International Law Commission to the General Assembly*, [1966] 2 Y.B. Int'l L. Comm'n 217, 219-20, U.N. Doc. A/CN.4/SER.A/1966/Add.1 [hereinafter *ILC Commentary*] (official commentary of International Law Commission on Vienna Convention) ("the application of the means of interpretation in [Article 31] would be a single combined operation" involving all elements there specified).[5] Applying that rule, a State Party's obligations under the Covenant apply wherever it exercises authority capable of affecting enjoyment of Covenant rights by individuals subject to that authority or, put another way, whenever an individual is within the State Party's power or effective control. *See* U.N. Hum. Rts. C'ttee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter

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Doc. CCPR/C/USA/3 (Nov. 28, 2005); *see also* U.N. Hum. Rts. C'ttee, *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 10, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) [hereinafter *Concluding Observations*].

[5] Although the United States has not ratified the Vienna Convention, United States courts have recognized that its provisions codify customary international law. *See, e.g., Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001); *see also* S. Exec. Doc. L, 92d Cong., 1st Sess. 1 (1971) (letter of submittal from Secretary of State to President) ("Although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice.").

General Comment No. 31].[6] Hence, Article 2(1) plainly extends the protections of the Covenant to all persons within a State Party's territory *and also* to all persons within its jurisdiction.[7]

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[6] The Human Rights Committee is the expert body established under the Covenant to monitor compliance with the treaty. States Parties to the Covenant, including the United States, report to the Human Rights Committee on their implementation of its provisions. The Committee's concluding observations on periodic reports submitted by States Parties, views on individual communications submitted under the First Optional Protocol to the Covenant, or General Comments elaborating the understanding of specific provisions of the Covenant, while not formally binding as a matter of law, constitute authoritative interpretations of the treaty. International courts, as well as national courts in both common and civil law jurisdictions, have regularly relied on the Committee's statements when interpreting and applying the Covenant. *See, e.g.*, *Minister for Immigration & Multicultural & Indigenous Affairs v. B* (2004) 219 C.L.R. 365, ¶ 148 (High Court of Australia) ("In ascertaining the meaning of the ICCPR . . . it is permissible, and appropriate, to pay regard to the views of the UNHRC."); *A and others v. Sec'y of State for the Home Dep't*, [2005] UKHL 71, [2006] 2 A.C. 221 (H.L.).

[7] The High Commissioner recognizes that, even if Article 2(1) were given the restrictive, "territory"-only interpretation the United States has urged, the Covenant would still extend to the United States's detention of Petitioners for the simple reason that Guantánamo Bay "is in every practical respect a United States territory." *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring); *see also id.* at 480 (Stevens, J.) (plurality opinion) ("[T]he United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses."). For purposes of the applicability of the Covenant, however, the Court need not parse the status of Guantánamo Bay. Given the authority and control the United States exercises over the Guantánamo detainees, its Covenant obligations apply whether or not Guantánamo Bay constitutes United States territory.

First, the ordinary meaning of the relevant terms leads to that result. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 602 (6th ed. 2003) ("what matters" in treaty interpretation "is the intention of the parties *as expressed in the text*") (emphasis in original). As a purely formal matter, it might be argued that the phrase "all individuals within [a State Party's] territory and subject to its jurisdiction" is susceptible of two different readings: the word "and" could be read either conjunctively, limiting the scope of the treaty to a State Party's territory, or disjunctively, requiring a State Party to comply with its treaty obligations with regard to any person subject to its jurisdiction, regardless of their location. The more limited reading can be promptly rejected, however. By recourse to the basic principle of territoriality, a person within a State's territory would generally be subject to its jurisdiction. Hence, the conjunctive reading would render the phrase "subject to its jurisdiction" mere surplusage, offending the basic interpretive principle of textual effectiveness (*effet utile*) as well as standard canons of treaty interpretation. *Cf. Air France v. Saks*, 470 U.S. 392, 398 (1985).

Second, the context also supports the extraterritorial reading. Under Article 31(2)(b) of the Vienna Convention, the context of a treaty term includes "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." The First Optional Protocol to the ICCPR, which permits individuals to make submissions to the Human Rights Committee on alleged violations of the treaty, contains no territorial restriction. Optional Protocol to the International Covenant on Civil and Political Rights, art. 1, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, 999 U.N.T.S. 302 (*entered into force* Mar. 23, 1976) (Committee may receive com-

munications from "individuals subject to [a State Party's] jurisdiction"). Needless to say, there would be no reason to allow the Human Rights Committee to receive complaints from persons not entitled to the protections of the treaty in the first place. *See* Thomas Buergenthal, *To Respect and To Ensure: State Obligations and Permissible Derogations*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 74–75 (Louis Henkin ed., 1981); THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 106–07 (1986) ("A better interpretation is that suggested by Buergenthal" supported by "[t]he language of the Optional Protocol, formulated after [Art. 2(1)] had been completed.").

Finally, the object and purpose of the provision also supports the extraterritorial reading. The rights guaranteed by the Covenant are, by definition, universal.[8] Limiting a State Party's obligations to its own territory "would be unconscionable," because that reading would "permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory." U.N. Hum. Rts. C'ttee, *López Burgos v. Uruguay*, ¶ 12.3, U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981). *See* Buergenthal, *supra*, at 73–74 (restrictive territorial reading of Article 2(1) "is specious and would produce results that were clearly not intended," because it would nullify other rights clearly set forth in the treaty); MANFRED NOWAK, CCPR COMMENTARY 44 (2d ed. 2005) ("When

[8] *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), Preamble, U.N. Doc A/810 (Dec. 10, 1948) ("Member States have pledged themselves to achieve . . . the promotion of universal respect for and observance of human rights and fundamental freedoms," in order "to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction").

State parties . . . take actions on foreign territory that violate the rights of persons subject to their sovereign authority, it would be contrary to the purpose of the Covenant if they could not be held responsible.").[9]

The International Court of Justice has expressly endorsed the extraterritorial reading of Article 2(1). *See* Statute of the International Court of Justice art. 38(1)(d),

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[9] Since the conclusion that the Covenant applies extraterritorially results from the text of the treaty read in context and in light of its object and purpose, *see* Vienna Convention art. 31, there is no need to refer to the negotiating and drafting history, or *travaux préparatoires*. *See id.* art. 32 ("preparatory work" as supplementary means of interpretation if means identified in Article 31 insufficient); *ILC Commentary*, at 220 ("[P]reparatory work . . . does not . . . have the same authentic character as an element of interpretation, however valuable it may sometimes be in throwing light on the expression of the agreement in the text."). In any event, distinguished scholars have concluded that the *travaux* confirm the extraterritorial interpretation. *See* Buergenthal, *supra*, at 74 (concluding upon review of the *travaux* that "Article 2(1) permits and requires a different construction" than one which limits its scope to a State's territory); *accord* Meron, *supra*, at 106–09. At a minimum, even if the *travaux* could be read to show that some delegates expressed a concern to avoid imposing obligations on States Parties either to exert extraterritorial legislative jurisdiction, or to act with regard to persons under the sovereign authority of another State, nothing in the *travaux* supports immunizing States Parties from the obligations and prohibitions of the Covenant when they in fact exercise power and control over persons outside their territory. *See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 109 (July 9) [hereinafter *Wall* Advisory Opinion] ("The *travaux préparatoires* of the Covenant . . . show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory."); *see also* U.N. Hum. Rts. C'ttee, *Summary Record of the Hundred and Ninety-Fourth Meeting*, ¶ 32, U.N. Doc. No. E/CN.4/SR.194 (May 25, 1950) (United States delegation explaining that military "troops, although maintained abroad, remained under the jurisdiction of the State").

June 26, 1945, 59 Stat. 1055, 1060 ("judicial decisions" as means of determining international law). In 2004, the Court observed that, "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory." Hence, the Court continued, "[c]onsidering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions." *Wall* Advisory Opinion, *supra*, at ¶ 109. The Court therefore concluded that the Covenant applied to Israel's conduct in the West Bank. *Id.* at ¶¶ 110-11.

The following year, in the *Case Concerning Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. __, ¶ 216 (Dec. 19), the Court reiterated that precise point, holding that "international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory,' particularly in occupied territories." Having concluded that during the relevant period Uganda was an occupying power in Ituri, a district in the northeast region of the Congo, the Court held that it had violated its obligations under several international human rights and international humanitarian law treaties, including the Covenant. *Id.* at ¶ 219.

Likewise, in a series of cases submitted under the Optional Protocol that predate the ratification of the Covenant by the United States, the Human Rights Committee confirmed that the obligations under the Covenant extended beyond the territorial control of the State and applied the Covenant to cases of kidnapping by State agents abroad. *See López Burgos*, *supra*, at ¶¶ 12.1 –

12.3; U.N. Hum. Rts. C'ttee, *Celiberti de Casariego v. Uruguay*, ¶¶ 10.1 – 10.3, U.N. Doc. CCPR/C/13/D/56/1979 (July 29, 1981).[10]

The Human Rights Committee recently reaffirmed the extraterritorial scope of obligations under the Covenant, stating that a State Party "must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." *General Comment No. 31*, *supra*, at ¶ 10. The Committee continued: "This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peacekeeping or peace-enforcement operation." *Id.* The February 2006 report to the Human Rights Council by the Chairperson-Rapporteur of the Council's Working Group on Arbitrary Detention and other Special Rapporteurs expressly applied that understanding to the Guantánamo Bay detainees, concluding that "the particular status of Guantánamo Bay under the international lease agreement between the United States and Cuba and under United States domestic law does not limit the obligations of the United States under international human

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[10] The same interpretive approach has been followed by other human rights treaty bodies. *See, e.g.*, U.N. C'ttee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, ¶ 32, U.N. Doc. CERD/C/ISR/CO/13 (June 14, 2007); U.N. C'ttee Against Torture, *Conclusions and Recommendations of the Committee Against Torture*, ¶¶ 14-16, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006); U.N. C'ttee on the Rts. of the Child, *Concluding Observations*, ¶ 2, U.N. Doc. CRC/C/15/Add.195 (Oct. 9, 1992).

rights law towards those detained there."[11] And the extraterritorial interpretation was confirmed at the highest political level of the United Nations when the General Assembly, in its Resolution 45/170 on the situation of human rights in occupied Kuwait, confirmed the application of Iraq's obligations under the Covenant in territory occupied by it in Kuwait. *See* G.A. Res. 45/170, U.N. Doc. A/RES/45/170 (Dec. 18, 1990) (adopted by vote of 144-1, with United States in favor).

B. The United States Must Afford Petitioners the Protections of Article 9 Regardless of Their Status as Aliens.

The United States's obligations under the Covenant extend to "*all* individuals within its territory and subject to its jurisdiction . . . *without distinction of any kind* . . . ." ICCPR art. 2(1) (emphasis added). Hence, whatever interpretation might be given the phrase "all individuals within its territory and subject to its jurisdiction," there can be no suggestion that the protections afforded by Article 9 of the Covenant do not extend to citizens and non-citizens alike. Indeed, Article 26 of the Covenant expressly prohibits discrimination in the administration of justice. ICCPR art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.").

The United States recognized the point when it explained its implementation of specific provisions of the Covenant:

> Aliens living in the United States, even though not U.S. citizens, generally enjoy the constitutional and

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[11] U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Hum. Rts., *Report of the Working Group on Arbitrary Detention and Special Rapporteurs: Situation of Detainees at Guantánamo Bay*, ¶ 11, U.N. DOC. E/CN.4/2006/120 (Feb. 27, 2006).

> Covenant rights and protections of citizens, including . . . freedom from torture or cruel, inhuman or degrading treatment or punishment; prohibition of slavery; *the right to liberty and security of person*; the right to humane treatment for persons deprived of their liberty . . . .

U.N. Hum. Rts. C'ttee, *Initial Report of the United States to the Human Rights Committee*, ¶ 95, U.N. Doc. CCPR/C/81/Add.4 (Aug. 24, 1994) (emphasis added). *See also Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); *cf. Rasul*, 542 U.S. at 481 ("Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under [the federal habeas statute].").

The application of the Covenant to persons under the control of State Parties without regard to citizenship inheres in the Covenant's purpose to ensure respect for human rights. "[T]he rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness." U.N. Hum. Rts. C'ttee, *General Comment No. 15: The Position of Aliens Under the Covenant*, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.6 at 140 (Apr. 11, 1986). "Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens." *Id.* at ¶ 2.

The limited number of provisions in the Covenant that do allow for distinctions between citizens and non-citizens do so explicitly. For example, the rights guaranteed under Article 25, including the right to vote, are restricted to "citizens," and the right to freedom of movement secured by Article 12(1) applies only to those

within the relevant territory. By contrast, the provisions of Article 9 apply, without qualification, to "all individuals" subject to arrest or detention by a State Party. *General Comment No. 8*, at ¶ 1.

C. The United States Must Afford Petitioners the Protections of Article 9 Regardless of the Possible Concurrent Applicability of International Humanitarian Law.

Given the universality of international human rights, the protections of the Covenant neither disappear nor are set aside in times of armed conflict. Apart from the limited provisions for formal notification of derogation in public emergencies provided for by Article 4 (to which the United States has not resorted),[12] there is no provision in the Covenant providing for the suspension of its guarantees in times of armed conflict. It is instead well established that the application of international humanitarian law in the context of armed conflict does not preclude the concurrent enforcement of international human rights obligations:

> Human rights are inherent to the human being and protect the individual at all times, in war and in peace. International humanitarian law only applies in situations of armed conflict. Thus, in times of armed conflict international human rights law and international humanitarian law both apply in a complementary manner.

Int'l C'ttee of the Red Cross, International Humanitarian Law and Human Rights, http://www.icrc.org/Web/eng/siteeng0. nsf/htmlall/section_ihl_and_human_rights. *See also* 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 299-306 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

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[12] *See* note 3, *supra*.

In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, ¶ 25 (July 8), the International Court of Justice expressly so held with respect to the Covenant, stating that "the protection of the International Covenant of Civil and Political Rights does not cease in times of war." In the *Wall* Advisory Opinion, *supra*, at ¶¶ 105–06, the Court reiterated that human rights law applies in times of conflict, and in addition held that, while some rights may be exclusively matters of international humanitarian law or international human rights law, "others may be matters of both these branches of international law." *See also General Comment No. 31*, *supra*, at ¶ 11 ("While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.").

Consequently, even in times of armed conflict, human rights law applies. Where provisions of international humanitarian law apply, human rights law may also inform their interpretation or complement them. For instance, the fundamental guarantees of judicial process in times of non-international armed conflict assume clearer content from the more detailed rules of human rights law that are codified in the Covenant and other human rights instruments, and their interpretation by courts and international monitoring bodies. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 972 [hereinafter Common Article 3] (setting out in generally phrased language the minimum guarantees to be respected in armed conflict, including "judgment pronounced by a regularly constituted court affording *all the judicial guarantees which are recognized as indispens-*

able by civilized peoples") (emphasis added); *cf.* ICCPR arts. 9, 14 (requiring prompt hearing after arrest or detention "before a judge or other officer authorized by law," upholding right to fair trial and to petition court for review of legal basis of detention, and specifying basic judicial guarantees). As a result, in a non-international armed conflict, the relevant provisions of the Covenant provide clarity and detail to the more general protection contained in Common Article 3 to govern issues related to detention, including the judicial guarantees afforded, the competence, independence and impartiality of the tribunal, the permissible duration of proceedings, and the scope of review by a court or tribunal.

The determination of whether a particular individual has been captured and detained in the course of armed conflict, whether international or non-international as those terms are understood in international humanitarian law, is a fact-intensive inquiry governed by the rules of that body of international law.[13] Regardless of whether any provision of international humanitarian law might apply to any of the Petitioners, however, the United States's obligations under the Covenant and customary international law of human rights remain intact as to all of them.

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[13] In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795-97 (2006), this Court applied the provisions of Common Article 3 to the conflict between the United States and Al Qaeda in Afghanistan.

II. The United States's Treatment of the Guantánamo Detainees Violates Article 9 of the Covenant.

A. Article 9 Guarantees Petitioners a Right to Judicial Review of Their Detention.

Pursuant to Article 9(4), a State Party must ensure that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR art. 9(4).[14] While Article 9(4) reflects a broad practice among national legal traditions, many built on principles of habeas corpus and *amparo*, the obligation of the United States arising from Article 9(4) is neither fully defined by nor dependent on constitutional provisions or federal statutes affording access to habeas relief *per se*. Hence, in order to ensure compliance by the United States with its obligations under the Covenant, the judicial access afforded by the United States to persons it has detained must be assessed for compliance with each of the requirements set forth in Article 9(4).

First, Article 9(4) requires that individuals deprived of their liberty be "entitled to take proceedings *before a court*." ICCPR art. 9(4) (emphasis added). For purposes of Article 9(4), the "court" must observe the basic procedural guarantees that ensure a fair hearing as required by Article 14(1) of the Covenant. ICCPR art. 14(1)

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[14] Similar provisions appear in the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(4), Nov. 4, 1950, 213 U.N.T.S. 222 ("ECHR"), the American Convention on Human Rights art. 7(6), Nov. 22, 1969, 1144 U.N.T.S. 123, and the African [Banjul] Charter on Human and People's Rights art. 6, *adopted* June 27, 1981, 1520 U.N.T.S. 217.

("[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.").[15] In particular, a court's procedures must grant a prisoner meaningful access to the evidence used against him and afford him the opportunity to obtain evidence and testimony in his defense.[16] For the same reason, a court's procedures must allow prisoners adequate access to legal counsel[17] and cannot consider evidence obtained by torture.[18]

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[15] *See generally* U.N. Hum. Rts. C'ttee, *General Comment No. 32: Right to Equality Before Courts and Tribunals and to Fair Trial (article 14)*, ¶¶ 17-18, U.N. Doc. CCPR/C/GC/32/CRP.1 (June 19, 2007); U.N. Hum. Rts. C'ttee, *General Comment No. 29: States of Emergency (article 4)*, ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) ("The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.").

[16] *See generally Wloch v. Poland*, 34 Eur. Ct. H.R. 9, ¶¶ 126-131 (2000) (interpreting the provision of ECHR analogous to ICCPR art. 9(4) to find detention lawful only where defense has equal access to government's evidence presented in court); *Cantoral-Benavides v. Peru*, 2000 Inter-Am. Ct. H.R. (ser. C) No. 69, ¶ 15 (Aug. 18, 2000) (recognizing the right of parties "to prepare a proper defense . . . [and] to question witnesses."); U.N. Hum. Rts. C'ttee, *Perterer v. Austria*, ¶ 9.2, U.N. Doc. CCPR/C/81/D/1015/2001 (Aug. 20, 2004) (describing "principles of impartiality, fairness and equality of arms as implicit [in Article 14(1)]"); U.N. Hum. Rts. C'ttee, *Morael v. France*, ¶ 9.3, U.N. Doc. CCPR/C/36/D/207/1986 (July 28, 1989) ("[T]he Covenant should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of *ex officio reformatio in pejus*, and expeditious procedure.").

[17] *See, e.g., Hilaire, Constantine and Benjamin, et al. v. Trinidad and Tobago*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 152(b) (June 21, 2002) (detainee entitled to "adequate legal assistance for the effective preservation of constitutional motions"); *Imbrioscia v. Switzerland*, 17 Eur. Ct. H.R. 441, ¶¶ 33-34, 38 (1993).

[18] U.N. Hum. Rts. C'ttee, *General Comment No. 20: Concerning Prohibition of Torture and Cruel Treatment or Punishment (arti-*

Second, the court must have the power to decide "without delay on the *lawfulness* of [the] detention." ICCPR art. 9(4) (emphasis added); *see also* U.N. Hum. Rts. C'ttee, *General Comment No. 8: Right to liberty and security of persons (Art. 9)*, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.7 (June 30, 1982).[19] The Human Rights Committee has made clear that "lawfulness" within the meaning of Article 9(4) is not limited merely to an assessment of compliance with national law or of procedural regularity, but also compliance with international law, including the prohibition of arbitrary detention contained in Article 9(1) of the Covenant itself,[20] the requirement of legal certainty, here with respect to the standards supporting detention contained in Article 15 of

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cle 7), ¶ 12, U.N. Doc. HRI/GEN/1/Rev.1 (1992); *see also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 15, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 198 .) ("Convention against Torture") ("Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.").

[19] Article 9(4) requires that judicial review be provided "without delay." While detailed consideration of the facts of individual cases is beyond the scope of this brief, the High Commissioner notes that it is difficult to conceive of any possible justification for the delay in many of these cases of many years.

[20] ICCPR art. 9(1) ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."). In a series of cases relating to immigration detention, the Human Rights Committee found that the reviewing court's limited mandate violated both Article 9(1) and Article 9(4). *See, e.g.*, U.N. Hum. Rts. C'ttee, *Shafiq v. Australia*, ¶ 7.4, U.N. Doc. CCPR/C/88/D/1324/2004 (Nov. 13, 2006).

the Covenant,[21] and customary international law.[22] The prohibition against arbitrary detention set forth in Article 9(1) applies to "all deprivations of liberty," including executive detentions "for reasons of public security." U.N. Hum. Rts. C'ttee, *General Comment No. 8*, *supra*, at ¶¶ 1, 4. Accordingly, to suffice under Article 9(4), a court's inquiry into the lawfulness of detention must be broad enough to encompass an assessment of the overall arbitrariness *vel non* of the detention.

In order to avoid a characterization of arbitrariness, detention must "not only be lawful but reasonable in all the circumstances." U.N. Hum. Rts. C'ttee, *Alphen v. The Netherlands*, ¶ 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (Aug. 15, 1990); *see also* U.N. Hum. Rts. C'ttee, *Mukong v. Cameroon*, ¶ 9.8, U.N. Doc. CCPR/C/51/D/458/1991 (Aug. 10, 1994) (" '[A]rbitrariness' is not to be equated with 'against the law,' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law.").

Finally, the court must have the power to order release if the detention is not lawful. "Judicial review of the lawfulness of detention under article 9, paragraph 4, is

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[21] ICCPR art. 15(1) ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."). *See* U.N. Hum. Rts. C'ttee, *Nicholas v. Australia*, ¶ 7.5, U.N. Doc. CCPR/C/80/D/1080/2002 (Mar. 24, 2004).

[22] *See United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 42 (May 24) ("Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.").

not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1." U.N. Hum. Rts. C'ttee, *Baban et al. v. Australia*, ¶ 7.2, U.N. Doc. CCPR/C/78/D/1014/2001 (Sep. 18, 2003). If a State Party is incapable of justifying the continued detention of a prisoner, the failure to release the prisoner would be inherently arbitrary, and a violation of Article 9(1). U.N. Hum. Rts. C'ttee, *Mpaka-Nsusu v. Zaire*, ¶ 10, U.N. Doc. CCPR/C/27/D/157/ 1983 (Mar. 26, 1986). Under these circumstances, continued detention of Petitioners would also constitute a direct violation of Article 9(2). ICCPR art. 9(2) ("Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.").

B. United States Law as Construed by the Court of Appeals Would Not Satisfy Article 9.

In the United States, rights guaranteed by Article 9(4) have traditionally been protected by the writ of habeas corpus. U.N. Hum. Rts. C'ttee, *Initial Report of the United States to the Human Rights Committee*, *supra*, at ¶ 254 ("Through habeas corpus a person may obtain an immediate judicial hearing on the legality of the detention and an order directing the official who holds him in custody to release him, if appropriate.") (citing *Wales v. Whitney*, 114 U.S. 564, 574 (1885)). Because the United States relied on existing statutes and constitutional provisions to ensure that the "fundamental rights and freedoms protected by the Covenant . . . can be effectively asserted and enforced by individuals in the judicial system," *id.* at ¶ 8, restrictions on the reach and availability

of habeas corpus implicate the United States's obligations under the Covenant.

According to the Court of Appeals, the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 [hereinafter MCA] stripped the federal courts of jurisdiction to hear pending habeas claims by Petitioners. Whether Congress intended such a result, and whether, if Congress so intended, the legislation violates constitutional provisions, are matters for this Court to decide as a matter of national law. If United States law were as construed by the Court of Appeals to preclude habeas corpus, however, the United States would be in breach of its obligations under the Covenant for failing to provide judicial review of the lawfulness of detention that satisfied the three components of Article 9(4).

First, the administrative CSRTs clearly cannot themselves qualify as "courts" under Article 9(4), if only because their structure within the executive branch and their composition of military officers render them insufficiently independent and impartial to discharge the judicial function.[23] In addition, the rules and evidentiary procedures employed do not provide the basic procedural protections necessary to safeguard the rights set forth in the Covenant.[24] Contrary to the requirement that

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[23] U.N. Hum. Rts. C'ttee, *Vuolanne v. Finland*, ¶9.6, U.N. Doc. CCPR/C/35/D/265/1987 (May 2, 1989) (review of petitioner's case by superior military officer "did not have a judicial character [and therefore] cannot be deemed to be a 'court' within the meaning of article 9, paragraph 4").

[24] On its review of the United States's most recent periodic report under the Covenant, and following a lengthy written and oral dialogue with senior United States officials, the Human Rights Committee expressed its concern that the procedures governing the CSRTs "may not offer adequate safeguards of due process" in light of Article 9(4). *Concluding Observations*, *supra*, at ¶ 18.

detainees be given equal access to the government's evidence supporting detention, CSRTs provide the detainees only superficial and oftentimes wholly incomplete information. According to the Department of Defense's instructions for CSRTs, the Government need only provide detainees with a summary of the Government's unclassified evidence supporting continued detention and none of the classified information otherwise considered by the CSRT.[25] Further, while detainees are ostensibly able to obtain the attendance of witnesses on their own behalf who are "reasonably available," Implementation Enclosure (1) at 6, detainees appear to be restricted in practice to seeking testimony from other Guantánamo Bay detainees, and even those requests are reported to be regularly refused.

The injury done by the imposition of such evidentiary hurdles is compounded by the rules denying detainees access to counsel. Rather than legal counsel, detainees are assigned a "Personal Representative." Implementation Enclosure (1) at 2. The Personal Representative, however, is not a lawyer, and indeed, must inform the detainee at their initial meeting: "I am neither a lawyer nor your advocate . . . . None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing." Implementation Enclosure (3) at 3.

There is also unacceptable risk that the evidentiary record generated during the CSRT phase will reflect evidence obtained through torture or cruel, inhuman, or

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[25] Deputy Secretary of Defense, Memorandum for the Secretaries of the Military Departments et al., "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba" (July 14, 2006), Enclosure (1) at 7(H)(5), *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf [hereinafter Implementation].

degrading treatment of others or of the prisoner himself. Neither the Detainee Treatment Act of 2006, Pub. L. No. 109-148, 119 Stat. 2939 (2006) [hereinafter DTA], nor the Government's instructions for CSRTs categorically exclude the use of evidence obtained by torture.[26] Any underlying act of torture or cruel, inhumane or degrading treatment would itself be a gross violation of human rights obligations, as would its use as evidence in a detention hearing. *See* Convention against Torture art. 15; ICCPR art. 7 (as explained in *General Comment No. 20*, ¶ 12). Any court that accepts into evidence statements obtained through torture, and allows the continued detention of a prisoner on the basis of that evidence, ceases to function as a court and becomes, instead, an instrument of oppression. *See A and others*, [2006] 2 A.C. 221, *supra*, at ¶ 164 (use of coerced statements in court is not question of power of executive "but rather the integrity of the judicial process").

Without effective access to the evidence relied on by the government to justify continued detention, without the effective ability to obtain additional material evidence, without sufficient access to counsel, and without meaningful ability to determine whether inculpatory evidence is the result of torture or other impermissible coercion, the process afforded by the CSRTs leaves detainees without any meaningful opportunity to mount an effec-

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[26] Under procedures issued after the DTA's passage that were not applied to Petitioners, a CSRT may consider "any information it deems relevant and helpful to a resolution of the issues before it," Implementation Enclosure (1) at 6, and "(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and (B) the probative value (if any) of any such statement." DTA § 1005(b)(1). Neither the DTA nor the Government's Implementation instructions for CSRTs contain any analog to the prohibition on the use of statements obtained through torture in military commissions established under the MCA. *See* MCA § 3(a) (adding 10 U.S.C.A. § 948r(b)).

tive defense or otherwise receive a fair hearing. A body that cannot provide a fair hearing cannot, by definition, provide meaningful judicial review of detention as required by Article 9(4).

The factual record presented to the Court of Appeals for the District of Columbia Circuit under the DTA is necessarily tainted by the procedural shortcomings of the CSRT. That court is, of course, a "court" within the meaning of the Covenant. However, given the structural deficiencies of the CSRT, effective judicial scrutiny would be stymied even if ordinary principles of review applied. Given the narrow review authorized by the DTA, the Court of Appeals, for its part, is rendered incapable of engaging in the full review of detention required by Article 9(4) of the Covenant.

Second, the review of CSRT determinations afforded under § 1005(e)(2) of the DTA is insufficient in scope and substance to ensure that Petitioners obtain judicial review of the lawfulness of their detention as required by Article 9 of the Covenant.

As a threshold matter, effective judicial inquiry into the lawfulness and reasonableness of detention is seriously frustrated by the unduly vague definition of "unlawful enemy combatant," which results in impermissible uncertainty regarding the applicable legal standards. At various times material to the Petitioners, the executive has applied an unreasonably vague definition to the term, *see* Memorandum from Deputy Secretary of Defense to Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (defining "enemy combatant" as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in

hostilities against the United States or its coalition partners"), or refused to articulate any definition at all. *See In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443, 474-78 (D.D.C. 2005). Nor has subsequent legislation clarified the issue. Indeed, in addition to exposing Petitioners to the prospect of continued arbitrary detention in violation of Article 9 of the Covenant, this failing breaches the principle of certainty of law protected by Article 15 of the Covenant. *See Nicholas v. Australia*, *supra*, at ¶ 7.5.

Even if a sufficiently clear legal standard applied, the narrow scope of review afforded by the DTA precludes effective judicial review of the lawfulness of detention. Rather than amounting to a substantive review of justification for detention, the DTA apparently limits the D.C. Circuit's review of CSRT decisions simply to "(i) whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(c) (emphasis added). The Government interprets the DTA to forbid the Court of Appeals from engaging in factual inquiries beyond the narrow record before the CSRT to determine whether the CSRT did in fact reach a defensible result. *See* Government's Response in Opposition to Motion to Compel at 10-20, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Aug. 21, 2006); *see also* Government's Motion for Entry of Protective Order at 13, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Aug. 25, 2006) ("Because review under the DTA is on the record of the CSRT, counsel does not have a need to engage in factual development[.]"); Government's Reply in Support of Motion for Entry of Protective Order at 3,

Bismullah v. Gates, No. 06-1197 (D.C. Cir. Nov. 13, 2006) ("[D]iscovery is not appropriate because this Court's review under the DTA is on the record."). The disparity between the scope of judicial review required by the Covenant and the limited review apparently permitted by the DTA is further exacerbated by the requirement that the Court of Appeals review the CSRT determination in light of the "rebuttable presumption in favor of the Government's evidence." DTA § 1005(e)(2)(C)(i).

As a result, under the executive's interpretation of the DTA, the Court of Appeals lacks both the authority and the practical ability to make an inquiry into whether continued detention is substantively justified as a matter of fact and law. In the absence of such review, the court has exceedingly limited ability to identify arbitrary detention. It may be that DTA § 1005(e)(2) permits an inquiry into "whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with . . . the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence." As Judge Rogers pointed out, however, "[b]ecause a detainee still has no means to present evidence rebutting the government's case—even assuming the detainee could learn of its contents—assessing whether the government has more evidence in its favor than the detainee is hardly the proper antidote" to the suspension of habeas. *Boumediene v. Bush*, 476 F.3d 981, 1006 (D.C. Cir. 2007) (Rogers, J., dissenting). Such a state of affairs is inimical to "the fundamental requirements of the law . . . that a person cannot be subject to detention unless a neutral and detached magistrate makes an independent finding that there is sufficient probable cause to believe that person committed an offence." Hum. Rts. C'ttee, *Initial Report of the United States to the Human Rights Committee*, *supra*, at ¶ 256 (citing *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975)).

Finally, if, as Judge Rogers stated, "neither the DTA nor the MCA require [that a detainee unlawfully held be released]," *Boumediene*, 476 F.3d at 1006 (Rogers, J., dissenting), the scope of CSRT determinations by the Court of Appeals is inadequate for the additional reason that the court is not invested with the authority to release prisoners who, in its determination, are unlawfully detained. The authority to release unlawfully detained prisoners is an explicit requirement of Article 9(4), because it is the crucial mechanism by which judicial review protects the fundamental right against arbitrary detention embodied by the Covenant.

The individuals detained by the United States at Guantánamo Bay are individuals invested with rights under the Covenant that the United States has voluntarily agreed by treaty to respect and ensure. Their continued detention under the legal regime described by the Court of Appeals squarely violates the United States's obligations under Article 9 of the Covenant. This Court should act to bring the United States into compliance with the commitments it made when it ratified the Convention.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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August 24, 2007